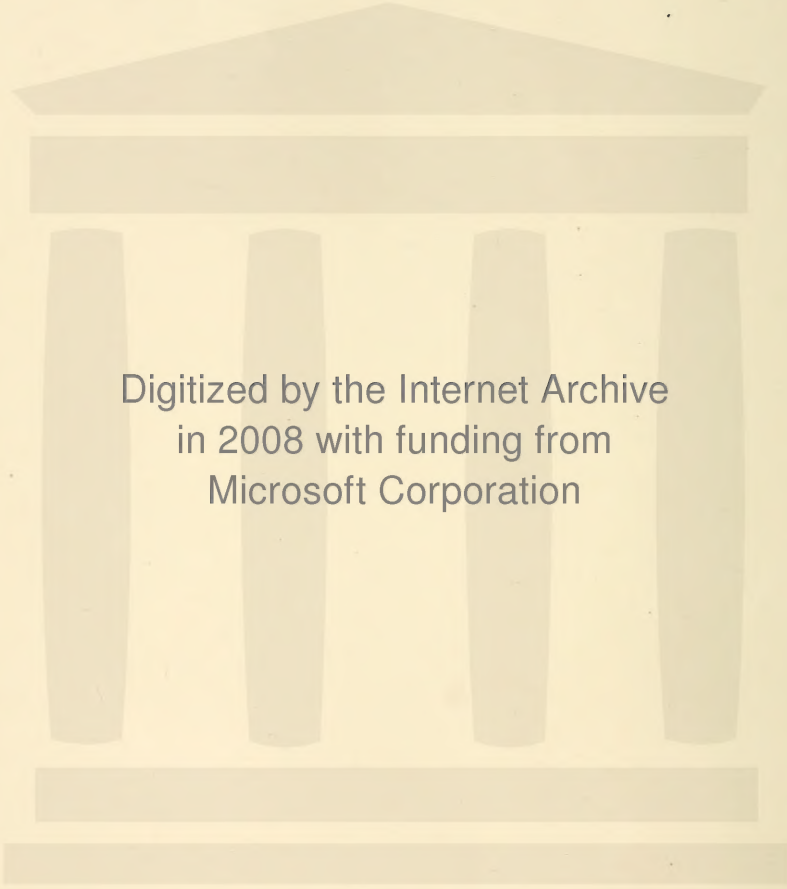
AA 000 742 675 2
UC SOUTHERN REGIONAL LIBRARY FACILITY

3
3
17

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW


Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/michiecarriers03mich

A TREATISE

ON THE LAW OF

CARRIERS

BY THE

EDITORIAL STAFF OF THE MICHIE COMPANY

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE

VOLUME III

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1915

v.3

T
M5827c
1915

Copyright 1915
by
The Michie Company

CARRIERS

CHAPTER XXIII—(*Continued*).

RIGHTS, DUTIES AND LIABILITIES AS TO TRANSPORTATION.

I. Duties as to Transportation in General, §§ 2251-2255. See volume 2.
II. Route, Time and Means of Transportation, §§ 2256-2275. See volume 2.
III. Nature of Liability and Degree of Care Required, §§ 2276-2350. See volume 2.
IV. As to Stations and Stopping Places, §§ 2351-2385. See volume 2.
V. As to Roadbed and Track, §§ 2386-2402. See volume 2.
VI. As to Vehicles, §§ 2403-2425. See volume 2.
VII. As to Means of Conveyance, §§ 2426-2434. See volume 2.
VIII. Receiving and Discharging Passengers, §§ 2435-2489. See volume 2.
IX. Accommodations and Duties during Transit, §§ 2490-2524.
A. Scope Note, § 2490.
B. Rules and Regulations, § 2491.
C. Accommodations in General, § 2492.
D. Particular Accommodations, §§ 2493-2497.
a. In General, § 2493.
b. Railroads and Street Railway Companies, §§ 2494-2496.
(1) In General, § 2494.
(2) Chair Cars, § 2495.
(3) When Passengers Are Carried on Freight Trains, § 2496.
c. Carriers by Water, § 2497.
E. Providing Accommodation Inferior to Those Agreed Upon, § 2498.
F. Classification and Separation of Passengers, §§ 2499-2508.
a. In General, § 2499.
b. Separation of Male and Female Passengers, § 2500.
c. Separation of White and Colored Passengers, §§ 2501-2506.
(1) In General, § 2501.
(2) By Regulations of the Carrier, § 2502.
(3) Statutes Requiring the Separation, § 2503.
(4) Statutes Prohibiting the Separation, §§ 2504-2505.
(a) State Laws, § 2504.
(b) Acts of Congress, § 2505.
(5) Degree of Care and Liability Incurred, § 2506.
d. Exclusion of Passenger from Car because of Bad Moral Character, § 2507.
e. Equality of Accommodations, § 2508.
G. Particular Rights and Duties in Transit, §§ 2509-2522.
a. Overloading Conveyance, § 2509.
b. Rights and Duties as to Providing Seats, § 2510.
c. Allowing or Compelling Passengers to Expose Themselves to Danger, §§ 2511-2514.
(1) In General, § 2511.
(2) Warning Passengers of Danger, § 2512.
(3) Removal of Passenger from Place of Danger by Force, § 2513.
(4) Preventing Passenger Leaving Moving Train, § 2514.
d. Allowing Passenger to Alight Temporarily at Intermediate Station, § 2515.
e. Duties to Drover Alighting at Intermediate Stations to Care for Stock, § 2516.
f. Announcement of Station and Change of Cars, § 2517.
g. Transfer of Passengers, § 2518.

667612

h. Opening and Closing of Car Doors, § 2519.
i. Rescue of Passenger Falling from Train, § 2520.
j. Duty to Care for Sick or Injured Passengers, § 2521.
k. Opportunity to Procure Food, § 2522.
H. Stopping Over at Intermediate Stations, § 2523.
I. Duty as to Passenger Boarding Wrong Train, § 2524.
X. Management of Conveyance, §§ 2525-2552.
A. General Rule, § 2525.
B. Crowded Trains or Cars, § 2526.
C. Running Trains or Cars in a Manner Calculated to Alarm Passengers, § 2527.
D. Avoiding Dangers Encountered during the Journey, § 2528.
E. In Passing through Tunnels, § 2529.
F. In Running Trains or Cars on Wrong Track, § 2530.
G. In Approaching Switch Apparently Misplaced, § 2531.
H. Omission of Signals Required by Statute, § 2532.
I. Moving Disabled Trolley Car, § 2533.
J. Absence of Driver or Motorman from Post of Duty, § 2534.
K. Speed of Trains or Cars, § 2535.
L. Jerks and Jolts of Trains or Cars, §§ 2536-2539.
a. Management of Train in General, § 2536.
b. In Making Up Trains, § 2537.
c. In Starting, Stopping, and Running Trains, § 2538.
d. In Recoupling Trains Which Break Apart, § 2539.
M. Negligent Handling of Engine, § 2540.
N. Collisions, §§ 2541-2550.
a. In General, § 2541.
b. Collisions between Trains or Cars Operated on the Same Track, § 2542.
c. Collisions of Trains with Cattle and Other Obstructions, § 2543.
d. Collisions of Street Cars with Road Vehicles, § 2544.
e. Collisions with Structures Alongside the Track, § 2545.
f. Collisions with Cars on Parallel or Side Tracks, § 2546.
g. Collisions between Vehicles of Different Carriers, §§ 2547-2549.
(1) In General, § 2547.
(2) Collisions between Trains of Intersecting Railroads, § 2548.
(3) Collisions between Street Cars and Trains or Cars of Intersecting Railroad, or Street Railway, Companies, § 2549.
h. Collision between Automobile Carrier and Other Vehicle, § 2550.
O. Upsetting Coach, § 2551.
P. Care Required as to Telegraph Lines, Operators, etc., § 2552.
XI. Duty to Protect Passengers, §§ 2553-2566.
A. General Rule, § 2553.
B. Knowledge of the Commission of the Wrong, § 2554.
C. Knowledge, or Duty to Know, of Passenger's Peril, § 2555.
D. Reason to Apprehend Passenger's Peril, §§ 2556-2562.
a. In General, § 2556.
b. Presence of Dangerous Persons on Vehicle or Vessel, § 2557.
c. Disorder among Passengers, § 2558.
d. Intermingling of White and Colored Passengers, § 2559.
e. Negligence of Passengers in Getting on or Off the Vehicle, § 2560.
f. Scuffling of Hackmen Near Station, § 2561.
g. Servants of Express Companies, etc., at Station, § 2562.
E. Limitation of Carrier's Liability, §§ 2563-2566.
a. In General, § 2563.
b. Absence of Knowledge, etc., of Passenger's Peril, § 2564.
c. Performance of Duty, or Inability, to Protect, § 2565.
d. Acts for Which Carrier Liable, § 2566.
XII. Liability for Acts and Omissions of Servants, §§ 2567-2629.

A. In General, § 2567.
B. Negligence of Servants, § 2568.
C. Wilful Acts of Servants, §§ 2569-2601.
a. In General, § 2569.
b. Assaults upon Passengers, §§ 2570-2592.
(1) In General, § 2570.
(2) Assaults within the Scope of the Employment, § 2571.
(3) Assault Outside the Scope of the Employment, §§ 2572-2584.
(a) In General, § 2572.
(b) Minority Rule, § 2573.
(c) Prevailing Rule, §§ 2574-2576.
aa. In General, § 2574.
bb. Limitation of the Rule, § 2575.
cc. Application of the Rule, § 2576.
(d) Acts Which Are or Are Not within Scope of Employment, §§ 2577-2583.
aa. In General, § 2577.
bb. Acts Done in Connection with Collection of Tickets and Fares, § 2578.
cc. Assaults by Steward and Waiters on Steamboat, § 2579.
dd. Assault by Baggage Master, § 2580.
ee. Assaults Committed after the Relation of Carrier and Passenger Is Determined, § 2581.
ff. Assault by Conductor upon Passenger Who Has Alighted from Street Car, § 2582.
gg. Accidental Blow by Servants Engaged in Playful Scuffle, § 2583.
(e) Presumption as to Scope of Duty, § 2584.
(4) Justifiable Assaults, §§ 2585-2590.
(a) In General, § 2585.
(b) Acts Done in Self-Defense, §§ 2585-2589.
aa. In General, § 2586.
bb. What Constitutes Self-Defense, §§ 2587-2589.
(aa) In General, § 2587.
(bb) Circumstances Justifying the Act, § 2588.
(cc) Degree of Force Permissible, § 2589.
(c) Forcible Expulsion of Passengers, § 2590.
(5) Assaults Provoked by the Passenger, § 2591.
(6) Failure of Agent to Comply with Law as to Uniform, § 2592.
c. Insult to Passenger, § 2593.
d. False Imprisonment and Arrest, §§ 2594-2600.
(1) General Rule, § 2594.
(2) What Constitutes False Imprisonment, §§ 2595-2600.
(a) In General, § 2595.
(b) The Detention or Restraint, § 2596.
(c) The Unlawfulness of the Detention or Restraint, §§ 2597-2600.
aa. In General, § 2597.
bb. Detention to Enforce Payment of Fare, § 2598.
cc. Arrest without Warrant, § 2599.
dd. What Constitutes Probable Cause, § 2600.
e. Communication of Disease by Employee to Passenger, § 2601.
D. Scope of Employment, §§ 2602-2616.
a. In General, § 2602.
b. Inviting or Directing Passenger to Alight at Dangerous Place, § 2603.
c. Assisting Passenger on or Off Train or Car, § 2604.
d. Pushing or Pulling Passenger Off Train or Car, § 2605.
e. Directing or Permitting Passenger to Alight from Moving Train, § 2606.
f. Giving Information to, or Instructing, Passengers, § 2607.
g. Acts Calculated, or Intended, to Alarm Passengers, § 2608.
h. Unintentional Assaults upon Passengers, § 2609.

i. Falling against, or Jostling, Passengers, § 2610.
j. Directing Passenger to Render Assistance, § 2611.
k. Refusing Passenger Entrance to Car, § 2612.
l. Causing Unnecessary Delay in Transportation, § 2613.
m. Making Overcharge for Ticket, § 2614.
n. Assaults upon Passengers, § 2615.
o. False Imprisonment of Passengers, § 2616.
E. Who Are Servants, §§ 2617-2629.
a. In General, § 2617.
b. Independent Contractors, § 2618.
c. Construction Companies, § 2619.
d. Persons in Charge of Sleeping, or Palace, Cars, § 2620.
e. Servants Invested with Authority of Peace Officers, § 2621.
f. Assistants Engaged by Servants, § 2622.
g. Servants Employed Jointly by Several Masters, § 2623.
h. Servants of Lessors or Lessees, § 2624.
i. Servants of Receivers, § 2625.
j. Pilots, § 2626.
k. Postal Agents, § 2627.
l. Surgeon Employed by Carrier, § 2628.
m. Employees Off Duty, § 2629.
XIII. Companies and Persons Liable, §§ 2630-2667.
A. In General, §§ 2630-2636.
a. Delegation of Duties by Carrier, § 2630.
b. Liability for Negligence in Operation of Trains of Another Carrier, § 2631.
c. Liability of Carrier for Injury to Passengers of Another Carrier, § 2632.
d. Liability of Employee of Carrier, § 2633.
e. Liability of Electric Company Furnishing Power, § 2634.
f. Carrier Transporting Soldiers for Government, § 2635.
g. Liability of Seller of Ticket, § 2636.
B. Injury Due to Concurrent Negligence, §§ 2637-2641.
a. In General, §§ 2637-2638.
(1) Negligent Carriers Liable, § 2637.
(2) Negligence of Other Carrier No Defense, § 2638.
b. Collision Resulting from Concurrent Negligence of Two Carriers, §§ 2639-2641.
(1) Negligent Carriers Liable, § 2639.
(2) Negligence of Other Carrier No Defense, § 2640.
(3) Presumption of Negligence, § 2641.
C. Stations and Approaches, §§ 2642-2646.
a. In General, § 2642.
b. Stations Used by Several Carriers, §§ 2643-2646.
(1) In General, § 2643.
(2) Duties as to Passengers of Other Carrier, § 2644.
(3) Duty to Protect Passengers from Negligence of Other Carrier, § 2645.
(4) Station Owned by Independent Company, § 2646.
D. Liability of Carrier Operating Trains Over Another's Lines, §§ 2647-2651.
a. In General, § 2647.
b. Liability for Negligence of Owner of Road, § 2648.
c. Liability for Injury to Passengers of Another Lessee of Tracks, § 2649.
d. Effect of Illegality of Contract between Companies, § 2650.
e. As Affected by Compensation Received, § 2651.
E. Liability of Lessor, §§ 2652-2658.
a. In General, § 2652.
b. Lessor Liable for Negligence of Lessee, § 2653.
c. Liability for Indignities of Fellow Passengers, § 2654.
d. Lessor's Liability to Its Own Passengers, § 2655.

e. Lease Illegal or Ultra Vires, § 2656.
f. Leases under Statutory Authority, § 2657.
g. Liability of Lessor of Steamboat, § 2658.
F. Liability When Railroad Operated by Trustee, §§ 2659-2660.
a. Liability of Trustee, § 2659.
b. Liability of Railroad Operated by Trustee, § 2660.
G. Railroads in Hands of Receiver, §§ 2661-2665.
a. Liability of Receiver, §§ 2661-2662.
(1) In Official Capacity, § 2661.
(2) Personal Liability of Receiver, § 2662.
b. Liability of Railroad, §§ 2663-2664.
(1) In General, § 2663.
(2) After Discharge of Receiver, § 2664.
c. Liability of Profits and Income, § 2665.
H. Who Liable for Injuries Occurring on Chartered Conveyances, § 2666.
I. Liability for Injuries on Consolidated Lines, § 2667.
XIV. Limitation of Liability, §§ 2668-2693.
A. Power to Limit Liability as to Passengers for Hire, §§ 2668-2671.
a. General Rule, § 2668.
b. Contractual Exemption from Statutory Penalty, § 2669.
c. Statutory Power to Limit Liability, § 2670.
d. Passengers Received on Freight Trains, § 2671.
B. Power to Limit Liability as to Persons Carried Free or at Reduced Rates, §§ 2672-2677.
a. Limitation of Liability in Pass Given as Mere Gratuity, §§ 2672-2676.
1. In General, § 2672.
2. Degrees of Negligence, § 2673.
3. Pass Issued in Violation of Law, § 2674.
4. Under Statutory Provisions, § 2675.
5. Using Nontransferable Pass of Another, § 2676.
b. Reduced Rates or Passes Based upon Some Consideration, § 2677.
C. Power to Limit Liability in Drover's Pass, §§ 2678-2683.
a. Drover as Passenger for Hire, § 2678.
b. Carrier Cannot Limit Liability in Drover's Pass, §§ 2679-2681.
(1) In General, § 2679.
(2) Drover's Return Pass, § 2680.
(3) Degrees of Negligence, § 2681.
c. Stipulation That Drover Is Employee of Carrier, § 2682.
d. Reasonable Regulations Binding, § 2683.
D. Power to Limit Liability as to Persons Engaged in Certain Employments, §§ 2684-2689.
a. Limitation of Liability in Pass Given Employee, § 2684.
b. Express Messengers, § 2685.
c. Mail Clerks, § 2686.
d. News Agents, § 2687.
e. Circus Employees, § 2688.
f. Employees of Pullman Car Companies, § 2689.
E. Sufficiency of Assent of Passenger to Limitation of Carrier's Liability, §§ 2690-2691.
a. Passenger for Hire, § 2690.
b. Persons Carried Gratuitously, § 2691.
F. Authority of Master to Limit Liability of Carrier for Injury to Servant, § 2692.
G. Construction of Contracts Limiting Liability of Carrier, § 2693.

§§ 2490-2524. Accommodations and Duties during Transportation —§ 2490. Scope Note.—The object of this section will be to discuss the rights and duties of carriers in regard to accommodations for passengers, sepa-

ration of passengers, and other rights and duties of carriers to passengers during transportation which have not been dealt with in other sections, particularly the section on the liability of carriers of passengers for injuries by collisions,[1] the section on the liability of carrier for injuries to passengers by jerks and jolts of trains or cars,[2] and the section on the liability of carriers for negligence on account of running trains or cars at an excessive rate of speed,[3] as well as the section on taking on and letting off passengers.[4]

§ 2491. Rules and Regulations.—In General.—A contract of carriage is subject to all reasonable rules and regulations then in force, and a passenger accepts either the express or implied undertaking of carriage, with the understanding that he will conform to such regulations of the carrier with respect to the transportation as are appropriate and reasonable.[5] The reasonableness of such rules is a question of law, when the circumstances surrounding their adoption are not in dispute.[6] But they need not bring home to each passenger personal knowledge of the existence of a reasonable rule.[7] The manner of making such rules public, so as to charge passengers with notice thereof, is usually prescribed by the statute—they must be "posted up at the time in a conspicuous place inside of its passenger cars then in the train." If such regulations are so posted, and the passenger is injured while violating such reasonable rules, then such passenger can not recover unless circumstances prevail which override the rule.[8]

§ 2492. Accommodations in General.—A carrier of passengers has a duty, arising from the public nature of its employment to furnish for the use of passengers on its lines such accommodations as are reasonably required by the existing conditions of passenger traffic.[9] Among the duties of carriers of pas-

1. Appended to Chicago, etc., R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356, 3 R. R. R. 519, 26 Am. & Eng. R. Cas., N. S., 519.

2. Appended to Freeman *v.* Metropolitan St. R. Co., 95 Mo. App. 94, 68 S. W. 1057, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

3. Appended to Northern Pac. R. Co. *v.* Adams, 116 Fed. 324, 54 C. C. A. 196, 3 R. R. R. 734, 26 Am. & Eng. R. Cas., N. S., 734.

4. See ante, "Receiving and Discharging Passengers," § 2285.

5. Rules and regulations.—McLain *v.* St. Louis, etc., R. Co., 131 Mo. App. 733, 111 S. W. 835.

A common carrier of passengers may require stockmen accompanying their stock to ride in caboose of train while in motion. Judgment 74 N. E. 1014, affirmed. Lake Shore, etc., R. Co. *v.* Teeters, 77 N. E. 599, 166 Ind. 335, 5 L. R. A., N. S., 495.

Railroad companies not only have the right, but they must run their trains in accordance with established rules and regulations, and passengers must exercise reasonable diligence to acquaint themselves with them, and, where the regulations are reasonable, the passengers must comply therewith. Chicago, etc., R. Co. *v.* Field, 34 N. E. 406, 7 Ind. App. 172, 52 Am. St. Rep. 444.

A carrier may adopt reasonable rules for the transaction of its business, and passengers must comply therewith. Funderburg *v.* Augusta, etc., R. Co., 61 S. E. 1075, 81 S. C. 141, 21 L. R. A., N. S., 868.

6. Question for jury.—Ohage *v.* Northern Pac. R. Co., 200 Fed. 128, 118 C. C. A. 302.

7. Personal knowledge.—Funderburg *v.* Augusta, etc., R. Co., 81 S. C. 141, 61 S. E. 1075, 21 L. R. A., N. S., 868.

8. Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

To absolve itself from liability for injuries to a passenger riding in its baggage car, the carrier must adopt and post in a conspicuous place in its passenger cars printed rules and regulations forbidding or warning passengers not to ride in such baggage car. Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

9. Duty to provide sufficient accommodations.—Chicago, etc., R. Co. *v.* Pullman, etc., Car Co., 139 U. S. 79, 35 L. Ed. 97, 11 S. Ct. 490; Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547.

Where duties touching the conveniences and accommodations of a passenger are involved the carrier is only bound to ordinary diligence. Stevens *v.* Central R., etc., Co., 80 Ga. 19, 5 S. E. 253; Central R., etc., Co. *v.* Perry, 58 Ga. 461.

It is, in general, the duty of a carrier of passengers to provide accommodation sufficient for their safe transportation. Anderson *v.* South Carolina, etc., R. Co., 61 S. E. 1096, 81 S. C. 1.

"Where the passenger embarks without making any special contract, and without knowledge as to what accommoda-

sengers for hire is that of providing for the safety and comfort of their passengers during the transportation by furnishing them the usual and reasonable accommodations which are incident to the mode of conveyance employed.[10] While this duty is imposed upon the carrier by the common law, it has frequently been made the subject of statutory enactment. Thus, it has been provided by statute that carriers shall furnish passengers with reasonable accommodations,[11] with sufficient accommodations,[12] and that they shall furnish sufficient accommodations for all passengers reasonably to be expected to require carriage at any one time[13] or offering themselves as passengers a reasonable time before the advertised starting time of the conveyance.[14] But, in order to make the carrier liable to a passenger for its failure to furnish the accommodations which are reasonably necessary to the comfort and safety of passengers, it must, of course, appear that the passenger sustained damages in consequence of the carrier's omission of duty in this respect.[15]

Right to Ride in Particular Car.—A person who is free from personal objection, which will deprive him of the right of selection, has the right to travel in the car best adapted to his comfort, provided all the seats in that car are not occupied in advance; if they are, then he must accept a seat in another car, though not as comfortable in all respects, or wait until another train arrives.[16] Where a passenger, when about to take his train, was directed by a porter to ride in the smoker, and he did so without having appealed to the con-

tions will be afforded, the law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal; but the passenger in such a case is not entitled to any particular apartments or special accommodations." Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547.

The word "reasonable," as used in Civ. Code 1902, § 2157, requiring every railroad to furnish "reasonable" accommodations for the convenience and safety of passengers, was intended to have a broad meaning, and signifies that the accommodations shall be reasonable, as distinguished from extreme luxury or scantiness—that is, sufficient for all reasonable purposes—and further conveys the meaning that reasonable efforts, considering all the circumstances, must be made to provide such sufficient accommodations. Anderson *v.* South Carolina, etc., R. Co., 61 S. E. 1096, 81 S. C. 1.

Duty to provide suitable accommodations.—A railroad company is required to provide suitable and safely constructed cars for carrying passengers. Cincinnati, etc., R. Co. *v.* Morley, 4 O. C. C. 559, 2 O. C. D. 706; Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457.

10. Werle *v.* Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Duck *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 63 S. W. 891.

Although a railway company advertises an excursion, it can not know with certainty the numbers it must accommodate, and can only be required to use due diligence in furnishing accommodations; such duty being, in that regard, relative and dependent upon the circumstances of each case. Chicago, etc., R. Co. *v.* Fisher, 31 Ill. App. 36.

Plaintiff, having purchased tickets for passage and berths on a steamboat for himself and his family, persons of color, on finding the berths small, and the accommodations inadequate, requested the officers of the boat to exchange the berths for staterooms, the accommodations of which were better, but the officers refused to do so. Thereafter plaintiff demanded the return of the money paid, which was refunded, and he, with his family, left the boat. Held that, on these facts, in the absence of evidence of any demand for a stateroom except in exchange for the berths, no cause of action was shown for damages for refusal to furnish plaintiff accommodations. Miller *v.* New Jersey Steamboat Co., 58 Hun 424, 12 N. Y. S. 301, 34 N. Y. St. Rep. 914.

11. Cal. Civ. Code, § 2184; Dak. Comp. L., § 3841; Mont. Civ. Code, 1895, § 2793; 1 S. Car. Rev. Stat., 1893, § 1710.

12. Neb. Comp. Laws, 1893, c. 16, § 121, p. 312.

13. Cal. Civ. Code, § 2185; Dak. Comp. L., § 3893; Mont. Civ. Code, 1895, § 2895.

14. Mansf. Ark. Dig., § 5475; Ind. Rev. Stat., 1894, § 5185; Kan. Gen. Stat., 1889, § 1212; Ky. Stat., 1894, § 783; 1 How. Ann. Mich. Stat., § 3324; Miss. Ann. Code, 1890, § 4306; N. Mex. Comp. Laws, 1884, § 2671; N. Y. Laws, 1850, c. 140, § 36; N. Car. Code, 1883, § 1963; Sayles' Tex. Civ. Stat., art. 4226.

15. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 42 S. W. 1030.

16. Right to ride in particular car.—Louisville, etc., R. Co. *v.* Smith, 10 Ky. L. Rep. 497.

ductor for any other quarters, he could not recover damages for sickness caused by riding there.[17]

§§ 2493-2497. Particular Accommodations—§ 2493. In General.—In the absence of express stipulations specifying the accommodations which are to be furnished passengers, it is a matter of great difficulty to enumerate the accommodations which are to be provided. Obviously, the sufficiency of particular accommodations must depend upon a great many considerations, among which may be mentioned the mode of conveyance employed, the length and duration of the journey, and the climatic and other conditions of the region traversed.

§§ 2494-2496. Railroad and Street Railway Companies—§ 2494. In General.—A railroad or street railway carrying passengers is bound to exercise care not unduly to overload its conveyances [18] and to provide passengers with seats.[19] Generally, it may be said to be the duty of a railroad company, and in some instances such companies are required by statute, to provide for the comfort and welfare of passengers to the extent of properly and comfortably warming [20] and lighting [21] its coaches, and furnishing them with wholesome water for drinking purposes,[22] and with suitable retiring places.[23] With regard to properly heating its cars it has been held that a railroad company must exercise that high degree of care which very cautious, prudent and competent persons would exercise under the same circumstances [24] to keep its cars supplied with such reasonble degree of heat as will keep its passengers, in ordinary normal condition, in a reasonable degree of comfort.[25] To make a carrier liable for injury to a passenger on account of insufficient heating of a coach, it must appear that the condition was negligently permitted to exist, in addition to the fact that

17. Porter's direction.—Brezewitz *v.* St. Louis, etc., R. Co., 87 S. W. 127, 75 Ark. 242, 70 L. R. A. 212.

18. See post, "Overloading Conveyance," § 2509.

19. See post, "Crowded Trains or Cars," § 2510.

20. *United States.*—Hastings *v.* Northern Pac. R. Co., 53 Fed. 224.

Alabama.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

Missouri.—Taylor *v.* Wabash R. Co. (Mo.), 38 S. W. 304, 42 L. R. A. 110; International, etc., R. Co. *v.* Davis, 17 Tex. Civ. App. 340, 43 S. W. 540; Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677, 3 Am. & Eng. R. Cas., N. S., 397; St. Louis, etc., R. Co. *v.* Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.; Dillingham *v.* Hodges (Tex. Civ. App.), 26 S. W. 86; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.

By the principles of the common law, a railway carrier of passengers is bound to use reasonable care and to make reasonable efforts to the end of keeping its passenger coaches comfortably warm in cold weather, and is liable in damages to a passenger for any discomfort or illness it may produce by its failure of duty in this respect. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

For the cases dealing with the duty of railroad companies to heat the waiting rooms at their stations. See ante, "Station Houses," § 2358.

21. Lighting.—Shannons Code, §§ 3070, 3071. Parks *v.* Nashville, etc., R. Co., 81 Tenn. (13 Lea) 1, 2.

22. Furnishing water.—Shann. Code (Tenn.), §§ 3070, 3071; Parks *v.* Nashville, etc., R. Co., 81 Tenn. (13 Lea) 1, 2.

It is the duty of a railroad company to exercise the proper degree of care to provide water for the use of its passengers. St. Louis, etc., R. Co. *v.* Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.; Peck *v.* Atchison, etc., R. Co. (Tex. Civ. App.), 91 S. W. 323.

23. It is ordinarily the duty of railroad companies to provide passenger coaches with water closets, and to keep them open at proper times. Wood *v.* Georgia R., etc., Co., 84 Ga. 363, 10 S. E. 967.

A passenger is not required to go into another coach to find a toilet room. Louisville, etc., R. Co. *v.* Grimes, 150 S. W. 346, 150 Ky. 219.

24. Degree of care required.—St. Louis, etc., R. Co. *v.* Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451, affirmed in 97 Tex. 645, no op.

Evidence held sufficient to warrant verdict for plaintiff.—Missouri, etc., R. Co. *v.* Byrd, 89 S. W. 991, 40 Tex. Civ. App. 315; St. Louis, etc., R. Co. *v.* Duck (Tex. Civ. App.), 72 S. W. 445.

25. Roark *v.* Missouri Pac. R. Co., 163 Mo. App. 705, 147 S. W. 499.

a dangerous condition existed; there being no liability unless the carrier has reason to foresee injury to a healthy person by reason of the atmospheric condition of the car.[26] But the fact that a passenger was in a weakened condition in consequence of illness will not prevent a recovery for injury resulting from the failure of the carrier to provide the car with reasonable sufficient heat for a person in ordinary health.[27] The duty of a railway company to supply its vehicles with sufficient warmth is usually classed with such duties as supplying the cars with "an adequate corps of servants,"[28] "with seats, if a day coach," and with other duties touching the convenience and comfort of the passengers. But where the cold is such as that if not mitigated by reasonable means, life itself would be jeopardized, the adoption of such means becomes a duty involving the safety of the passenger.[29] And this is especially a duty when they are women and little children, and their discomfort is made known to the conductor or brakeman and fires requested.[30] In an action to recover for the death of a passenger caused by the alleged negligence of defendant in failing, though requested, to warm its coaches in cold weather, it is not necessary for plaintiff to allege and prove a universal custom on the part of railway companies to warm their coaches.[31] In some of the states railroad companies are required, by statute, to furnish their passengers with drinking water[32] and to equip night trains with good lights.[33]

Application of Rule to Mail Cars.—It is the duty of a railroad company to keep its mail cars so heated as to be safe and comfortable for the mail clerk while in the discharge of his duties,[34] in the absence of a contract exempting it from the duty of doing so.[35]

Rules as to Retiring Places.—A rule prohibiting the opening of water-closets on trains at stations is reasonable.[36]

When Special Notice of Condition Required.—The presence of a woman's menstrual period is not an abnormal condition, like weakness due to disease, of which the defendant is entitled to special notice, but is a normal condition of which carriers must take notice, and for which provide reasonable accommodation.[37]

26. Marcott *v.* Minneapolis St., etc., R. Co. (Wis.), 133 N. W. 37.

27. Roark *v.* Missouri Pac. R. Co., 163 Mo. App. 705, 147 S. W. 499.

28. Murray *v.* Lehigh, etc., R. Co., 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539.

29. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

If severe illness results to a passenger from the failure of a railway company to heat the car in which he is riding during cold weather, especially where there is a stove therein and ample opportunity to supply the needed heat, and the employees on the train are requested by the passenger to supply it, but fail to do so, the company is guilty of actionable negligence. 3 Thomp. Neg. 302. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

30. Where there are women and children.—Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677, 3 Am. & Eng. R. Cas., N. S., 397.

31. Ft. Worth, etc., R. Co. *v.* Hyatt, 12 Tex. Civ. App. 435, 34 S. W. 677, 3 Am. & Eng. R. Cas., N. S., 397.

32. Ala. Code, § 1155; Conn. Gen. Stat., 1888, § 3540; N. Y. Laws, 1864, c. 582.

33. Ala. Code, § 1155.

34. Application to mail cars.—International, etc., R. Co. *v.* Davis, 43 S. W. 540, 17 Tex. Civ. App. 340.

Rev. St. U. S., §§ 4002, 4005 [U. S. Comp. St. 1901, pp. 2719, 2723], providing that postal cars shall be properly heated for the accommodation of postal clerks, imposes a duty upon the carrier, and for a breach of this duty a right of action accrues to every postal clerk injured thereby. This right of action is not confined to the breach of the contract of carriage, but arises from the wrong done in the negligent performance of the duty imposed upon the carrier. Lindsey *v.* Pennsylvania R. Co., 26 App. D. C. 503.

35. Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

36. Rules as to retiring places.—Louisville, etc., R. Co. *v.* Turner, 126 S. W. 372, 137 Ky. 730.

37. When special notice required.—Brackett *v.* Southern Railway, 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212.

§ 2495. Chair Cars.—It is entirely within the power of a railroad company, which has equipped a train with first class cars for the accommodation of passengers entitled to first class passage, to have in the same train a chair car, wherein extra accommodations are afforded and extra services rendered for a reasonable extra compensation, and to exclude therefrom first class passengers who refuse to pay the additional charge.[38] This right is not denied or restricted by a statute which limits the sum railways may charge for first class passage.[39] And an advertisement by a railroad company in which it is stated generally that free chair cars will be run upon its road, and especially that free chair cars be run to a particular station, does not warrant the inference that the chair cars are free to all persons under all circumstances, or that they are free at all except to those taking passage to the station named; but if the inference can be drawn it will not warrant a recovery by a passenger who is denied free accommodations in a chair car, except upon a showing that he has been misled and has sustained some damage in consequence.[40]

§ 2496. When Passengers Are Carried on Freight Trains.—If a person takes passage upon a freight train, he can not expect, and is not entitled to, the same accommodations that he would have upon a train carrying only passengers. By taking passage upon a freight train he impliedly agrees to accept, and be satisfied with, the accommodations usually afforded upon trains of that character when carrying passengers.[41]

§ 2497. Carriers by Water.—Very naturally the duties of carriers by water as to accommodations for passengers are different and usually more extensive than those of a carrier by land. But, in the absence of express stipulations specifying the accommodations which shall be provided, it is not easy to define the character of the accommodations which passengers have a right to expect, or the degree of discomfort to which they must submit. The accommodations must be reasonably sufficient, but their sufficiency can not be determined by the fact that they are such as are furnished by particular carriers, or that they are such as are frequently afforded passengers. They must at least be such as are usually accorded to passengers on similar voyages in similar vessels, and such as are necessary to a reasonable degree of comfort, and to physical health and safety.[42] It has been said that a contract for passage by water implies something more than ship room and transportation. It includes reasonable comforts, necessaries, and kindness, and suitable food, and the common means of relief in case of sickness.[43] The accommodations furnished the different classes of passengers need not, of course, be of an equal degree of convenience and comfort; for passengers must be deemed to assume the inconveniences and discomforts which are usually and necessarily incident to travel in the manner which they have selected. However, while the reasonableness of particular accommodations may vary, accordingly as they are provided for one class of passengers or another, the duty to provide reasonable accommodations is a duty which the carrier owes to every passenger, whether in first cabin, second cabin, or steerage.[44] When passengers go on board a vessel without any special contract providing for any particular kind of passage, or specifying the character of the accommodations to be furnished, knowing that all the cabin

38. St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224; Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

39. St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224.

40. St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224.

41. See Central R. Co. *v.* Smith, 76 Ga. 209, 2 Am. St. Rep. 31.

42. Sparks *v.* The Sonora, Fed. Cas. No. 13,212; Bailey *v.* The Sonora, Fed. Cas. No. 746, Hoff. Op. 465.

43. Gleason *v.* Willamette Valley, 71 Fed. 712; Chamberlain *v.* Chandler, 3 Mason 242, Fed. Cas. No. 2,575.

44. Bailey *v.* The Sonora, Fed. Cas. No. 746; Hoff. Op. 465.

room has been taken and that there are no berths or room for passengers below deck, the circumstances establish a fair understanding that their ship room and quarters are to be on deck and are to be deemed reasonable accommodations.[45] But when a passenger has contracted for the exclusive use of a state room for himself and wife, it is a flagrant breach of contract for the carrier to put another male passenger in the room.[46] Ordinarily, steerage passengers are entitled to the use of the steerage room, free from the risk or inconvenience of freight therein. Cases may arise in which the passengers are so few in number in proportion to the size of the room, that there can be no objection to some portion of its being used as a freight room. But in such case, the carrier takes the risk, and it is his duty to so stow and secure such freight that the passengers will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk—for instance, to remain in their berths during the whole voyage or any unusual portion of it.[47] It has been said that, in the absence of a special contract to the contrary, deck, or even steerage, passengers are not entitled to be furnished with bedding.[48] But in an action by a passenger, whom defendant had undertaken to carry between the ports of San Francisco and Portland, it was held that the contract included the duty of furnishing the passenger with a berth, unless there was a fair understanding to the contrary.[49] It is the duty of the carrier to provide passengers with a sufficient supply of wholesome food, unless there is a contract, or a fair understanding, to the contrary.[50] If the food furnished passengers on a long voyage is such as is usually furnished on similar voyages, and is sufficient in quantity, and properly cooked, the fact that it is not so good, nor so well served, as on vessels making shorter voyages is not a ground for damages.[51]

§ 2498. Providing Accommodations Inferior to Those Agreed Upon.—A passenger who is furnished with accommodations inferior to those contracted for, is entitled to recover damages sustained in consequence.[52] The fact that a passenger in negotiating with the agent for tickets stated that she desired to purchase them as cheaply as possible, did not warrant the agent to assume that she wishes to travel second class.[53] A white woman, who has a first class ticket

45. Defrier *v.* Nicaragua, 81 Fed. 745.

46. Morrison *v.* The John L. Stephens, Fed. Cas. No. 9,847, Hoff. Op. 473.

47. The Oriflamme, 3 Sawy. 397, Fed. Cas. No. 10,572.

48. Defrier *v.* Nicaragua, 81 Fed. 745.

49. The Oriflamme (U. S.), 3 Sawy. 397, Fed. Cas. No. 10, 572.

50. Young *v.* Fewson, 8 C. & P. 55; Defrier *v.* Nicaragua, 81 Fed. 745; The D. C. Murray, 89 Fed. 508.

51. The President, 92 Fed. 673. As was said by Lord Denman, C. J., in Young *v.* Fewson, 8 C. & P. 55: "There is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff."

52. Southern R. Co. *v.* Wood, 114 Ga. 159, 39 S. E. 922, 23 Am. & Eng. R. Cas., N. S., 611; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 513.

Where a lady purchasing a first-class ticket was refused admission to the ladies' car in which those having such tickets were entitled to ride, it was held that she was entitled to recover. Texas, etc., R. Co. *v.* Johnson, 2 Texas App. Civ. Cas., § 185.

The fact that a passenger on a vessel enjoyed first-class accommodation for a part of the voyage before objection was made to his doing so, or that he failed to accept such accommodation when tendered him on condition of paying full fare, did not affect his right to recover for the tort of the vessel's officers in wrongfully excluding him from such accommodation during the latter part of the voyage. Gleason *v.* Willamette Valley, 71 Fed. 712.

53. Second class ticket given without request.—Plaintiff, desiring transportation to a distant state, applied to defendant's agent for tickets. Nothing was said by either the agent or plaintiff about second-class tickets, though plaintiff stated she desired to purchase tickets as cheaply as possible. On exhibiting the tickets to a conductor she was informed by him that her tickets were second-class, and she was forced to go forward into a dirty smoking car, occupied by men only, many of whom were smoking; and,

and is entitled to ride in the car set aside for white passengers, is entitled to recover damages for the discomfort and humiliation resulting from being compelled to ride in a car provided for, and occupied by, negroes.[54] Where plaintiff paid for first class ticket for himself and family, but by mistake of the ticket agent or otherwise, was given second class tickets, and, notwithstanding that he explained to the different conductors along the road the circumstances under which the second class tickets were delivered to him, was, with his family, compelled to travel in second class coaches, it was held that defendant was liable, although seats in the first class coaches could have been obtained by the payment of extra fare, and although, by regulations of defendant and the other lines over which plaintiff traveled, the conductors were bound to regard the tickets as the only evidence of the contract of carriage.[55] But it has been held that where a passenger, by mistake of a ticket agent, was given a second instead of a first class ticket, and, against his protests, was forced by the conductor, to whom he did not explain the circumstances of the purchase of the ticket, to occupy a seat in the second class coach, no right of action accrued to him by reason of the conduct of the conductor, and for the mistake of the ticket agent he was entitled to no more than nominal damages.[56]

Waiver of Right.—The fact that a passenger holding a second class ticket is compelled by the conductor to ride in a car which does not contain the accommodations to which he is entitled and that he rides in such a car, does not constitute a waiver of his right to claim damages for not being furnished with the accommodations to which his ticket entitles him.[57] Where a carrier violates its contracts by providing accommodations inferior to those agreed upon, the passenger is justified in refusing to surrender his ticket, and may retain it as evidence of his right to be there, and to insist upon the accommodations which he demands and to which his ticket entitles him.[58] When a common carrier, having entered into a contract of carriage, announces its purpose and determination to violate the contract, when it has accommodations and the ability to perform its contract, the passenger with his contract in hand is under no obligation to surrender it but may remain in the place where he has the right to be and demand his rights.[59]

there being no ventilation, the smoke and fumes made plaintiff and her children sick. The car in which plaintiff was forced to ride was not such a one as is ordinarily provided for persons holding second-class tickets. Held sufficient to warrant a verdict in plaintiff's favor. Southern R. Co. *v.* Wood, 39 S. E. 922, 114 Ga. 159, 23 Am. & Eng. R. Cas., N. S., 611.

54. Missouri, etc., R. Co. *v.* Ball, 25 Tex. Civ. App. 500, 61 S. W. 327.

55. St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 10 Am. St. Rep. 766, 1 L. R. A. 667.

56. Plaintiff inquired of defendant's ticket agent the price of a first-class ticket, and, on being informed, asked for such ticket, and paid the price demanded. The price stated was, in fact, that of a second-class ticket, and the ticket furnished was a second-class ticket. On presenting it to the conductor, plaintiff was required to go into a second-class car, but, though protesting, he did not explain the circumstances connected with the purchase. A rule of the road required conductors to permit a passenger who had failed to get the ticket desired, on complaint made of the true condition, to ride in the car he would have been entitled to but for the mistake, on payment of the difference in price. Held, that plaintiff could complain only of the action of the ticket agent, and that he was entitled only to nominal damages by reason thereof. Alabama, etc., R. Co. *v.* Drummond, 73 Miss. 813, 20 So. 7.

57. Waiver of right.—Southern R. Co. *v.* Wood, 114 Ga. 159, 39 S. E. 922, 23 Am. & Eng. R. Cas., N. S., 611.

58. Billinger *v.* Clyde Steamship Co., 158 Fed. 511.

59. Billinger *v.* Clyde Steamship Co., 158 Fed. 511.

Plaintiffs bought tickets which entitled them to transportation as second-class passengers on defendant's steamships from Jacksonville, Fla., to New York, with the privilege of a stop-over at Charleston, S. C., the remainder of the voyage to be made on any of defendant's vessels which stopped at Charleston. Plaintiffs, after stopping over, boarded a vessel of defendant at Charleston, which was about to sail for New York. As found by the jury they showed their tick-

§§ 2499-2508. Classification and Separation of Passengers—§ 2499. In General.—It is not only the right, but it is the duty of a passenger carrier to make all reasonable rules and regulations for the safety and comfort of passengers. And, while the carrier can not capriciously discriminate between passengers on account of their nativity, color, race, social position or their political or religious beliefs, it is well settled that he may, in the exercise of the right and the performance of the duty to establish and enforce reasonable rules and regulations, classify and separate passengers by well defined characteristics which make the separation desirable, affording equal accommodations to all passengers paying the same fare. The right of the carrier to separate his passengers is founded upon two grounds: his right of private property in the means of conveyance, and the public interest.[60]

§ 2500. Separation of Male and Female Passengers.—The right of a railroad company to set apart a car or compartment for the exclusive use of women and men accompanying them and to exclude therefrom men who are unaccompanied by women, and who are furnished equally good accommodations elsewhere on the train, has never been doubted.[61] A carrier of passengers setting apart by regulation a certain part of his conveyance for the exclusive use of ladies, is in this respect in a condition similar to that of an innkeeper whose premises are open to all guests. He may exclude all persons not conforming to regulations necessary and proper to secure quiet and good order.[62] A railroad company has a right to set apart a "ladies' car," and to authorize its employees to exclude from such car men traveling without female company,[63] but it can not construe such a regulation so as to justify it in excluding a female passenger for only an alleged want of chastity.[64] And the mere fact that, under the rules and regulations of the company, a certain car in their passenger train has been designated for the exclusive use of ladies, and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privileges of

ets to the purser and the captain who told them that because they were colored men they would only be taken in the steerage, and that unless they were willing to go as steerage passengers they could get off. The vessel in fact carried second-class passengers, and had accommodations for the same. Held, that plaintiffs were not bound to accept either alternative so offered, but were within their rights in staying on the vessel and insisting on the accommodations to which their contracts entitled them; that such accommodations being persistently refused they were not obliged to surrender their tickets when demanded and their refusal to do so did not prejudice their right to recover damages for breach of contract, or for mistreatment by the officers of the company while on the vessel. Billinger *v.* Clyde Steamship Co., 158 Fed. 511.

60. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641; West Chester, etc., Railroad *v.* Miles, 55 Pa. 209, 93 Am. Dec. 744.

61. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641; Peck *v.* New York, etc., R. Co., 70 N. Y. 587, affirming 8 Hun 286; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 31 Am. & Eng. R. Cas. 112, 4 Am. St. Rep. 776; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495; S. C., 42 Wis. 654, 24 Am. Rep. 437.

62. Ladies car.—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

63. Rules reasonable—Exclusion men.—Peck *v.* New York, etc., R. Co., 70 N. Y. 587.

Where a lady purchasing a first-class ticket was refused admission to the ladies' car in which those having such tickets were entitled to ride, it was held that she was entitled to recover. Texas, etc., R. Co. *v.* Johnson, 2 Texas App. Civ. Cas., § 185.

Regulation reasonable.—Considered as a question of law, a regulation of a railway company setting apart one car on each passenger train, primarily for the use of women and the men traveling with them, is proper and reasonable. Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

64. A female passenger traveling alone is entitled to ride in the ladies' car, notwithstanding an alleged want of chastity, if her behavior is ladylike and proper, and she can not be compelled to accept a seat in another car offensive to her because of smoking and bad ventilation; and this, whether she be white or colored. Brown *v.* Memphis, etc., R. Co., 5 Fed. 499.

such car, upon no other ground than that of her color. It might not be an unreasonable rule to require colored persons to occupy separate seats, in a car furnished by the company, equally as comfortable and safe as those furnished for other passengers. But, in the absence of some such provision, the company can not lawfully, from caprice, wantonness, or prejudice, exclude a colored woman from the ladies' car on account of her color merely.[65]

Application of Rule When Train Crowded.—Where a certain car is set apart, by a regulation of the company, for the exclusive use of ladies, if there is not sitting room for passengers excluded therefrom by the regulation, and there is room to seat them in such car, they can not be left standing without breach of the contract of carriage; but, in such a case, the object of the regulation must be regarded in the admission of male passengers into the ladies' car, and it must necessarily rest in the discretion of the proper officials of the train to select the persons to be admitted.[66]

§§ 2501-2506. Separation of White and Colored Passengers—§ 2501. In General.—While the propriety of separating passengers according to sex has never been seriously questioned, the classification and separation of passengers according to color has been prolific of litigation. Regulations of carriers assigning white and colored passengers to separate cars have frequently been attacked on the ground that they discriminate against colored passengers and are unreasonable, and on the additional ground that they violate the rights and privileges secured to persons of the colored race by the thirteenth and fourteenth amendments of the federal constitution. State laws requiring the separation of white and colored passengers have been assailed, not only on the ground that they are inhibited by these amendments, but on the further ground that they violate the commerce clause of the constitution. And this last objection has even been urged against state laws which prohibit the separation of the two races.

§ 2502. By Regulations of the Carrier.—It is, however, well settled that, to prevent contacts and collisions arising from natural and well known repugnances, which are likely to breed disturbances where white and colored passengers are brought together against their wishes, and to protect the interests of the carrier, a carrier of passengers may require white and colored passengers to occupy separate cars or compartments, or different parts of cars, if equal accommodations are furnished passengers of both races who pay the same fare.[67]

65. **Excluding colored women.**—Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

66. **Object of regulation must be observed.**—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

67. *United States.*—Houck *v.* Southern Pac. R. Co., 63 Fed. 226; Logwood *v.* Memphis, etc., R. Co., 23 Fed. 318, 21 Am. & Eng. R. Cas. 256; Murphy *v.* Western, etc., R. Co., 23 Fed. 637, 21 Am. & Eng. R. Cas. 258; The Sue, 22 Fed. 843; Green *v.* Bridgeton, Fed. Cas. No. 5,754; United States *v.* Dodge, 1 Tex. L. J. 47, Fed. Cas. No. 14,976.

Alabama.—Bowie *v.* Birmingham R., etc., Co., 125 Ala. 397, 27 So. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247.

Kentucky.—Ohio, etc., R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882, rehearing denied in 48 S. W. 145.

Missouri.—Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas. 571, 19 L. R. A. 269.

Pennsylvania.—West Chester, etc., Railroad *v.* Miles, 55 Pa. 209, 93 Am. Dec. 744.

South Carolina.—Smith *v.* Chamberlain, 38 S. C. 529, 17 S. E. 371, 58 Am. & Eng. R. Cas. 558, 19 L. R. A. 710.

Tennessee.—Chesapeake, etc., R. Co. *v.* Wells, 85 Tenn. (1 Pickle) 613, 4 S. W. 5, 31 Am. & Eng. R. Cas. 111.

Though not authorized or required by statute to do so, railroad companies may make reasonable regulations for the separation of white and colored passengers. Ohio, etc., R. Co. *v.* Lander, 104 Ky. 431, 47 S. W. 344, 882, 20 Ky. L. Rep. 913, rehearing denied in 48 S. W. 145.

Refusal to carry mulatto in white car.—A railroad company is not liable in damages to a mulatto passenger, who, having declined a seat in a coach free to persons of both sexes, regardless of race or color, and equal in all respects to any coach in the train; and having also refused to surrender her ticket unless admitted to a seat in another coach re-

But reasonable rules prescribed by statute must be followed.[68] And, since the fourteenth amendment to the constitution of the United States is not directed against the individual invasion of individual rights, but is simply prohibitory of state legislation abridging the privileges and immunities of citizens of the United States,[69] the provisions of the amendment are not violated by a railroad company in making and enforcing a regulation separating white and colored passengers.[70] Nor is the setting apart of coaches for the exclusive use of colored passengers, which are equally as good as those used in the transportation of white passengers, violative of a provision in a state constitution to the effect that "no person can, on account of color, be subject in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances."[71]

Reasonableness of Rules.—A rule of a street railroad requiring colored passengers to sit in the front end of its cars, and white passengers in the rear end, is reasonable.[72]

§ 2503. Statutes Requiring the Separation.—In most of the states in which there is a large negro population, statutes have been enacted which require carriers of passengers to provide separate, but equal, accommodations for white and colored passengers, and prescribe a penalty for the failure to do so.[73] These statutes have frequently been assailed as unconstitutional, sometimes on the ground that they violate the thirteenth and fourteenth amendments, and sometimes on the ground that they violate the commerce clause, of the federal constitution. But the contention that state enactments of this character conflict with the thirteenth and fourteenth amendments has proved unavailing, and, so far as there provisions of the federal constitution are concerned, the constitutionality of the laws have invariably been sustained.[74] Statutes of this character do not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, for the reason that "a statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." They do not conflict with the four-

served exclusively for white ladies and their gentlemen attendants; quits the train, of her own accord, on being informed by the conductor of his purpose to eject her, on account of her refusal to surrender her ticket. Chesapeake, etc., R. Co. *v.* Wells, 85 Tenn. (1 Pickle) 613, 4 S. W. 5, 31 Am. & Eng. R. Cas. 111.

68. Must follow statute.—Bradford *v.* St. Louis, etc., R. Co., 93 Ga. 244, 124 S. W. 516.

69. Civil Rights Cases, 109 U. S. 3, 62, 3 S. Ct. 18, 27 L. Ed. 836.

70. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas. 571, 19 L. R. A. 269.

71. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas. 571, 19 L. R. A. 269.

72. Reasonableness of rules.—Bowie *v.* Birmingham R., etc., Co., 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247.

73. Del. Rev. Code, p. 410, § 3; Fla. Rev. Stat. 1892, § 2268; Ga. Acts, 1890-91, vol. 1, p. 157, No. 75; Ky. Stat., 1894, §§ 795-801; La. Acts, 1890, No. 111; Miss. Ann. Code, 1890, §§ 1276, 3562; Tenn. Acts, 1891, c. 52, quoted in full in Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432; Tex. Rev. Stat., 1895, arts. 4509, 4516; Va. Acts, 1899-1900, c. 226 and c. 312.

Under Pen. Code 1895, §§ 526, 529, railroads doing business in the state are required to furnish equal accommodations in separate cars or compartments for white and colored passengers, and officers having charge of such cars are not permitted to allow white and colored passengers to occupy the same car or compartment. Hillman *v.* Georgia R., etc., Co., 56 S. E. 68, 126 Ga. 814, 8 Am. & Eng. Ann. Cas. 222.

74. Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, affirming Ex parte Plessy, 45 La. Ann. 80, 11 So. 948, 58 Am. & Eng. R. Cas. 550, 18 L. R. A. 639; Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46; Ohio, etc., R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, rehearing denied in 48 S. W. 145.

teenth amendment for the reason that, while the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[75] A more serious question as to the constitutionality of these enactments arises in connection with the commerce clause of the federal constitution. The rule is that an act requiring the separation of white and colored passengers conflicts with the commerce clause of the federal constitution and is void if it applies to interstate passengers, but is a constitutional enactment if it applies only to domestic passengers, i. e., passengers whose transportation commences and ends within the state.[76] Accordingly, these statutes, so far as they apply to passengers whose transportation begins and ends within the state where they are enacted, are not open to the objection that they interfere with interstate commerce.[77] In the leading case upon this point a railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. It was held by the supreme court of Mississippi that the statute applied solely to commerce within the state.[78] That view as to the effect of the statute, being the construction placed upon a state law by the highest court of the state, was accepted as conclusive when the case came before the supreme court of the United States, and the decision of the Mississippi court was upheld.[79] In answer to the contention of counsel that the act did affect and regulate interstate commerce, Brewer, J., in delivering the opinion of the court, said: "Its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state." But a statute of this character which applies to all passengers, and not alone to those whose transportation begins and ends within the state, violates the commerce clause of the federal constitution and is void.[80] There is, however, a late Tennessee case in which it was held that a statute of this kind, though applicable both to intra and interstate travel, is not obnoxious to the commerce clause of the federal constitution.[81] But as bearing upon the value of this case

75. Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; Lee *v.* New Orleans, etc., R. Co., 125 La. 236, 51 So. 182.

76. Abbott *v.* Hicks, 44 La. Ann. 770, 11 So. 74.

77. Ohio, etc., R. Co. *v.* Lander, 104 Ky. 431, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882, rehearing denied in 48 S. W. 145.

78. Louisville, etc., R. Co. *v.* State, 66 Miss. 662, 6 So. 203, 39 Am. & Eng. R. Cas. 399, 14 Am. St. Rep. 599, 5 L. R. A. 132.

79. Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 L. Ed. 784.

80. Anderson *v.* Louisville, etc., R. Co., 62 Fed. 46; Abbott *v.* Hicks, 44 La. Ann. 770, 11 So. 74.

81. Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 11 Am. & Eng. R. Cas., N. S., 144, 41 L. R. A. 432.

"Laws providing for the separation of the white and colored races in public conveyances, giving each equal privileges of travel and accommodation, are reasonable, and are valid exercise of state authority under the police powers, although they affect and impose burdens upon interstate commerce. Plessy *v.* Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166; New York, etc., R. Co. *v.* New York, 165 U. S. 628, 17 S. Ct. 627, 41 L. Ed. 853; Louis-

as authority, it may be noted that neither of the two above cited cases which directly involved the validity of such acts, when applicable to interstate passengers, was as much as referred to in the opinion.

To Whom Statutes Apply.—Any person having an appreciable mixture of negro blood belongs to the colored race, within the Louisiana statute, requiring railroad companies to provide separate accommodations for white and colored races.[82] When a statute requiring the separation of white and colored passengers contains a provision to the effect that the act shall not apply, among others, to officers in charge of prisoners, a white officer in charge of a colored prisoner may be denied the privilege of taking his charge into the coach set apart for white passengers.[83]

§§ 2504-2505. Statutes Prohibiting the Separation—§ 2504. State Laws.—Statutes have been enacted in a few of the United States which, in effect, forbid the separation of white and colored passengers.[84] It is undoubtedly within the power of the state legislatures to enact laws of this kind, provided that they do not so operate as to interfere with interstate commerce. It has, however, been held that a state statute which, in effect, prohibits the separation of the two races by a carrier engaged in interstate commerce is invalid. Thus, in an action by a colored passenger to recover damages from the owner of a steamboat, which was engaged in interstate commerce, for refusing to plaintiff, who sought transportation from one point to another within Louisiana, accommodations in the cabin specially set aside for white passengers, a Louisiana statute prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was, so far as applicable to the facts of the particular case, held to be invalid on the ground that it was a regulation of interstate commerce.[85]

§ 2505. Acts of Congress.—But, while the states have a limited power to enact legislation of this kind, it is not within the power of the congress of the United States to invade the province of the state legislatures by enacting laws of this character to operate within the states. An attempt to do so was made by the act of congress known as the "Civil Rights Act," passed March 1, 1875,[86] entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude. But, as to cases involving its vio-

ville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 33 L. Ed. 784, 10 S. Ct. 348." Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432.

82. Louisiana statute construed.—Lee *v.* New Orleans, etc., R. Co., 125 La. 236, 51 So. 182.

83. Louisville, etc., R. Co. *v.* Catron, 102 Ky. 323, 19 Ky. L. Rep. 1346, 43 S. W. 443.

84. McClain's, Iowa Code, § 5386, Minn. Gen. Stat., 1894, § 8002; Neb. Comp. Stat., 1893, p. 283, c. 14a, § 1; N. Y. Laws, 1881, c. 400; Pa. Act of March 22, 1867, P. L. 38.

85. Hall *v.* De Cuir, 95 U. S. 485, 24 L. Ed. 547, reversing De Cuir *v.* Benson, 27 La. Ann. 1. A statute of this kind, so far as it affects the business of an interstate carrier, is obviously unconstitutional for the reason, as expressed by Mr. Chief Justice Waite, in delivering the opinion of the United States supreme court, that "it does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, can not but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without."

86. 18 U. S. Stat. at L. 335.

lation arising within the states, the act was held to be unconstitutional and void, first by the United States district and circuit courts [87] and finally by the supreme court of the United States,[88] upon the ground that the fourteenth amendment was prohibitory upon the states only, and the legislation authorized to be adopted by congress for enforcing it was not direct legislation on matters respecting which the states were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court, Mr. Justice Bradley observed that the fourteenth amendment "does not invest congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental right specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect." The court expressly refrained from expressing any opinion as to the validity of the law in reference to cases arising in the territories or the District of Columbia, which are subject to the plenary legislation of congress in every branch of municipal regulation. And it was said: "whether congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view." Where an act of congress, authorizing a railroad company to extend its road into the District of Columbia, contained a provision to the effect that no person should be excluded from the cars of the company on account of color, it was held that the company had no power to make and enforce a regulation separating the colored from the white passengers.[89]

§ 2506. Degree of Care and Liability Incurred.—Compelling Passenger to Leave Car.—While a carrier may make and enforce regulations providing different cars for white and colored passengers, a conductor, in requiring the white passengers to leave the car provided for colored passengers, is bound to do so in a reasonable manner and at such a time and under such circumstances as will not expose the passenger to increased danger.[90]

Liability of Carriers—Damages.—Under a statute requiring white and colored passengers to be carried separately, a carrier may not require a white person to ride in the colored coach and is liable in damages for doing so.[91] A white passenger voluntarily riding in the colored coach rather than risk getting a seat in another coach may not recover on account of riding in the colored coach,

87. United States *v.* Washington, 20 Fed. 630, 4 Woods 349; Smoot *v.* Kentucky, etc., R. Co., 13 Fed. 337; Cully *v.* Baltimore, etc., R. Co., 1 Hughes 536, Fed. Cas. No. 3,466. But compare United States *v.* Dodge, 1 Tex. L. J. 47, Fed. Cas. No. 14,976.

88. Civil Rights Cases, 109 U. S. 3, 62, 3 S. Ct. 18, 27 L. Ed. 836.

89. Railroad Co. *v.* Brown (U. S.), 17 Wall. 445, 21 L. Ed. 675.

90. Compelling passenger to leave car.—Carleton *v.* Central, etc., R. Co., 155 Ala. 326, 46 So. 495, 16 Am. & Eng. Ann. Cas. 445.

A conductor is not justified in ordering or compelling a white passenger in the negro coach to go into another coach while the train is running at a dangerous rate of speed. Central, etc., R. Co. *v.* Carleton, 163 Ala. 62, 51 So. 27.

91. Liability of carriers—Damages.—Chesapeake, etc., R. Co. *v.* Austin, 137 Ky. 611, 126 S. W. 144.

and, where a passenger was not directed to ride in the colored coach, and remained on the train knowing its crowded condition, he can not complain where he was furnished such accommodations as could reasonably be furnished.[92]

Mistake as to Color.—If a conductor in enforcing the law requiring conductors to separate white and colored passengers, mistakes a white man for a negro, the carrier is not liable if he used extraordinary diligence to prevent such mistake.[93]

Status of Conductor as Employee.—The conductor in such cases, although he has conferred upon him police powers to execute the provisions of the law, is not, because of such delegation of police power, an officer of the state, but is none the less the agent of the carrier, rendering it liable for his acts while exercising that power.[94]

Penalty.—The penalty imposed by statute for the failure to furnish separate cars or compartments for white and colored passengers, can not be inflicted upon a railroad company because the employees of the company in charge of a special train, chartered by individuals and furnished with separate cars for colored passengers, refuse to allow colored passengers to ride in the cars set apart for passengers of their race, and require them to ride in a baggage or tool car.[95]

§ 2507. Exclusion of Passenger from Car Because of Bad Moral Character.—The carrier can not classify passengers according to their moral character. Thus a woman, properly dressed and of orderly behavior, can not be excluded from a car in which she is entitled to ride, merely because she is known or reputed to be of bad character.[96]

§ 2508. Equality of Accommodations.—In providing for the separation of passengers, the carrier is bound to furnish equal accommodations to all passengers who pay the same fare. Thus, in providing for the separation of white and colored passengers, the carrier is charged with the duty of furnishing the colored passengers with cars or compartments that are as safe and comfortable in their conditions and appointments as those which are furnished to white passengers paying the same fare.[97] A carrier who fails to provide colored passengers with accommodations equal to those furnished white passengers, becomes liable to a colored passenger for damages suffered by him in consequence of the carrier's omission of duty in this respect.[98] And where the separation of the races is required by statute, the fact that the colored passenger, who is denied the accommodations afforded the white passengers, does not go into the coach

92. Voluntary act of passenger.—Chesapeake, etc., R. Co. *v.* Austin, 137 Ky. 611, 126 S. W. 144.

93. Degree of care.—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 399.

94. Liability for act of conductor.—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899.

Though the conductor of a common carrier is clothed by law with police power, that fact affords no immunity to a carrier for damages resulting from his wrongful discharge of his duty, either as servant of the carrier or under color of his police power; and hence a carrier is liable for its conductor's wrongful acts in carrying out the law requiring the separation of white and colored passengers. Georgia R., etc., Co. *v.* Baker, 58 S. E. 88, 1 Ga. App. 832.

A conductor in performing the statutory duty of assigning passengers to the proper coaches acts as the agent of the carrier, and it is liable for his misconduct. Louisville, etc., R. Co. *v.* Ritchel, 147 S. W. 411, 148 Ky. 701, 41 L. R. A., N. S., 958, Ann. Cas. 1913 E, 517.

The words "conductor" and "manager," used in Ky. St., §§ 795-800 (Russell's St., §§ 5343-5348), requiring segregation of white and negro passengers, and requiring the conductor or manager to see that the statute is obeyed, mean the same person, except where one not designated as conductor is in charge of a train. Louisville, etc., R. Co. *v.* Renfro, 135 S. W. 266, 142 Ky. 590, 33 L. R. A., N. S., 133.

95. Louisville, etc., R. Co. *v.* Commonwealth, 99 Ky. 663, 37 S. W. 79.

96. Brown *v.* Memphis, etc., R. Co., 7 Fed. 51, 1 Am. & Eng. R. Cas. 247.

97. Houck *v.* Southern Pac. R. Co., 38 Fed. 226; Logwood *v.* Memphis, etc., R. Co., 23 Fed. 318, 21 Am. & Eng. R. Cas. 256; The Sue, 22 Fed. 843; Gray *v.* Cincinnati, etc., R. Co., 11 Fed. 683.

98. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 38 S. W. 1136.

set aside for whites will not be a defense to his action for damages.[99] But it has been held that, in order to entitled a negro passenger to recover in an action based upon the failure of the carrier to furnish colored passengers with accommodations equal to those furnished white passengers, it must appear that he sustained damages in consequences of the carrier's omission of duty in this respect.[1] However, a colored woman, who is denied admission into the women's car, although she holds a first class ticket, and required to ride in the smoking car, containing only men, some of whom are smoking, may, if there is room in the woman's car and the other car is not suitable for her to ride in, refuse to accept the accommodations, leave the train, and recover damages against the carrier.[2] A colored passenger is denied the right of equal accommodations if he is unable to obtain a seat in the car set apart for colored passengers, in consequence of the conductor allowing the seats therein to be usurped, and the car to be crowded, by white passengers.[3] A negro passenger who is compelled to occupy a car which, unlike the cars in which white passengers are carried, is not equipped with a water closet, is entitled to recover damages for pain and suffering sustained in consequences of the carrier's omission of duty.[4] A railroad company which has set apart on its trains a passenger car for the exclusive use of women, and men accompanied by women, but has not set apart a car for the exclusive use of colored passengers, can not rightfully exclude a colored woman from the women's car, in which there are vacant seats, on account of her color, and require her to ride in a car occupied mostly by men.[5] But a colored passenger who is excluded from a waiting room set aside for white passengers, in which no smoking and chewing is allowed, and required to wait in a room set aside for colored passengers, in which there is no smoking or chewing during the period of her occupancy, the accommodations are not unequal merely because those practices may have been permitted at some other time.[6] A carrier of passengers by steamboat can not rightfully exclude colored passengers from the regular table and require them to take their meals upon the guards of the boat or in the pantry.[7] But a colored passenger on a steamboat who refuses to remove from one table to another on being requested to do so because of objections to his presence on the part of white passengers, and whose supper is duly furnished him, can not complain of discrimination because, upon his refusal to move, the white passengers are removed to the other table, leaving him alone.[8] In an early case brought by a colored passenger to recover damages for being refused passage in the cabin of defendant's boat, and required to accept a deck passage, in consequence of the enforcement against him of a rule or regulation which did not allow the use of the cabin to passengers of his race, a demurrer to defendant's notice of defense setting up the rule was overruled, on the ground that the reasonableness of the regulation was a mixed question of law and fact which could not be determined on demurrer. In its opinion, the court seems to recognize the right of the carrier, under some circumstances to refuse plaintiff cabin accommodations, though he was willing to pay therefor, without providing him with other accommodations equally good.[9] So far as the decision goes to this extent, it is certainly erroneous.

99. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 38 S. W. 1136.

1. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 42 S. W. 1030; Norwood *v.* Galveston, etc., R. Co., 12 Tex. Civ. App. 560, 34 S. W. 180, 3 Am. & Eng. R. Cas., N. S., 395.

2. Gray *v.* Cincinnati, etc., R. Co., 11 Fed. 683.

3. Williams *v.* International, etc., R. Co., 28 Tex. Civ. App. 503, 67 S. W. 1085.

4. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 38 S. W. 1136.

5. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

6. Smith *v.* Chamberlain, 38 S. C. 529, 17 S. E. 371, 58 Am. & Eng. R. Cas. 558, 19 L. R. A. 710.

7. Coger *v.* Northwestern, etc., Packet Co., 37 Iowa 145.

8. McGuinn *v.* Forbes, 37 Fed. 639.

9. Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

§§ 2509-2522. Particular Rights and Duties in Transit—§ 2509. Overloading Conveyance.—In view of the common practice of street railway companies to overcrowd their cars, and of the fact that the practice ordinarily only affects the comfort, and not the safety, of the passengers, it can not be said that it is negligence, as a matter of law, to carry more passengers than can be seated, or even to so crowd their cars with passengers that some of them are compelled to ride on the platforms.[10] And it has been held that the fact that a ferry company undertakes to carry a greater number of passengers than it can accommodate with seats is not alone sufficient to show negligence on the part of the carrier.[11] But every carrier of passengers, whether by railroad, street railway, stage coach, or other means, is bound to exercise care to prevent the overcrowding of its conveyances to such an extent that the ordinary and usual risks of the transportation are materially increased.[12] And it may be safely said that it is the general duty of a railroad company to furnish sufficient room within its cars for all passengers it receives for transportation.[13] And when a railroad company has notice in advance that an unusual number of passengers will ride on its trains, it must use reasonable efforts to provide safe accommodations.[14] The failure of a railroad company to provide a passenger with a seat or other safe and secure place to ride, whereby the passenger is obliged to ride in an unsafe place, undoubtedly tends to show negligence.[15] The question of negligence must, however, depend upon whether the overcrowding, under the circumstances of each particular case, was not consistent with the high degree of care which the law exacts of passenger carriers, and is almost always a question of fact for the jury.[16] It has been said that it is gross negligence in a street railway

10. Meesel *v.* Lynn, etc., R. Co. (Mass.), 8 Allen 234; Mt. Adams, etc., R. Co. *v.* Reul, 4 O. C. C. 362, 2 O. C. D. 596.

A street railway company is not negligent in permitting a passenger to ride in a crowded car, if he chooses to do so. Kebbe *v.* Connecticut Co., 84 Atl. 329, 85 Conn. 641, Ann. Cas. 1913C, 167.

It is not negligence for a street car company to permit passengers to enter cars which are already crowded. McCumber *v.* Boston Elevated R. Co., 207 Mass. 559, 93 N. E. 698.

11. Burton *v.* West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215.

12. See the following illustrative cases:

California.—Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

Illinois.—Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93.

Kansas.—Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

Massachusetts.—Treat *v.* Boston, etc., R. Corp., 131 Mass. 371, 3 Am. & Eng. R. Cas. 423.

Minnesota.—Brusch *v.* St. Paul, etc., R. Co., 52 Minn. 512, 55 N. W. 57.

Nebraska.—Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

New Jersey.—Hansen *v.* North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718.

New York.—Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. Rep. 305, 28 N. Y. S. 739, 4 Am. & Eng. R. Cas. 256, 260; Lehr *v.* Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889; Sheridan *v.* Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 34 How. Prac. 217.

Pennsylvania. — Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. 624, 31 Atl. 52.

Texas.—Williams *v.* International, etc., R. Co., 28 Tex. Civ. App. 503, 67 S. W. 1085; International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

Washington.—Graham *v.* McNeill, 20 Wash. 466, 55 Pac. 631, 12 Am. & Eng. R. Cas., N. S., 149, 43 L. R. A. 300, 72 Am. St. Rep. 121.

13. General duty.—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

To absolve itself from liability for injuries to a passenger riding in a baggage car, the carrier, in addition to adopting and posting in a conspicuous place in passenger cars printed rules and regulations forbidding and warning passenger not to ride in such baggage cars, must provide such passenger with proper accommodations in a passenger car. Lane *v.* Choctaw, etc., R. Co., 91 Pac. 883, 19 Okla. 324.

14. Unusual crowds.—Chicago, etc., R. Co. *v.* Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914 A, 561.

15. Werle *v.* Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429.

16. Maury *v.* Talmadge, 2 McLean 157, Fed. Cas. No. 9,315; Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. Rep. 305, 28 N. Y. S. 739; Lehr *v.* Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889.

Whether a common carrier in not providing a seat for every passenger has

to overcrowd and load down its cars with passengers beyond any reasonable limit, so that it is not able to control and readily stop its cars as they approach an intersecting street in order to prevent a collision.[17] When a street railway company undertakes to carry large numbers of people, vastly in excess of the seating and standing capacity of its cars, permits passengers to ride on the platforms, stops its car when in such crowded condition that other persons may get upon it, and, because of the crowd, a passenger, who has boarded the car before it becomes crowded, is pushed off a platform to his injury, the company is guilty of negligence.[18] It has been said that if it is impossible to prevent a greater number of passengers than can be carried with safety from getting on a train, the carrier has a right to refuse to move the train until proper control can be secured.[19]

Passengers Riding on Platform or Other Place.—The conductor of a train represents the railroad company in relation to the transportation of passengers on his train, and his acts in receiving and carrying passengers on the platforms when the train is overcrowded binds the company.[20] The carrier owes to a passenger involuntarily, necessarily and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there,[21] but its liability is not absolute.[22] The rule is

fulfilled its legal duty toward a passenger is a question of fact for the jury; and, where an injury results to a passenger by failure to provide a seat, the fact that for a long period of time sufficient seats had not been provided, and that this was known to the defendant company, may be pleaded and proven as a circumstance of substantial negligence, as well as aggravation. Lyndon *v.* Georgia R., etc., Co., 60 S. E. 278, 3 Ga. App. 534.

When plaintiff boarded defendant's motor train it was so crowded that he was unable to get inside, but he secured standing room on the rear platform of the trailer. When the first stop was made, four blocks distant, he stepped off the train to allow a fellow passenger to alight, and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately, and secured standing room on the front step of the trailer, holding on to the dashboard and to the iron rail attached to the car for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving injuries. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. It was held that the question of negligence was for the jury, and that it was error to direct a verdict for the defendant. Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

17. Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220.

18. Reem *v.* St. Paul, etc., R. Co., 77 Minn. 503, 80 N. W. 638.

In an action for the death of a passenger while riding on the inside running board of defendant's open street car by contract with a car on the other track, it is not error to instruct that defendant is liable if its employees permitted other passengers to board the car after deceased in such numbers that deceased was crowded out from the body of the car to a dangerous position. Kalis *v.* Detroit United Railway, 119 N. W. 906, 155 Mich. 485.

19. Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

20. Passengers riding on platform.—Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325.

21. Degree of care—Passenger on platform.—Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325. See Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917; Merwin *v.* Manhattan R. Co., 48 Hun 608, 1 N. Y. S. 267, 16 N. Y. St. Rep. 20; S. C., 113 N. Y. 659, 21 N. E. 415.

The carrier must provide the passenger with a seat in its passenger cars, and if any of the seats are occupied with luggage, or one passenger is occupying more than one seat, he is not bound to request such obstructions removed, but may seek some other unoccupied place. "Nolan *v.* Brooklyn, etc., R. Co., 87

22. The liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to him. Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325.

that the passenger will not be guilty of negligence per se by riding upon the platform or in the baggage car, when the platform or passenger cars are crowded, or when he is unable to observe any vacant seats, if he acted under all the circumstances as a reasonable prudent man would have acted.[23]

Proximate Cause.—The negligence of a railroad company in overcrowding its cars, compelling a passenger to ride on the platform, from which he is pushed by the jostling of other passengers, is the proximate cause, the casualty being one which the company might reasonably have foreseen, though it could not have foreseen the particular circumstances.[24]

N. Y. 63, 41 Am. Rep. 345; Werle *v.* Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Willis *v.* Long Island R. Co., 34 N. Y. 670; Weymouth *v.* Broadway, etc., R. Co., 2 Misc. Rep. 506, 22 N. Y. S. 1047, 51 N. Y. St. Rep. 612; Merwin *v.* Manhattan R. Co., 113 N. Y. 659, 21 N. E. 415; Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917; Morrison *v.* Erie R. Co., 56 N. Y. 302; Schaefer *v.* Union R. Co., 29 App. Div. 261, 51 N. Y. S. 431; Weymouth *v.* Broadway, etc., R. Co., 142 N. Y. 681, 37 N. E. 825; Vail *v.* Broadway, etc., Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423; Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229; Gerstle *v.* Union Pac. R. Co., 23 Mo. App. 361; Chaney *v.* Louisiana, etc., R. Co., 176 Mo. 598, 75 S. W. 595; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418; Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105." Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

If a carrier negligently and unreasonably fails to provide sufficient cars so that passengers are compelled to ride on the platforms and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury therein, unless he has contributed to the injury by his own negligence. Norvell *v.* Kanawha, etc., R. Co., 68 S. E. 288, 67 W. Va. 467, 29 L. R. A., N. S., 325.

23. *United States.*—Pennsylvania Co. *v.* Paul, 126 Fed. 157, 62 C. C. A. 135; Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536, 17 Am. & Eng. R. Cas., N. S., 93.

Alabama.—Highland Ave., etc., R. Co. *v.* Donovan, 94 Ala. 299, 10 So. 139.

Arkansas.—St. Louis, etc., R. Co. *v.* Leigh, 45 Ark. 368, 55 Am. Rep. 558.

California.—Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

Illinois.—Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608; Chicago, etc., R. Co. *v.* Newell, 212 Ill. 332, 72 N. E. 416; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406.

Iowa.—Marquette *v.* Chicago, etc., R. Co., 33 Iowa 562; Blake *v.* Burlington, etc., R. Co., 89 Iowa 8, 56 N. W. 405, 21 L. R. A. 559.

Kentucky.—Chesapeake, etc., R. Co. *v.* Jordan, 25 Ky. L. Rep. 574, 76 S. W. 145; Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208; Chesapeake, etc., R. Co. *v.* Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271.

Maryland.—Baltimore, etc., R. Co. *v.* State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454.

Massachusetts.—Maguire *v.* Middlesex R. Co., 115 Mass. 239; Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843.

Michigan.—Morgan *v.* Lake Shore, etc., R. Co., 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609.

Minnesota.—Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610, 34 Am. & Eng. R. Cas. 359; Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, Gil. 110, 18 Am. Rep. 360; Benedict *v.* Minneapolis, etc., R. Co., 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. Rep. 345.

Mississippi.—Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259.

Missouri.—Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

Nebraska.—Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

New Jersey.—New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283, 21 Atl. 1052.

New York.—Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325.

Oklahoma.—Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

Pennsylvania. — Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. 624, 31 Atl. 52.

Tennessee. — Washburn *v.* Nashville, etc., R. Co., 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

Texas.—Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Galveston, etc., R. Co. *v.* Morris, 94 Tex. 505, 61 S. W. 709; International, etc., R. Co. *v.* Ormond, 64 Tex. 485.

Washington.—Graham *v.* McNeill, 20 Wash. 466, 55 Pac. 631, 12 Am. & Eng. R. Cas., N. S., 149, 43 L. R. A. 300, 72 Am. St. Rep. 121.

24. Proximate cause.—International, etc., R. Co. *v.* Williams, 50 S. W. 732, 20 Tex. Civ. App. 587.

§ 2510. Rights and Duties as to Providing Seats.—A carrier may properly provide reasonable rules and regulations for the seating of passengers.[25] And it may employ necessary force to remove a passenger for persistent nonobservance of such rules.[26] In the absence of any rule of a carrier to the contrary, a passenger has the right to remain in the seat first selected by him on entering a car, and can not rightfully be removed to another by the conductor, though there are many vacant seats in the car, and the conductor had been occupying the seat selected just before the passenger entered the car.[27] In some of the United States it is provided by statute that common carriers of persons must furnish passengers with seats.[28] And independently of statute, while the carrier probably is not bound absolutely and under all circumstances to provide every passenger with a seat, it can not be questioned that it is the duty of the carrier to make the usual and reasonable provisions for seating the passengers whom it undertakes to carry,[29] and to see that every passenger has an opportunity to be seated.[30] It has been held that a common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, can not through its train official lawfully require him to vacate a seat which he is occupying in the car to which he has been duly assigned.[31] It has been held that a carrier must provide passengers with seats, failure to do so being a breach of the contract of carriage, subjecting it to proximately resulting damages.[32] If the carrier neglects or refuses to discharge this duty to its passengers, without a just excuse, the passenger may treat the contract as violated by the carrier, and he may leave the train, and sue for a breach of the contract. Thus, a passenger who left a train upon failing to obtain a seat in consequence of the refusal of the conductor to require passengers, who were occupying more than their share of seats, to make room for him, was held to be entitled to damages.[33] Possibly, too, the passenger may remain upon the train without waiving his right to recover damage under the contract for the inconvenience of riding without a seat. But, if he wishes to repudiate the contract he must do so in toto; he can not avail himself of the benefit of the transportation and at the same time refuse to perform his part of the contract. Hence, the failure of the

25. Right to prescribe rules and regulations as to seats.—McLain *v.* St. Louis, etc., R. Co., 111 S. W. 835, 131 Mo. App. 733.

26. Right to enforce rules.—McLain *v.* St. Louis, etc., R. Co., 131 Mo. App. 733, 111 S. W. 835.

27. Absence of rule.—McLain *v.* St. Louis, etc., R. Co., 111 S. W. 835, 131 Mo. App. 733.

28. Cal. Civ. Code, § 2185; Dak. Comp. Laws, § 3894; Mont. Civ. Code, 1895, § 2895.

29. Trumbull *v.* Erickson, 38 C. C. A. 536, 97 Fed. 891, 17 Am. & Eng. R. Cas., N. S., 93; Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 34 Am. & Eng. R. Cas. 359, 12 Am. St. Rep. 610; Camden, etc., R. Co. *v.* Hoosey, 99 Pa. 492, 6 Am. & Eng. R. Cas. 454, 44 Am. Rep. 120.

It is the duty of a carrier of passengers to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and proper accommodations means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers. Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him with a seat without transportation than it is when he is offered transportation without a seat. Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 31 Am. & Eng. R. Cas. 112, 4 Am. St. Rep. 776.

30. A railroad company is liable to a passenger for the refusal and failure of the conductor to furnish him with such a seat as he has paid for, when there are more of such seats than there are passengers, but there are none vacant, owing to the fact that some of the passengers occupy more seats than they are entitled to. Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259.

31. New York, etc., R. Co. *v.* Burns, 51 N. J. L. 340, 17 Atl. 630, 39 Am. & Eng. R. Cas. 423.

32. Breach of contract.—Texas, etc., R. Co. *v.* Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115.

33. Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259.

carrier to provide a passenger with a seat does not entitle the passenger, who remains upon the train after having had a reasonable opportunity to leave it, to refuse to surrender his ticket or pay the fare.[34] But some cases seem to support the rule that a passenger, who is properly on a train, and who, exercising due diligence, learns that he can not obtain a seat, does not, by refusing to pay the fare, become a trespasser,[35] and he certainly would not until he is given a reasonable opportunity to leave the vehicle.[36] In some cases, if a passenger is unable to obtain a seat in the cars in which he is entitled to ride, but there are vacant seats in another car which he ordinarily has no right to enter, he can not be left standing without a breach of the contract of carriage. Thus, it has been held that if a male passenger is unable to find a seat in the cars provided for men, but there is room to seat him in a car set apart for women, he may enter the women's car, if he can do so peaceably and unforbidden, and is entitled to remain there until he is furnished with a seat elsewhere.[37] And it has been held that a passenger who is unable to obtain a seat in the ordinary coaches of a train, in which he is entitled to ride, may pass into a drawing room car and, without paying extra fare for the privilege, take a seat therein until he is furnished a seat in the other cars.[38] As has been shown in the next preceding section a carrier may in some cases be chargeable with negligence in so overloading its conveyance that a passenger is not only unable to find a seat but is forced to occupy a dangerous position. And no doubt if a passenger, exercising reasonable care and prudence, is injured in consequence of the carrier's neglect to provide him with a seat, he is entitled to damages.[39] But, while there may, of course, be circumstances under which due care on the part of a carrier requires that its passengers be furnished with seats, ordinarily it can not be said, as a matter of law, that the mere failure of a carrier to provide all of its passengers with seats of itself amounts to negligence,[40] where it does not appear that a less

34. *Arkansas.*—St. Louis, etc., R. Co. *v.* Leigh, 45 Ark. 368, 55 Am. Rep. 558.

Missouri.—Davis *v.* Kansas, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457.

Ohio.—Close *v.* Cooper, 34 O. St. 98.

Tennessee.—Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5, 31 Am. & Eng. R. Cas. 112, 4 Am. St. Rep. 776.

A carrier must furnish seats if practicable, and a passenger may refuse to give up his ticket or pay fare if a seat is not furnished, and one who has purchased a ticket of a particular class is entitled to accommodations of that class, but in general a passenger electing to remain on a particular train must accept the reasonable accommodations afforded him on such train, and a carrier must provide its train with coaches reasonably sufficient to carry comfortably as many persons as in the exercise of ordinary care it should reasonably anticipate. Chesapeake, etc., R. Co. *v.* Austin, 126 S. W. 144, 137 Ky. 611.

35. '"It is as much his duty, as the agent of the company, to see that each passenger is furnished with a proper seat, as it is to require him to pay his fare.' Willis *v.* Long Island R. Co., 34 N. Y. 670. 'A passenger who refuses to pay fare unless a seat is provided does not thereby become a trespasser on the train.' Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610, 34 Am. & Eng. R. Cas. 359. A common carrier can not lawfully make a rule that will forfeit the rights of passengers who exhibit their tickets, and demand the accommodations to which they are entitled under it and are refused, on the whim or caprice of the carrier that they shall not ride because they are colored, unless they will accept inferior accommodations, and thus compel them to surrender their rights or leave the conveyance, and sue for damages." Billinger *v.* Clyde Steamship Co., 158 Fed. 511.

36. Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 34 Am. & Eng. R. Cas. 359, 12 Am. St. Rep. 610.

37. Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495; S. C., 42 Wis. 654, 24 Am. Rep. 437.

38. Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325.

39. See Camden, etc., R. Co. *v.* Hoosey, 99 Pa. 492, 44 Am. Rep. 120, 6 Am. & Eng. R. Cas. 454.

40. Duty to provide seats.—Burton *v.* West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215. (Action for injuries received alleged to be due to failure of company to provide a seat.)

In an action by a passenger because compelled to ride in a crowded train, the carrier should be permitted to show that it had no notice of any extra travel which would require more than the usual trains, and that the train which it had was suffi-

number was provided than was customary and sufficient for those who ordinarily preferred to be seated,[41] or where the passenger is informed or should have had knowledge of the crowded condition of the car.[42] And a passenger may waive any rights in this respect by staying upon the car, paying his fare, and finishing his journey.[43]

Degree of Care Required.—A carrier must exercise as high a degree of care for the safety of passengers in providing seats in its cars as it does in providing the car or the roadbed, or in the running of its trains,[44] but it is not absolutely bound to do so.[45]

§§ 2511-2514. Allowing or Compelling Passengers to Expose Themselves to Danger—§ 2511. In General.—Generally speaking, it is the duty of a passenger carrier to exercise care to prevent passengers from incurring unnecessary perils.[46] And the due performance of this general duty may require the carrier to warn passengers of dangers to which they are exposed, to direct passengers to remove from a perilous position, and even, in some cases, to enforce a compliance with the direction. Of course it is negligence for a conductor to cause a passenger to go on the platform unnecessarily at a time when a sudden stopping of the train may be expected.[47] While it is not negligent per

cient under ordinary circumstances to accommodate all offering to be carried. Chesapeake, etc., R. Co. *v.* Austin, 126 S. W. 144, 137 Ky. 611.

In an action by a colored person against a carrier for being compelled to stand during a trip, where there was evidence that an extraordinary emergency existed which the railway could not and did not anticipate, it was error to instruct that, if white people came into the car for colored people and so crowded it that plaintiff was compelled to stand, the jury should find for plaintiff. St. Louis, etc., R. Co. *v.* Petties, 99 Ark. 415, 138 S. W. 961.

Failure to furnish seat as negligence per se.—Failure of a railroad company to furnish every passenger with a seat, and allowing a passenger to board a car when there is no seat for him, is not negligence per se. Houston, etc., R. Co. *v.* Bryant, 72 S. W. 885, 31 Tex. Civ. App. 483.

41. Burton *v.* West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215.

42. Knowledge of crowded condition.—A railroad company is not guilty of breach of duty to provide a seat for a passenger if it has exercised due care to adequately meet all demands that it has reasons to expect, and the passenger is informed or should have had knowledge of the crowded condition of the cars. St. Louis, etc., R. Co. *v.* Tittle (Tex. Civ. App.), 115 S. W. 640.

That a coach marked for colored people was crowded with white people did not render the railroad company liable, in the face of an unanticipated emergency which rendered it impossible to give a colored person a seat, she having entered the coach when she knew it was crowded, so that it was impossible for her to get a seat, unless the white passengers should be expelled. St. Louis, etc., R. Co. *v.* Petties, 99 Ark. 415, 138 S. W. 961.

43. Where plaintiff accepted transportation in a crowded street car, and surrendered her ticket, she waived strict performance so far as her contract rights were concerned to a seat, and the only duty defendant then owed her was that owing to a passenger who had contracted to ride standing. Weeks *v.* Auburn, etc., Elect. R. Co., 113 N. Y. S. 636, 60 Misc. Rep. 400.

Where the plaintiff, a colored person, boarded a train when there was an unusual crowd, on account of which the conductor was unable to give her a seat, and the crowd spread into the negro coach, and there was not room to give all the passengers seats, and the plaintiff did not call on the conductor to give her a seat, the carrier was not liable. St. Louis, etc., R. Co. *v.* Petties, 99 Ark. 415, 138 S. W. 961.

44. Degree of care required.—International, etc., R. Co. *v.* Anthony, 24 Tex. Civ. App. 9, 57 S. W. 897; International, etc., R. Co. *v.* Williams, 50 S. W. 732, 20 Tex. Civ. App. 587; Galveston, etc., R. Co. *v.* Morris (Tex. Civ. App.), 60 S. W. 813, judgment affirmed in 61 S. W. 709, 94 Tex. 505; St. Louis, etc., R. Co. *v.* Campbell, 69 S. W. 451, 30 Tex. Civ. App. 35.

45. Carrier not absolutely bound to furnish safe seats.—A carrier of passengers is not absolutely bound to furnish passengers safe seats, but is only chargeable with the exercise of a very high degree of care to provide reasonably safe seats. Boyles *v.* Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 936.

46. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

47. Causing passenger to expose himself.—Chicago, etc., R. Co. *v.* James, 105 Pac. 40, 81 Kan. 23.

se for a passenger to ride upon the platform of an electric street railway car,[48] nevertheless a passenger who voluntarily rides on the platform when there is room for him inside the car, takes upon himself the duty of looking out for, and of protecting himself against the usual and obvious peril attendent upon his position, such as the danger of being thrown from the platform by the ordinary jolting and swinging of the car.[49] Hence, it is held that a passenger standing upon a rear platform of a trolly car from choice has no right to rely in preserving his equilibrium, upon the protection of a closed door, nor is it the duty of the conductor to warn him before opening the door suddenly where it appears that he was not leaning against the door and was not in a position that the opening of the door required him to move or in any way interferred with him.[50] And the rule is sometimes laid down that as to a passenger in such a position, where there is no defect in the management or operation of the road save such danger which is common from the peculiar position occupied, the measure of duty on the part of the carrier simply to use reasonable care to carry the passenger safely.[51] It is said that any other ruling would practically obliterate the rule that when a passenger voluntarily enters a dangerous position he assumes the ordinary risk in that respect.[52] On the other hand, as we have seen, when the carrier by overcrowding his car forces or otherwise compels his passengers to ride upon the platform or in any place of danger he must exercise all additional care commensurate with the dangers surrounding them in that situation.[53]

§ 2512. Warning Passengers of Danger.—A carrier of passengers is under no obligations to warn passengers against dangers which would not be apprehended by the exercise of the high degree of car which the law exacts of the carrier,[54] nor, at least under some circumstances, against dangers which are

48. Nirk *v.* Jersey City, etc., St. R. Co., 75 N. J. L. 642, 68 Atl. 158; Scott *v.* Bergen County Tract. Co., 63 N. J. L. 407, 43 Atl. 1060.

49. Nirk *v.* Jersey City, etc., St. R. Co., 75 N. J. L. 642, 68 Atl. 158, citing Elliott *v.* New Port, St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208; Watson *v.* Portland, etc., R. Co., 91 Me. 584, 40 Atl. 699, 44 L. R. A. 157, 64 Am. St. Rep. 268; Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845, 16 Am. & Eng. R. Cas., N. S., 162; City R. Co. *v.* Lee, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. Rep. 798; New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283, 21 Atl. 1052.

Where a passenger on an electric street car remains on the running board, the car not being crowded, it is not the duty of the conductor to warn him of the danger from jolts or lurches incident to the ordinary motion of the car when passing over switches or rounding curves. Olund *v.* Worcester Consol. St. R. Co., 92 N. E. 720, 206 Mass. 544.

50. Nirk *v.* Jersey City, etc., St., R. Co., 75 N. J. L. 642, 68 Atl. 158.

51. A street railway company maintained tracks four feet apart for the operation of cars, between which there was a space of twenty-two inches in the clear. There were no defects in the roadbed or rolling stock. On a holiday, while its cars were overtaxed, a passenger on a crowded car took a position on the running board next to the parallel track, and was struck by a car thereon. He knew of the danger. Held, that the company was required only to use reasonable care to carry him safely under the circumstances, and an instruction that it must have used the "utmost" care was error. Order 95 N. Y. S. 1130, 107 App. Div. 630, reversed. Gregory *v.* Elmira, etc., R. Co., 83 N. E. 32, 190 N. Y. 363, 18 L. R. A., N. S., 160.

52. Gregory *v.* Elmira, etc., R. Co., 190 N. Y. 363, 83 N. E. 32, 18 L. R. A., N. S., 160.

53. See ante, "Overloading Conveyance," § 2509.

54. Craighead *v.* Brooklyn City R. Co., 123 N. Y. 391, 25 N. E. 387, reversing 25 N. Y. St. R. 941, 5 N. Y. S. 431.

Where a passenger on an electric car while on the running board for the purpose of changing his seat was injured by a collision of his body with one of the trolley poles between the tracks, the conductor's assent to such change of seats without warning the passenger of his danger was not negligence, where the distance between the trolley poles and the car was great enough to enable persons ordinarily to stand upon or pass along the running board in safety, and where the construction of the road at the place where the accident occurred was not unusual, or the distance between the running board such as was likely to endanger passengers making ordinary and customary use thereof. Judgment 95 N. Y. S. 1163, 107 App. Div. 620, reversed. Tietz *v.* International R. Co., 78 N. E. 1083, 186 N. Y. 347, 10 L. R. A., N. S., 357.

as apparent to the passengers as to the carrier's servants.[55] And a carrier is not always bound to know that a passenger is occupying an exposed position, and, unless the carrier does, or due care requires that it should, know that the passenger is unnecessarily exposed, the passenger can not complain that he was not warned.[56] It is the duty of those in charge of a traction car which is crowded to overflowing to know of the presence of a passenger upon the step of such car, and, knowing that such place is fraught with danger, to furnish him with a safe place to ride or to warn him to retire from his position, and a liability results from an injury which arises either by reason of such passenger being pushed from such car by virtue of its overcrowded condition or by being struck by a passing car.[57] A carrier is undoubtedly under an obligation to give passengers timely warning of perils which are known to the carrier, or which would be known to, or apprehended by, the carrier, if in the exercise of the required degree of care, but of which the passengers, though exercising due care, are ignorant.[58] Thus, if passengers on a vessel are accustomed to pass over a hatch-

55. No duty where danger apparent.—Where a passenger goes on the platform of a car in motion, and notices that the train is running at an unusual and dangerous rate of speed, an employee of the carrier who knows of his presence on the platform need not warn him of the danger. Ebert *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 49 S. W. 1105.

56. Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208. See Carroll *v.* Interstate Rapid Transit Co., 107 Mo. 653, 17 S. W. 889, 52 Am. & Eng. R. Cas. 273; Tolleman *v.* Sheboygan, etc., R. Co., 148 Wis. 197, 134 N. W. 406.

Plaintiff, a boy of eight years of age, voluntarily and without the knowledge of the conductor, left his place inside of a crowded street car, and pushed his way to the front platform, where his companion was riding. The conductor, after having collected the fares on the rear platform and in the body of the car, came forward, opened the wicket in the front door, and demanded the fares of those on the front platform, among whom were these two boys. When the conductor asked plaintiff's companion for his fare, the boy claimed that he had paid his fare on a car from which he had been transferred, but the conductor refusing to accept his statement as true, told him that he must either pay his fare or get off, and then opened the door. As the conductor opened the door, plaintiff, who had heard the conversation, and was himself on the car without a transfer check, which had been denied him by the conductor of a car from which he had transferred, stepped with one foot down on the step of the car, and, holding to the iron support at the side of the car, attempted to get off backward. The driver caught him and placed him back on the platform, saying, "Don't you get off, you will fall;" but almost immediately thereafter he repeated the act, and, although the driver again attempted to push him back, he was either thrown off or jumped off backward, receiving the injury complained of. It was held that there was no evidence from which the negligence of the company could be fairly inferred. Sandford *v.* Hestonville, etc., R. Co., 136 Pa. 84, 20 Atl. 799.

57. Peterson *v.* Elgin, etc., Tract. Co., 142 Ill. App. 34, judgment affirmed in 87 N. E. 345.

58. Notice or warning of unknown danger.—Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898.

A drover riding on a cattle train was directed to get on top of the train until they came to a point further along on the road when a caboose would be attached. While standing upon the top of the car, and near the end of it, the trainmen attempted to couple the car to the caboose, thereby producing a quick and powerful concussion, which threw the plaintiff between the car on which he was standing and the one beyond it, upon the coupling, inflicting an injury upon him. It was held that the plaintiff was entitled to warning of the stock that would occur by the coupling. Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898.

Where a conductor on a car on which a passenger was killed by being struck by a car on the adjacent track, going in the opposite direction, saw the passenger on the back platform in distress protruding his head outside of the car and knew that the passenger was oblivious of the danger and also knew of the dangerous juxtaposition of the cars passing on the other track, he was negligent in not warning the passenger of the approaching and impending danger, from being struck by a car on the other track, in time to have averted the danger. Gage *v.* St. Louis Transit Co., 109 S. W. 13, 211 Mo. 139.

Where a conductor of a trolley car knows of a passenger's dangerous position on a step within the vestibule of a crowded car, and fails to warn him of the danger, or where he negligently fails to learn of the dangerous position of the

way, which is likely to be open at certain times, passengers, who have no knowledge of the possible danger, should receive proper caution.[59] A passenger who is exposed, while assisting to care for another passenger who has become ill, to a danger of which he is not aware, but of which the carrier's servants, if exercising due care, would have knowledge, is entitled either to be protected against, or to have timely warning of, the danger.[60] In an action to recover for injuries received by plaintiff in consequence of the defective condition of a car which had been continued in the service, after its condition had been discovered, for the purpose of taking it to the company's power house for repairs, it was, in effect, said that defendant was not justified in continuing the car in the service and allowing passengers to ride thereon, without giving the passengers full notice of the condition of the car, and allowing them an opportunity to decide, after full knowledge, whether they would continue as passengers.[61] It has been held that, although a passenger on a street car was guilty of contributory negligence in protruding his arm from the window of the car, in consequence of which it was struck by the girder of a bridge over which the car was passing, defendant was nevertheless liable if conductor, who saw the passenger's danger, neglected to give him warning.[62] When a street car runs so close to a fixed structure that a person standing on the foot board will come in collision therewith, unless he stands very close to the car, it is negligence to allow a passenger, who has no knowledge of the structure, to ride on the foot board, without warning him of the danger.[63] When an overhead structure, as, for example, a snowshed, is not of sufficient height to allow persons who are on top of freight trains to pass under in safety, a passenger on a freight train who is rightfully on top of the train is entitled to be duly warned, either by word or some other appropriate method, of the approach of the train to the overhead structure.[64] And it may be negligence to fail to warn a passenger upon a freight train, which has been delayed, of the possibility that the train will be run into by another train which is approaching on the same track.[65] If a train or street car is run in an unusual manner, and a danger arises therefrom which does not ordinarily exist, it is the

passenger, he is guilty of negligence, making the carrier liable for injuries to the passenger caused by his being forced outward so as to collide with a trolley pole. Tolleman *v.* Sheboygan, etc., R. Co., 148 Wis. 197, 134 N. W. 406.

Driver of coach—Duty as to warning passenger.—Where the driver of a coach approaches a place of particular danger to passengers, he is bound to warn them of the nature of the danger. Dinnigan *v.* Peterson, 4 Cal. App. 764, 87 Pac. 218.

59. Behrens *v.* The Furnessia, 35 Fed. 798.

60. Lake Shore, etc., R. Co. *v.* Salzman, 52 O. St. 558, 40 N. E. 891, 31 L. R. A. 261.

61. Washington *v.* Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

62. South Covington, etc., St. R. Co. *v.* McCleave, 18 Ky. L. Rep. 1036, 38 S. W. 1055.

63. West Chicago St. R. Co. *v.* Marks, 182 Ill. 15, 55 N. E. 67, affirming 82 Ill. App. 185.

As a representative of the street car company, the motorman owes to every passenger extraordinary care, and the highest reasonable degree of care consistent with the operation of the road is due from the company to any passenger who might be on the running board, and such passenger should be given warning by the motorman, or conductor, of possible danger from an obstruction which might injure him. Hinckley *v.* Danbury, 70 Atl. 590, 81 Conn. 241.

A passenger on a crowded open trolley car stood on the running board, instead of occupying an uncomfortable position between the seats. The conductor, on approaching a trestle, warned him of the danger thereof, and he stepped inside. After the car passed the trestle, he stepped onto the running board again, with the knowledge of the conductor, and he was injured by being struck by a girder of a bridge, of which the conductor gave no warning. Held, that the conductor was negligent in failing to repeat the warning to the passenger. Edwards *v.* New Jersey, etc., Ferry Co., 129 N. Y. S. 717, 144 App. Div. 554.

64. Nelson *v.* Southern Pac. Co., 18 Utah 244, 55 Pac. 364, 14 Am. & Eng. R. Cas., N. S., 374.

65. Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409; Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

company's duty to warn passengers of the danger.[66] Thus, it may be the duty of a railroad company, through its servants in charge of a train, to warn passengers that the train will start with a jerk radically different from that usually experienced when a train is put in motion.[67] When a train is stopped under such circumstances as to lead passengers, who are exercising due care, to believe that they are to alight, the passengers should, generally speaking, be warned against, or otherwise prevented from, alighting.[68] So, too, when the act of alighting from a train or street car is attended with perils which the passengers can not reasonably be expected to discover for themselves, they should be properly warned.[69] Undoubtedly, street railway companies may in many cases, as in the case of an adult, or in the case of a person reasonably competent to care for himself, carry passengers on the platforms of their cars without being chargeable with negligence as a matter of law.[70] But in the case of a passenger who is obviously and manifestly incompetent, either from extreme youth or other cause, to exercise any proper judgment or discretion for his own safety, a somewhat larger measure of duty may be said to devolve upon the conductor of a street car than under ordinary circumstances. He is not, of course, held to the exercise of critical skill or judgment; for the performance of his ordinary duties in a crowded car may give him little opportunity to observe closely the capacity or intelligence of a particular person in his charge. He is, in this repect, held only to the exercise of that degree of discrimination which a reasonably prudent and observing man would be expected to exercise under the circumstances. His duties require him to give his attention not only to those who may wish to board the car, but to those who wish to leave it, as well as to such as remain. It is his duty to collect the fares, regulate the movements of the car, and generally to conduct the affairs of the company in his charge. He may, therefore, when the car is crowded, and passengers are passing in and out, have little chance to test with accuracy the intelligence or capacity of the individual passengers. But he is bound to give his undivided attention to his business, and if any person boards his car who is obviously incompetent to choose a place of safety, or whom he knows, or as an observing and prudent man ought to know, to be thus incompetent, it is his duty to exercise the highest care and vigilance consistent with the performance of his ordinary duties for his safety.[71] But it has been held

66. Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

67. Farnon *v.* Boston, etc., R. Co., 180 Mass. 212, 62 N. E. 254, 1 R. R. R. 95, 24 Am. & Eng. R. Cas., N. S., 95.

In an action to recover for the death of a passenger, a shipper of cattle, who was killed by being thrown off the footboard of a switch engine, where he was riding by the direction of defendant's servants, in consequence of the sudden accleration of the speed of the engine in making a running switch, it was said that, the proof showing that the making of a running switch is usually attended with danger, and would be especially dangerous to a person in the position of the deceased, it became the duty of defendant's servants to advise the deceased of the facts before attempting the running switch, so that he might have taken extra precaution, or have gotten off the engine before the switch was attempted. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, 31 Am. & Eng. R. Cas. 61.

68. See ante, "Misleading Invitation to Alight," §§ 2481-2487.

69. See ante, "Duty to Warn Passengers of Danger," § 4288.

70. Sandford *v.* Hestonville, etc., R. Co., 136 Pa. 84, 20 Atl. 799.

Where a boy under 14 years of age got upon the lower step of the platform of a crowded street car, and rode for a long distance as a passenger, and was finally thrown off by the jolting of the car, it was held not to be negligence per se when the passenger occupied this place upon the car, without objection of the driver or conductor, but that the questions of negligence and contributory negligence, under all the circumstances, taking into consideration the age and capacity of the lad, were for the jury. West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa. 524, 27 Am. & Eng. R. Cas. 201.

71. Sandford *v.* Hestonville, etc., R. Co., 136 Pa. 84, 20 Atl. 799.

It has been held that to allow a boy five year of age to ride on the front platform of a horse car is evidence of negligence sufficient to go to a jury. Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

Where a child was compelled by the conductor of a horse car to stand upon

that to call a boy to the platform of a street car when the car is about to reach his destination and the car is being stopped for the purpose of letting him off, the stop signal being made and the boy being called at the right time, is not negligence.[72] Whether the circumstances require that the passengers be warned of a danger is usually a question for the jury. Thus, it has been held to be error to charge a jury that if a street car, instead of being run in the usual manner, was run on the wrong track, with the running board next to the poles erected between defendant's two tracks, and the passengers were not warned, defendant was guilty of negligence.[73]

Change in Methods.—No presumption of negligence arises when the managers of a street railway company make a change in the method of carrying the fenders on its cars without giving notice to its passengers of the change in the method. Street cars are usually provided with fenders at each end, and whether they shall be run with both fenders down, on one up and the other down, is a matter that must be left to the reasonable discretion of the company.[74]

§ 2513. Removal of Passenger from Place of Danger by Force.—Ordinarily, the duty of the carrier to prevent passengers from unnecessarily exposing themselves to danger, is discharged by warning them of the danger, or by directing passengers who are occupying positions of peril to remove to places of greater safety, and the carrier is under no obligation to exercise force to prevent passengers from voluntarily exposing themselves to unnecessary perils. The duty of the carrier does not "extend to the imprisonment of the passenger so as to prevent the latter by his recklessness or folly from voluntarily exposing himself to needless peril."[75] No doubt a carrier usually has the power to remove a passenger from a perilous position by force, but ordinarily he is not bound to do so in the case of an adult passenger, or in the case of a passenger who is reasonably able to care for himself; a simple request is sufficient.[76] Thus, a passenger who remains on the rear platform of a car, after he has been requested or ordered by one of the carrier's employees to leave the platform and enter the car, assumes the risk of being thrown to the ground by the starting of the train.[77] The passage of the train, upon which plaintiff was a passenger, was obstructed by burning tanks of oil, which had been wrecked on the track ahead.

the crowded platform, and while there, was thrown from the car by the hasty and careless exit of another passenger, it was held that the company was liable. Sheridan *v.* Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 34 How. Prac. 217.

72. Cronan *v.* Crescent City R. Co., 49 La. Ann. 65, 21 So. 163, 6 Am. & Eng. R. Cas., N. S., 225.

73. Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

A boy thirteen years old was permitted to ride on the platform of a street car with no admonition or objection from the conductor. Announcing his purpose loud enough for the conductor to hear the boy stepped off the car while in motion, and was injured. A verdict directed by the lower court was set aside on the ground that the question of negligence should have been submitted to the jury. Crissey *v.* Hestonville, etc., R. Co., 75 Pa. 83.

74. Whilt *v.* Public Service Corp., 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568.

"But it is insisted that because, on this car, the rear fender was down when the custom had been otherwise, such change justifies an inference of negligence, unless the passenger was notified of the change; but this we do not concede, for, as was said by the supreme court in Whilt *v.* Public Service Corp., 74 N. J. L. 141, 64 Atl. 972, this would require an inference of negligence whenever the defendant made an improvement in the construction or management of its cars, and we are of opinion that the care due from a carrier to its passenger does not require notice to him of every change made in the construction of its cars or the manner of carrying a proper attachment to it, if the additional use of space in the highway, required as a consequence of such change, is limited in its scope to the right granted the company." Whilt *v.* Public Service Corp., 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568.

75. Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

76. Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 565, 34 S. W. 485, 3 Am. & Eng. R. Cas., N. S., 323.

77. Louisville, etc., R. Co. *v.* Bisch, 120 Ind. 549, 22 N. E. 662, 41 Am. & Eng. R. Cas. 89.

The passengers were conducted around the wreck to a point 256 feet away from it to wait for a train. While they were waiting, plaintiff, out of curiosity, voluntarily approached to within 80 feet of the burning tank and stood there for twenty minutes watching them, and was injured by an explosion. It was held that defendant was not bound, under the circumstances of the case, to restrain plaintiff by physical force in order to keep him out of manifest danger, which was as obvious to him as to defendant.[78] The mere fact that a passenger has been drinking does not make it the duty of the trainmen to remove him from the platform of a railroad coach by force, if he is apparently in a condition to be able to take care of himself.[79] But if a passenger, by reason of his youth, is not able to understand the risk, or able to judge for himself, or if it is known to the carrier that he is insane or otherwise unable to exercise discretion, the duty of the carrier to prevent passengers from unduly exposing themselves would not be fully performed without an enforcement of proper regulations to compel the passenger to occupy a position less exposed.[80] Thus, when a child is occupying an exposed position on the platform of a street car, unless he is of an age and discretion to justify his being allowed to act and judge for himself, the conductor does not perform his whole duty by merely directing him to go inside of the car; it is his duty to compel obedience.[81]

§ 2514. Preventing Passenger Leaving Moving Train.—While the law exacts of carriers of passengers a high degree of care for the safety of passengers, according to the circumstances, and this duty ordinarily continues until the passenger is discharged; yet it is not required that the carrier shall keep a lookout to prevent passengers from jumping off running trains, nor that it shall, at its peril, "see and ascertain" that a passenger is about to leave a moving car without having given any notice, express or implied, of an intention to do so.[82] It is not the duty of the carrier's agent on a street car about to stop

78. Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 8 Am. & Eng. R. Cas., N. S., 714.

79. Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 4 Am. & Eng. R. Cas., N. S., 86, 33 L. R. A. 69.

80. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

81. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

A little girl of five years of age, in company with another of eleven, was permitted to ride on the front platform of a street car. When she came near to her home she attempted to get off, and was injured. Mr. Justice Williams, in delivering the opinion of the court, said: "It was gross negligence to allow children of that age to get on the platform, and to ride there. If they got on without his (the conductor's) permission, instead of consenting that they might ride on the platform, it was the duty of the company to compel them to go inside, or to stop and put them off." Pittsburgh, etc., R. Co. *v.* Caldwell, 74 Pa. 421.

A boy eight years and four months old got upon the rear platform of a street car, intending to ride thereon to his home, several blocks distant. While sitting upon this platform with his feet upon the car step, where there was no gate, the car started, and while it was running fast the boy became dizzy, fell off, and was injured. The motorman (who was also conductor) knew that the boy was on the car. It was held that, since it was within the province of the acting conductor to compel this boy to go inside the car, or stop it, and put him off, if he did not do so, the jury had a right to say that the conductor was guilty of negligence which was imputable to the company. Jackson *v.* St. Paul, etc., R. Co., 74 Minn. 48, 76 N. W. 956.

82. Duty to prevent passenger leaving moving train.—Ashtabula Rapid Trans. Co. *v.* Holmes, 67 O. St. 153, 65 N. E. 877.

That a flagman fails to notify a passenger standing on the step that the train is moving, and that it is dangerous to attempt to alight while the train is in motion, will not charge the company with negligence; the fact that the passenger is on the step not warning the flagman that he will alight while the train is in motion. Morris *v.* Illinois Cent. R. Co., 127 La. 445, 53 So. 698, 31 L. R. A., N. S., 629.

Employees of a railroad should use ordinary care to prevent injuries to passengers, and their failure to control passengers who will jump from a moving train is not a failure of the duty of the trainmen. Morris *v.* Illinois Cent. R. Co., 127 La. 445, 53 So. 698, 31 L. R. A., N. S., 629.

The flagman, standing on the platform, had a right to assume that the passenger would not attempt to alight before the

at a regular stopping place to warn a passenger who has left his seat for the purpose of alighting, not to do so until the car has stopped, unless there is something in the appearance or conduct of the passenger reasonably calculated to give the conductor notice of the helplessness of the passenger and his apparent intention of alighting before the car shall have stopped.[83] But where the carrier is put upon notice that the passenger is or may be going to undertake to alight from a moving car, he should exercise that high degree of care generally required of carriers to prevent it.[84] Thus where, on a dark night, the conductor of an electric car twice announced a station, and then opened the door and went onto the platform, and a passenger, ignorant, though exercising ordinary care, of the fact that the car was still moving, the current having been turned off at the top of a grade and the movement of the car being so smooth that a person would not notice it, followed him onto the platform, passed by him down the steps, and was injured in attempting to alight, the carrier is liable; the conductor having failed to warn her, though he knew her danger, or by the exercise of ordinary care should have known of it, and he being bound to know, under the circumstances, that she followed him for the purpose of alighting.[85]

An ordinance regulating street railways by providing that conductors shall not allow ladies or children to leave or enter cars while in motion modifies the common-law rule of negligence of carriers and contributory negligence of passengers, and a street car conductor who permitted a female passenger to attempt to alight while the car was in motion was negligent for which the street railroad was liable, unless the passenger was guilty of contributory negligence in leaving the car under the circumstances.[86]

§ 2515. Allowing Passenger to Alight Temporarily at Intermediate Station.—It has been stated, without qualification, that "where a passenger enters a railway train, and pays the regular fare to be transported from one station to another, his contract does not obligate the corporation to furnish him with safe egress or ingress at any intermediate station."[87] But while it may be, and very likely is, true that the plaintiff in the case in which this statement was made was not entitled to leave the train at the intermediate station where he was injured, the principle enunciated by the words quoted is altogether too broad. Without being supported by reason, it is inconsistent with the recognized and reasonable practice of passengers, and contrary to the clear weight of authority. According to the better view, the right of passengers temporarily to leave the carrier's train, coach, or boat, at an intermediate station or stopping place, and the duty of the carrier to passengers doing so, must depend upon whether the

train had stopped, and was not negligent in failing to warn him not to get off, as he descended the steps. Illinois Cent R. Co. *v.* Massey, 97 Miss. 794, 53 So. 385.

The conductor of a street car was not negligent in failing to warn plaintiff against attempting to alight before the car stopped, where the conductor did not know and had no reason to believe that she intended to do so. Armstrong *v.* Portland R. Co., 97 Pac. 715, 52 Ore. 437.

83. Warning not to leave moving car.—Hutchinson *v.* Capital Traction Co., 36 App. D. C. 251.

84. Where a girl under fourteen years of age unaccustomed to riding on street cars becomes frightened by the negligence of defendant's servants in carrying her past her known destination, and the conductor knows or should have known of such passenger's condition, and that she is about to leave a moving car, he should exercise the highest degree of care possible to prevent such passenger from alighting. And if he fails to exercise the due care required of him, and the passenger receives injuries while alighting from the moving car, defendant railway company is liable therefor. Kruger *v.* Omaha, etc., St. R. Co., 114 N. W. 571, 80 Neb. 490, 17 L. R. A., N. S., 101.

85. Blue Grass Tract. Co. *v.* Skillman, 102 S. W. 809, 31 Ky. L. Rep. 480.

86. Effect of ordinance.—Johnson *v.* St. Joseph R., etc., Co., 128 S. W. 243, 143 Mo. App. 376.

87. De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 43 N. W. 182, 39 Am. & Eng. R. Cas. 463, 16 Am. St. Rep. 687, 4 L. R. A. 632.

temporary absence from the carrier's conveyance for any particular purpose is, under the circumstances of each case, reasonably incident to the usual and proper performance of the contract of transportation.[88] No doubt the circumstances under which some stops are made do not justify passengers in alighting from the train. For example, when a train is stopped at a place not provided for, and for a purpose other than, the letting off and taking on of passengers, as at a water tank to take on water or upon a side track to allow another train to pass, and the stop is made under such circumstances that the duty and safety of passengers both concur in suggesting that they remain in the cars, a passenger who temporarily alights from the train, is not entitled to protection as a passenger until he has resumed his place on the train.[89] Where a train was stopped on a dark night near one of the regular stations for the purpose of allowing another train to pass, and no notice was given the passengers to leave the cars, plaintiff, who, being told by some one, whom he mistook for the conductor, that he must go and look to his baggage, got off the train and was injured by falling into a cattle guard, was very properly denied recovery against the carrier.[90] But where a passenger on a railroad train, without objection on the part of the carrier or its agents, alights at an intermediate station or stopping place, which is a place for the reception and discharge of passengers, for any reasonable and usual purpose, as to obtain refreshments, to send or receive telegrams, to exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and the carrier owes him the duty of continuing to exercise care for his safety,[91] both in its maintenance of safe platforms, approaches, etc.,[92] and in allowing reasonable time to board with safety when the train is ready to move on.[93] And this rule applies where a passenger alights at an intermediate station to speak to a third person.[94] In a case which goes to, perhaps, an extreme

88. See Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83.

89. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258; De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 43 N. W. 182, 39 Am. & Eng. R. Cas. 463, 16 Am. St. Rep. 687, 4 L. R. A. 632.

A passenger, at midnight got off the train at a water tank, and, in attempting to get on, was run over. Held, that the court should have charged that if it was not a regular passenger station, and defendant's servants in charge of the train knew that no passenger was to get on or off there that night, and did not know that plaintiff got off, it was for the jury to determine whether defendant was guilty of negligence which was the proximate cause of plaintiff's injury, and also should have defined "proximate cause." Galveston, etc., R. Co. *v.* Cooper, 70 Tex. 67, 8 S. W. 68.

90. Frost *v.* Grand Trunk R. Co. (Mass.), 10 Allen 387, 87 Am. Dec. 668.

91. *United States.*—Alabama, etc., R. Co. *v.* Coggins, 88 Fed. 455, 32 C. C. A. 1; Andrist *v.* Union Pac. R. Co., 30 Fed. 345; Hrebrik *v.* Carr, 29 Fed. 298.

Colorado.—Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729.

Louisiana.—Peniston *v.* Chicago, etc., R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

New York.—Parsons *v.* New York, etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450.

Texas.—St. Louis, etc., R. Co. *v.* Humphreys, 25 Tex. Civ. App. 401, 62 S. W. 791; Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942; Missouri, etc., R. Co. *v.* Overfield, 19 Tex. Civ. App. 440, 47 S. W. 684; Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990. See, also, S. C., 70 Tex. 67, 8 S. W. 68; Missouri, etc., R. Co. *v.* Price, 48 Tex. Civ. App. 210, 106 S. W. 700.

92. During a stop of ten or fifteen minutes of defendant's train at a station, plaintiff alighted with other passengers, and stood on the platform talking until the conductor's call to get aboard, when he caught hold of the railing of the nearest coach to get on; but, the steps being crowded, and being unable to get on, he held onto the railing, and ran along the platform, until he could have opportunity to jump on. In so doing plaintiff stumbled over an oil bucket that had been left on the platform by defendant, and was injured. Held, that defendant was guilty of negligence leaving the oil bucket so near the train as to interfere with passengers in their efforts to board the train, warranting plaintiff's recovery. Texas, etc., R. Co. *v.* Mayfield, 56 S. W. 942, 23 Tex. Civ. App. 415.

93. This question is taken up separately at another point in this section.

94. When a train stops at a station, a passenger may alight for the purpose of

length in establishing this right, it appeared that the train, upon which plaintiff was a passenger, was stopped at an intermediate point along the road from half an hour to an hour in the nighttime, to await the arrival of another train of the company, to convey its passengers to its destination. The train stopped over an open ditch six or eight feet deep, at the bottom of which there were rocks and timbers, which ditch was known to the conductor but unknown to the passengers. There were no stationary lights by which it could be seen by plaintiff. While the train was standing there the plaintiff stepped out of the car, and was precipitated into the ditch and had his leg broken and was crippled for life. It was held that the plaintiff had the right under the circumstances to step out of the car, and that the company was liable for damages for the injuries resulting to him, on the ground of negligence.[95] The passengers of carriers by waters are entitled to the same privileges as those of railroad carriers in this respect. Thus it has been held that where a passenger on a steamboat, who has occasion to go ashore on business before reaching his destination, is injured while attempting to pass from the boat to the wharf, in consequence of the carrier's negligent omission to provide lights, the carrier is liable.[96] And where plaintiff, who was a passenger upon defendant's steamboat whereon meals were served to passengers whose tickets entitled them to meals, or who chose to pay for them, but whose ticket did not entitle him to meals, attempted to land for the purpose of obtaining breakfast, as was the custom of many passengers, at a wharf where the boat stopped a considerable time, it was held that he had a passenger's right to protection during his egress from the boat.[97] And it has been held that a passenger who has taken his place on board a vessel, has a right to return to the shore even for the purpose of obtaining tobacco, and the carrier owes him the duty of exercising care to provide a safe means of passage from the vessel to the pier.[98]

Notice, Warning and Time to Reboard.—A passenger who alights at an intermediate station for a proper purpose, and who remains within a reasonable distance of the train, is entitled to have reasonable notice or warning of the starting of the train and reasonable time, to enable him to regain his place in the train with safety,[99] and he is not guilty of negligence in leaving the train and waiting for the signal to get on the train before attempting to do so.[1]

speaking to some one on the platform; hence a railroad is liable for negligently injuring passenger in returning to train. Galveston, etc., R. Co. *v.* Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990, affirmed in 85 Tex. 431.

95. Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582.

96. Dice *v.* Willamette Transp., etc., Co., 8 Ore. 60, 34 Am. Rep. 575.

97. Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541, 2 L. R. A. 83.

98. Hrebrik *v.* Carr, 29 Fed. 298.

99. Andrist *v.* Union Pac. R. Co., 30 Fed. 345; Mitchell *v.* Western, etc., R. Co., 30 Ga. 22. See State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258.

A carrier which, with knowledge that a passenger temporarily on the station platform for rest and exercise during a stop intends to continue his journey, starts the train without reasonable warning and opportunity for the passenger to safely re-enter the car, is negligent, and liable for the natural consequences of such negligence, unless the passenger has contributed to his injuries. Gannon *v.* Chicago, etc., R. Co., 117 N. W. 966, 141 Iowa 37, 23 L. R. A., N. S., 1061.

Where a train stops between stations on account of a wreck, and the passengers leave the train without objection from the conductor, it is negligence to start the train without first giving the passengers timely warning to return. Gulf, etc., R. Co. *v.* Roundtree (Tex. Civ. App.), 25 S. W. 989.

One of the grounds of negligence alleged in the petition being that, after the conductor's signal for the train to start, sufficient time was not given for the passengers to get aboard before the train was started, and there being evidence to support such allegation, it was not error to charge that if the jury found that, before plaintiff had time to reboard the train, defendant negligently started the train, and thereby injured plaintiff, it would be guilty of negligence. Texas, etc., R. Co. *v.* Mayfield, 56 S. W. 942, 23 Tex. Civ. App. 415.

1. Waiting for signal.—Texas, etc., R. Co. *v.* Mayfield, 23 Tex. Civ. App. 415, 56 S. W. 942.

Sudden Jerks.—Where a through passenger leaves the train at an intermediate station, and the employees of the train carelessly give it a sudden jerk just as she is attempting to re-enter it on the side opposite the platform, whereby she is injured, such carelessness is negligence, as to her, rendering the carrier liable.[2]

Duty to Hold Train for Passenger Alighting.—It is the duty of a railway company to hold a train at a station a reasonably sufficient length of time to allow a passenger who has been instructed or permitted to leave the train at an intermediate station by its conductor in charge to return and re-enter the train in safety before it is started,[3] and it is for the jury to say whether the train was held a reasonably sufficient length of time.[4] Although a conductor is asked by a passenger how long a train will stop at a certain station, the conductor is not presumed to know that the passenger wishes to alight and spend the time of the stop away from the station, and if the passenger, without informing the conductor that he wishes to stop at the station and without the conductor's knowledge, alights from the train, the carrier is under no obligation to hold the train for the length of time mentioned by the conductor.[5] But, if the conductor has knowledge of the fact that the passenger has left the train, it is negligence to start it before the expiration of the stated time, without due notice to the passenger, who is so far away that he can not get aboard.[6] When a train is stopped at a station for supper, and the length of the stop is announced, the fact that the train is not held the length of time specified, will not, it seems, authorize a recovery of damages by one of the passengers for being left at the station, if the passengers are given due notice to get aboard before the train is started.[7]

Duty to Afford Opportunity to Leave Train.—Ordinarily, where a passenger obtains a ticket entitling him to transportation over a railway between two designated points, no duty exists on the part of the carrier to afford him opportunities to leave the train before reaching his destination.[8]

2. Sudden jerks.—St. Louis, etc., R. Co. *v.* Humphreys, 62 S. W. 791, 25 Tex. Civ. App. 401.

3. Duty to hold train for persons alighting.—Johnson *v.* Texas Cent. R. Co., 42 Tex. Civ. App. 604, 93 S. W. 433; San Antonio, etc., R. Co. *v.* Trigo, 108 S. W. 1193, 49 Tex. Civ. App. 523.

Plaintiff, having boarded defendant's train without a ticket, was directed by the conductor to pay his fare to the next station, and there get off and purchase a ticket for the rest of his journey; the conductor stating that he would have time enough to do this and get back on the train. Plaintiff accordingly got off at the next station to purchase a ticket, but just as it was handed to him the train started, and he was unable to get aboard. Held, that defendant was negligent in not holding the train for a reasonably sufficient time to enable plaintiff to alight, purchase his ticket, and return, without incurring the risk of boarding the train while in motion. St. Louis, etc., R. Co. *v.* Germany (Tex. Civ. App.), 56 S. W. 586.

Persons alighting with conductor's consent.—A passenger having made known to the conductor his desire to alight to get a lunch during the time the train stopped, and the conductor having informed him that he would have time to do so, and consented to his alighting for that purpose and the passenger having alighted, it was the duty of the conductor to hold the train in accordance with his answer; the passenger not having boarded the train sooner. Missouri, etc., R. Co. *v.* Price, 106 S. W. 700, 48 Tex. Civ. App. 210.

4. Johnson *v.* Texas Cent. R. Co., 42 Tex. Civ. App. 604, 93 S. W. 433.

5. Statement of conductor as to length of stop as binding carrier.—The statement of a train conductor, in answer to a passenger's question, that the train would stop a certain length of time at an intermediate station, creates no obligation to stop that length of time, and such question and answer have no bearing on the question of damages for an injury to the passenger who left the train at the station, and attempted to board it after it had started. Missouri Pac. R. Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785.

6. Foreman *v.* Missouri Pac. R. Co., 4 Tex. Civ. App. 54, 23 S. W. 422. See S. C., 46 S. W. 834; Missouri, etc., R. Co. *v.* Price, 106 S. W. 700, 48 Tex. Civ. App. 210.

7. Texas Trunk R. Co. *v.* Mullins (Tex. App. Civ.), 18 S. W. 790.

8. Duty to afford opportunity.—Central, etc., R. Co. *v.* Madden, 135 Ga. 205, 69 S. E. 165, 31 L. R. A., N. S., 813, 21 Am. & Eng. Ann. Cas. 1077.

§ 2516. Duties to Drover Alighting at Intermediate Stations to Care for Stock.—While a carrier of live stock can not, by stipulating that the stock shall be cared for by the shipper, relieve itself of that duty, it may, nevertheless, grant the privilege or license to the shipper to look after his stock, and when the shipper with the consent or by the direction of a trainman in authority, goes to the stock car for the purpose of looking after his stock, he is entitled to the exercise by the carrier of proper care and caution for his safety,[9] and although such passenger be himself negligent, by riding in the stock car, the carrier will be liable to him for injury, if the servants were negligent in not giving him timely warning of his danger.[10] Where a passenger can by terms of the contract under which he is riding on a freight car alight at every station where the train is stopped, the conductor is negligent in not warning him of danger in alighting at a certain place when he sees plaintiff's intention so to do.[11] And the statement of a conductor, in answer to an inquiry by a stockman who wishes to get off at an intermediate station to look after his stock, that the train is at the station, when, in fact, it is standing upon a trestle, has been held to justify a finding of negligence.[12] But the question as to the servant's negligence in such cases is for the jury.[13]

§ 2517. Announcement of Station and Change of Cars.—As has been shown in an earlier chapter, while there are dicta, there is a very little common-law authority to the effect that it is the duty of railroad passenger carriers to announce the names of stations.[14] A primary duty rests on a carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carrier to formulate and enforce such reasonable regulations as the conduct of the business requires.[15] Within proper limits, they may make schedules, create routes,

9. Receivers *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

In general.— In an action against a railroad for personal injuries, there was no error in charging that if plaintiff, who was accompanying his shipment of cattle, was off train at station prodding up cattle which were down in the cars, and if other facts were so, it was defendant's duty to warn plaintiff before starting the train and to give him reasonable time to get on. Atchison, etc., R. Co. *v.* Worley (Tex. Civ. App.), 25 S. W. 478.

10. Where a passenger is injured, while riding in a stock car, in a railroad collision between the train in which he was riding and another section which ran into plaintiff's train, which was stopped on account of the air brakes getting out of order, if the conductor, in the exercise of reasonable care, should have known of plaintiff's danger, and with the exercise of reasonable care should have warned him in time for him to avoid injury, his failure to warn plaintiff renders the company liable, though plaintiff was negligent in riding in the car. Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

11. International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

12. International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190.

13. Duty to warn question for jury.— Whether it was negligence for trainmen in charge of a cattle train and caboose containing passengers accompanying the cattle, knowing that the caboose had stopped on a bridge, where it would be dangerous for any one to leave it, and knowing that it was the duty of passengers to get off the car at stops to attend to the cattle, or knowing that they might get off to attend to a call of nature, for the relief of which the caboose was not provided, to fail to warn a passenger, whom they saw leave the car, of the danger which he would encounter, was a question for the jury. Cruseturner *v.* International, etc., R. Co., 86 S. W. 778, 38 Tex. Civ. App. 466.

14. See ante, "Announcement of Stations and Stopping Places," § 2475.

15. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

and prescribe transfer points at which passengers, travelling beyond, must change cars. Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the travelling public, by reasonable means, of regulations so necessary to any journey by rail; for such a pronouncement would, essentially, cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when, and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies.[16] Where it is necessary for a passenger to change cars or trains in the prosecution of the journey, reasonable notice thereof by the servants of the carrier is sufficient, and the passenger not governing himself by such notice can not recover damages if he loses his connection.[17] If a carrier gives such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be traveled, and the cars to be taken at an intermediate point of the voyage, it discharges its whole duty in this respect. If a passenger, merely by a failure to use such care and caution, instead of changing cars at a particular station, and taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty, or of contract, on the part of the company. The fact of the publicity of such regulations, the time, manner, and circumstances of publishing them, and whether sufficient to bring home actual notice to the passenger, provided he bestows reasonable care and attention, in order to inform himself, is one to be determined by the jury.[18] And it has also been

16. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

"The decision of Alabama, etc., R. Co. *v.* Carmichael, 90 Ala. 19, 8 So. 87, 9 L. R. A. 388, announces, though only in argument of a related question, the duty on the passenger, or proposed passenger, raised by the performance of the primary duty we have said rested on the carrier, to exercise reasonable prudence and diligence to ascertain such regulations in the premises as the carrier has promulgated. If the passenger fails to exercise such care and negligence, his negligence, and not that of the carrier, is the proximate cause of a resultant injury. The Page Case, supra, so holds, and we think the reasons stated before are conclusive of the correctness of the views entertained." Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

17. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

The above text is based upon the decisions of the New York courts in Page *v.* New York Cent. R. Co., 13 N. Y. Super. Ct. 532, and later, after revivor in the name of Barker, was taken to and affirmed by the court of appeals, and reported in 24 N. Y. 599. See Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

"The duty of railways where there is a change of cars has often been commented upon by the courts. It seems to result, from the very nature of the case, that the very least which could be regarded as the reasonable performance of the duty of the company towards its passengers would be that the passenger should have timely notice of the change and reasonably sufficient time to make it." Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981, 984.

When a carrier's servants know that a passenger is in the wrong car, and that he must go into another car to reach his destination, they may simply tell him what to do, and ordinarily leave him to follow their directions. Cincinnati, etc., R. Co. *v.* Raine (Ky. App.), 113 S. W. 495.

18. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981; Barker *v.* New York Cent. R. Co., 24 N. Y. 599. See Church *v.* Chicago, etc., R. Co., 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616, 2 Am. & Eng. R. Cas., N. S., 1.

And it seems that if the railroad company gives reasonable notice, by published schedules and verbal announcement in the train, of the necessity of changing cars at a certain point, a passenger who, by his own fault, neglects to do so, can not recover. Page *v.* New York Cent. R. Co., 13 N. Y. Super. Ct. 523.

And it has been held that where a pas-

held that a railroad is negligent where the conductor in charge of the train fails to inform a passenger that there are coaches attached to the train in which he may continue his journey, and he is injured in alighting to change cars.[19] But if the ticket agent at the time of selling a ticket to a passenger erroneously informs him that the train for which the ticket is sold is a through train, and will take him to his destination without change of cars, the passenger has a right to rely upon such information unless a different announcement is made under such circumstances that it can be reasonably said that it was heard by the passenger.[20] And it is held that a general announcement to all the passengers is not sufficient, unless the jury are satisfied that it was heard by the plaintiff.[21] But it has been held that if a passenger learns en route that it is necessary to change cars, it is the duty of the passenger to inform himself as to where the change is to be made,[22] and where, by reason of her failure to find out where such change should be made, she is carried over the wrong line, the railway company is not liable unless she was misled by its agents or servants.[23]

§ 2518. Transfer of Passengers.—When the passenger's journey is not accomplished upon the same conveyance, but the passenger is required to change from one to another of the carrier's conveyances, the carrier is as much bound to exercise care for his safety while the change is being made as when he is actually being carried.[24] Thus, where the progress of a train is stopped in con-

senger in a caboose attached to a freight train which was making a regular scheduled trip, was, before he or the train reached their destination, taken off in the caboose on a branch line, on an irregular side trip, without notice, and exposed to cold, causing rheumatism, the jury was warranted in finding the carrier guilty of negligence. Rosted *v.* Great Northern R. Co., 76 Minn. 123, 78 N. W. 971.

19. Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 60 S. W. 653, affirmed in 72 S. W. 165, 96 Tex. 301.

20. Dye *v.* Virginia Mid. R. Co., 9 Mackey (20 D. C.) 63, 19 Wash. L. Rep. 369.

Plaintiff purchased a ticket to go by railroad to L., and at the depot the ticket master pointed out to him a certain train as the train for L. At S. this train turned onto a branch not leading to L., but an hour later another train passed through S. for L., stopping for passengers at S. Held, that if, on or before reaching S., notice was given that all passengers for L. must change cars there, in such manner that all passengers of ordinary intelligence, and in the exercise of ordinary care and caution, would have heard it, then there was no such original misdirection of plaintiff as would make it the fault of the company if he remained in the branch train after it turned off at S. Barker *v.* New York Cent. R. Co., 24 N. Y. 599.

21. General announcement to all passengers.—Dye *v.* Virginia Mid. R. Co., 9 Mackey (20 D. C.) 63, 19 Wash. L. Rep. 369.

22. St. Louis, etc., R. Co. *v.* McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324.

23. Unless passenger misled by agent of carrier.—St. Louis, etc., R. Co. *v.* McCullough, 45 S. W. 324, 18 Tex. Civ. App. 534.

A passenger who bought a ticket to her destination, but left the proper car at an intermediate station, where she got on the wrong car, and was consequently left at that station, and exposed to inconveniences and hardships, could recover from the railroad, or not, according as to whether her action was or was not directed by railroad employees on the train on which she was riding. Robertson *v.* Louisville, etc., R. Co., 37 So. 831, 142 Ala. 216.

A passenger may rely on a direction of trainmen as to the proper car to be taken, and is not chargeable with contributory negligence for following that direction, although a mistake resulting therefrom migh have been avoided by making other inquires or taking other steps of that nature. Robertson *v.* Louisville, etc., R. Co., 37 So. 831, 142 Ala. 216.

24. *Indiana.*—Citizens' St. R. Co. *v.* Merl, 134 Ind. 609, 33 N. E. 1014.

Maryland.—Baltimore, etc., R. Co. *v.* Hauer, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

New Jersey.—Whilt *v.* Public Service Corp., 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568; Walger *v.* Jersey City, etc., St. R. Co., 71 N. J. L. 356, 59 Atl. 14.

South Carolina.—Oliver *v.* Columbia, etc., R. Co., 55 S. C. 541, 33 S. E. 584.

Washington.—Cameron *v.* Union Trunk Line, 10 Wash. 507, 39 Pac. 128.

Where a passenger on a street car receives a transfer, it is the duty of the street car company to afford him an opportunity to transfer from the car in which he is riding to the car in which the transfer entitles him to ride, and time and opportunity to reach a place of

sequence of some obstruction upon, or break in, the track, and it is necessary to transfer the passengers to a point beyond, for the purpose of taking another train, the passengers are entitled to the same care in making the transfer as at any other time during the transportation.[25]

Liability for Conductor's Promise to Assist Passenger in Changing Cars.—A railway company is not bound by conductor's promise to assist passenger in changing cars, where the train stopped long enough for her to alight and change.[26]

Transfer Accommodations.—See ante, "Transfer Accommodations," § 2385.

§ 2519. Opening and Closing of Car Doors.—Railroad and street railway companies have sometimes been held liable to passengers for injuries sustained by them, while getting on or off trains or cars, by the shutting of car doors upon their hands, in consequence of the violent and unexpected movement of the trains,[27] or the negligent closing of doors by the carrier's servants.[28] On the other hand, a recovery has been denied, in a case of this kind, where the slamming of the car door was not due to the negligent management of the train[29] And in most cases where the accident resulted during the course of the trans-

safety within or on the car before running cars on another track in such manner as to endanger the passengers. Koran *v.* Metropolitan St. R. Co., 118 Pac. 875, 85 Kan. 707.

25. Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593, 3 Am. & Eng. R. Cas. 350; Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 8 Am. & Eng. R. Cas., N. S., 714.

Where, on a street car coming to a trestle where there was a washout, the conductor told the passengers that no car would cross it that night, but that they might walk over the trestle and take a car at the other end, and while they were walking over a car coming from the other direction ran into one of them, though others in advance shouted to the conductor to stop, a finding of negligence of the carrier was authorized. Bugge *v.* Seattle Elect. Co., 103 Pac. 824, 54 Wash. 483.

26. Promise to assist passenger.—St. Louis, etc., R. Co. *v.* McCullough (Tex. Civ. App.), 33 S. W. 285.

27. Poole *v.* Georgia R., etc., Co., 89 Ga. 320, 15 S. E. 321; Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338, digested in section V of note to Phillips *v.* St. Charles St. R. Co., 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902, 106 La. 592, 31 So. 135.

28. Plaintiff was riding on a street car with a companion and had her finger cut off as they were leaving the car at the rear door. The door of the car was opened or shut by the driver from his place in front, and plaintiff testified that she started out first, and in passing out placed her hand on the side of the door, and that the door closed and cut off her finger. The driver and another witness testified for the company that the door did not close while plaintiff and her companion were getting off. It appeared that the accident was immediately proclaimed, and there was no other way of accounting for it. It was held that it was negligence in the driver to close the door before they had time to leave the car, and that there was sufficient evidence to support a verdict for plaintiff. McGlynn *v.* Brooklyn Crosstown R. Co., 6 N. Y. St. Rep. 51, 42 Hun 656.

29. Skinner *v.* Wilmington, etc., R. Co., 128 N. C. 435, 39 S. E. 65, 22 Am. & Eng. R. Cas., N. S., 32, digested in § 5 of note to Phillips *v.* St. Charles St. R. Co., 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902, 106 La. 592, 31 So. 135.

A passenger on one of defendant's trains, who had been unable to find a seat, took a stand in the aisle of one of the cars near the water-closet, braced his left hand on the door of the closet, and caught hold of the arm of the seat on the opposite side with his right hand, to steady himself, and prevent the motion of the cars from throwing him down. While plaintiff was standing in that position, talking to another passenger, defendant's flagman came through the car, approaching the plaintiff from behind, and suddenly opened the door of the closet, and looked in. As the door opened, plaintiff's fingers immediately slipped into the crevice next to the hinges, and the flagman suddenly closed the door, before plaintiff had time to remove his hand, catching his middle and third fingers between the shutter, and crushing them. He did not know the fingers were in till they were crushed, it was so sudden. There was nothing to prevent the flagman seeing the position of plaintiff's hand. It was held that the injury received by the plaintiff resulted from a mere accident, and was not due to any negligence on the part of the railroad company or its servants. Murphy *v.* Atlanta, etc., R. Co., 89 Ga. 832, 15 S. E. 774.

portation, the passenger has been denied recovery.[30] A passenger who placed his hand on the door jamb as the door was opened by one of defendant's employees whom he was following into the car, but who did not know of the passenger's presence, has been denied a recovery for injuries sustained by the closing of the door by the servant.[31] But in similar cases it has been held that the question of the carrier's negligence and the passenger's contributory negligence were for the jury,[32] to be determined from the particular facts in each case, such as the lurching of the cars, etc.[33] It has been said, in effect, that the servants of railroad companies, in opening and closing doors of cars, are bound to exercise that care which an ordinarily careful and prudent person would use under the circumstances.[34] To entitle a passenger to recover for injuries due to the sudden slamming of a car door by a brakeman, it is not necessary that the brakeman had actual knowledge of the dangerous position of the passenger, nor that his act was intentional, but negligent ignorance by the brakeman is sufficient.[35] But ordinarily it is not negligence for a porter on a railway train to close the doors of the company's cars, without first warning the passengers of his intention to do so.[36]

The operator of an elevator can not be said to be negligent in closing his car door on a passenger's hand when, by the passenger's directions and in order to enable him to catch a train, he was trying to move his elevator quickly, and had no reason to expect that while in the act of closing the door the passenger would be pushed and put his hand in the way of the closing door.[37]

§ 2520. Rescue of Passenger Falling from Train.—A railway carrier of passengers, who knows, or ought to know, that a passenger has fallen or been thrown from one of its trains, has no right to leave him in a helpless condition in a position of known danger, without using every reasonable effort to prevent injury to him by passing trains, or otherwise.[38] The carrier is bound to stop the train from which the passenger has fallen, and remove him to a place of safety, if that can be done without danger to its passengers and employees, or notify those in charge of a train from which he is in danger of receiving injury, and

30. See St. Louis, etc., R. Co. *v.* Rexroad, 59 Ark. 180, 26 S. W. 1037, 58 Am. & Eng. R. Cas. 615; Hardwick *v.* Georgia R., etc., Co., 85 Ga. 507, 11 S. E. 832.

A carrier of passengers is not liable for injury to one of them, caused by his being crowded through a car doorway and his hand being caught by the door, if the carrier's employees used due care in closing the door. Rubin *v.* Interborough Rapid Transit Co. (App. Term), 136 N. Y. S. 60.

31. Ham *v.* Georgia R., etc., Co., 97 Ga. 411, 24 S. E. 152.

32. Romine *v.* Evansville, etc., R. Co., 24 Ind. App. 230, 56 N. E. 245.

33. The jury might find that the lurching of a car as it approached a station should have operated as a warning to the carrier's servant, in charge of the door, that passengers coming to it to leave the car might be thrown against it, as regards the question of negligence of such servant in opening the door at such time, catching between it and the jamb the hand of such a passenger. Larson *v.* Boston Elevated R. Co. (Mass.), 98 N. E. 1048.

34. St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

35. Negligent ignorance.—Bennett *v.* Central, etc., R. Co., 6 Ga. App. 185, 64 S. E. 700.

36. Gulf, etc., R. Co. *v.* Davidson, 61 Tex. 204, 21 Am. & Eng. R. Cas. 431.

37. Where the operator of defendant's elevator, by direction of plaintiff, a passenger, and to enable her to reach her train, tried to move the elevator quickly, and had no reason to expect that, while he was closing the door, plaintiff would be pushed by other passengers and would put her hand where the door would close against it, and there was no evidence that the operator was negligent, defendant was not liable for injuries to plaintiff through having her hand crushed by the door. Cashman *v.* New York, etc., R. Co., 87 N. E. 570, 201 Mass. 355.

"In some particulars the case is like Hines *v.* Boston Elev. R. Co., 198 Mass. 346, 84 N. E. 475, and Hannon *v.* Boston Elev. R. Co., 182 Mass. 425, 65 N. E. 809. See, also, Maddox *v.* London, etc., Railway, 38 Law T., N. S., 458; Richardson *v.* Metropolitan Railway, L. R. 3 C. B. 574; Metropolitan Railway *v.* Jackson, 3 App. Cas. 193." Cashman *v.* New York, etc., R. Co., 201 Mass. 355, 87 N. E. 570.

38. Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L. R. A. 241.

cause it to be operated with a due regard for his safety, or adopt some other reasonable precaution to avoid injury to him.[39] But the carrier is under an obligation to stop a train for the purpose of rescuing a passenger who has fallen off, only when it can do so without endangering the safety of its other passengers and its servants.[40] This duty to exert every practicable effort to rescue a passenger who has fallen from a train, is imposed upon the carrier although the passenger falls off, without fault on his part or that of the carrier, but as the result of a pure accident[41] and even though he falls off in consequence of his own negligence.[42] But a carrier is not guilty of negligence in failing to back up a passenger train and render aid to a passenger who had, a short distance from the station to which he had taken passage, fallen off from the train, where a brother and friends living in the same town knew of the accident before the trainmen, and were taking active measures for the relief of the passenger.[43]

Duty Applies to All Servants.—When a pasenger falls from a train, that the conductor is in control of the train will not excuse any officer of the train, knowing of the fall, from using the highest degree of care for the safety of the passenger, either in stopping the train, or taking other prompt measures, and their failure to exercise that care is a failure of the railroad itself.[44]

§ 2521. Duty to Care for Sick or Injured Passengers.—A railroad company is under obligation to give such care to a passenger, who becomes sick on its train, as is fairly practicable, with the facilities at hand, without thereby unduly delaying its train, or unreasonably interfering with the safety and comfort of its other passengers.[45]

Duty to Care for Infirm Passenger.—Persons laboring under physical infirmities, or otherwise unable to take care of themselves, who travel on railroad trains, must provide proper assistance for themselves, and it is not the duty of the conductor, in the absence of instructions from the company, to render such assistance.[46]

§ 2522. Opportunity to Procure Food.—The duty of a carrier, when its train is on time, to give opportunity to its passengers to procure food at regular eating stations is discharged when it exercises care to furnish an opportunity to those in ordinary physical condition to provide food for themselves, and it is not ordinarily its duty to convey food to infirm passengers.[47] It is the duty of a carrier to use due care to furnish opportunity to its passengers to procure food, where they are delayed by a wreck due to its own fault, for the delay calls on it

39. Cincinnati, etc., R. Co. *v.* Kassen, 49 O. St. 230, 31 N. E. 282, 52 Am. & Eng. R. Cas. 427, 16 L. R. A. 674.

40. Reed *v.* Louisville, etc., R. Co., 20 Ky. L. Rep. 815, 47 S. W. 591, 44 L. R. A. 823, rehearing denied in 20 Ky. L. Rep. 990, 48 S. W. 416, 44 L. R. A. 824.

41. See Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L. R. A. 241.

42. Cincinnati, etc., R. Co. *v.* Kassen, 49 O. St. 230, 31 N. E. 282, 52 Am. & Eng. R. Cas. 427, 16 L. R. A. 674.

43. Where passenger being cared for.—Knepfle *v.* Cleveland, etc., Railway, 22-32 O. C. D. 660.

44. Duty applies to all servants.—Brice *v.* Southern Railway, 85 S. C. 216, 67 S. E. 243, 27 L. R. A., N. S., 768.

45. Sick or injured passenger.—Railway Co. *v.* Salzman, 52 O. St. 558, 40 N. E. 891, 49 Am. St. Rep. 745, affirming 9 O. C. C. 230, 4 O. C. D. 213.

If the passenger's condition demands it and there is a place upon the train where he can be taken, where he will be comfortable, so that surgeon can properly perform duties toward him, it is the duty of the railroad company to afford such facilities and aid in reaching that place as is consistent with the duties of the officers of the train. L. S. & M. S. R. Co. *v.* Salzman, 9 O. C. C. 230, 4 O. C. D. 213, affirmed in 52 O St. 558, 40 N. E. 891.

46. Duty to care for infirm passenger.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128. See Railroad *v* Mitchell, 98 Tenn. 27, 40 S. W. 72.

It is not the duty of a railroad company to supply assistance to sick persons and persons unable to take care of themselves while traveling in the company's cars. New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607, 97 Am. Dec. 478.

47. Opportunity to procure food.—Texas, etc., R. Co. *v.* Harrington, 98 S. W. 653, 44 Tex. Civ. App. 386.

to see that no injury comes to its passengers which it may reasonably prevent, and its obligation depends on the condition and environment of the passengers; though a passenger can not recover for the carrier's failure to act where he, by preferring a request either to the employees of the carrier or fellow passengers, could have procured necessary food.[48]

§ 2523. Stopping Over at Intermediate Stations.—In the absence of any agreement to the contrary, the purchaser of a full-fare railroad ticket, though entitled to a passage unlimited as to time, is entitled to but a continuous passage; and he has no right to stop over at an intermediate station, and afterwards demand the completion of the contract on a later train.[49] Thus, it is

48. Texas, etc., R. Co. *v.* Harrington, 44 Tex. Civ. App. 386, 98 S. W. 653.

A female passenger, carrying a child, boarded a train in the morning, with a reasonable expectation of reaching her destination by noon, according to the carrier's schedule. The train was delayed in consequence of a wreck. The train subsequently stopped at a station where an eating house was maintained not far from the tracks. Held, that the carrier was not released from failure to procure food for the passenger by the fact that the food was within reasonable reach of the average passenger, unless by exercising care she could have procured food. Texas, etc., R. Co. *v.* Harrington, 98 S. W. 653, 44 Tex. Civ. App. 386.

49. In absence of contract.—*Iowa.* — Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

Tennessee.—Louisville, etc., R. Co. *v.* Klyman, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755

Virginia.—Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

A ticket for transportation on a railroad between certain termini, which is silent as to the time when or within which it may be used, does not authorize the holder to stop over at any point between such termini, and resume his journey thereon on the next or any following train. Roberts *v.* Koehler, 30 Fed. 94.

If a passenger, who has purchased a ticket from a railroad company, which is silent on the subject of his stopping over, stops over before he reaches the point to which the ticket entitled him to ride, he can not resume his journey on that ticket. Drew *v.* Central Pac. R. Co., 51 Cal. 425.

A railroad company, after having entered upon the performance of the contract to carry a passenger, is under no legal obligation to give him a lay-over ticket; and he, after accepting such ticket, marked, "Good for thirty days only," is bound by the terms imposed. Churchill *v.* Chicago, etc., R. Co., 67 Ill. 390.

After a passenger has bought his ticket and taken a particular train, unless the right to stop over is reserved, the contract for his transportation is an entirety, and is at an end when, without the company's consent, he stops before reaching his destination. Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

When a passenger holding a ticket from one point to another selects his train, he has no right, as a rule, to leave it at a way station, and afterwards enter another, and proceed to his destination, without procuring a ticket or paying his fare from the way station. Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

A railway passenger who has purchased a through ticket between two points, over connecting railways, has no right to leave a train at a way station, and afterwards enter another train, and proceed to his original point of destination, without procuring another ticket or paying his fare. McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345. To the same effect, Beebe *v.* Ayres (N. Y.), 28 Barb. 275; Barker *v.* Coflin (N. Y.), 31 Barb. 556; Shedd *v.* Troy, etc., R. Co., 40 Vt. 88.

A passenger who buys a ticket from N. to M., and takes his passage in a certain train, acquires by his contract a right to be carried from one point to the other by that train. If he voluntarily leave the cars at a way station, he forfeits all right under his contract, and his ticket or check is no evidence of payment of fare in another train. State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

Passengers have not a right to stop on the way, and resume their journey on another train in virtue of the same ticket. A sale of a ticket upon the condition that it shall only entitle the passenger to a continuous journey, and a regulation that passengers on such tickets shall not stop over and take other trains, are reasonable, and may be enforced by putting a passenger violating them off the train. Terry *v.* Flushing, etc., R. Co. (N. Y.), 13 Hun 359.

A railroad ticket containing on its face the words, "Good for this day and train only," and dated of the day issued, gives to the passenger the right to select any train on that day, but not to ride part of the way on one train, and the residue on another. Gale *v.* Delaware, etc., R. Co. (N. Y.), 7 Hun 670.

In Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100, it was said that a passage on a ticket from one point to another must

held that the term "good for one seat," when used in a ticket, means a seat in the train on which the passenger enters to be carried, not by different trains or by broken stages, except in case of misfortune or accident.[50] In such cases it is said that the voluntary breaking the journey forfeits the passenger's rights under his ticket.[51] And the same rule applies to the holder of a ticket issued by a street surface railroad, good for one fare between two points.[52] A railroad company has a right to issue tickets with coupons attached entitling a passenger to a single continuous passage between certain stations without the rights of stopping at intermediate stations. But even if, under that ticket, the passenger had a right to stop at an intermediate station, he would lose it if he voluntarily or negligently detached the coupons.[53] And a railroad ticket sold at a reduced rate, entitling holder to one continuous trip between two points, does not entitle holder to stop over at an intermediate station.[54] Where the ticket does not state that it is for a continuous passage, or that stop overs will be allowed, but a rule of the company requires it to be continuous, of which rule, and of the difference in rate between the two kinds of passage, plaintiff is ignorant, if before reaching an intermediate station, plaintiff is informed of the rule and dif-

be continuous and that the holder of the ticket had no right to stop at an intermediate station and renew the journey on a different train.

A similar doctrine, as to the entirety of the contract, was held by the New York court of common pleas in Denny *v.* The N. Y. Central & Hudson R. R., 8 Alb. Law Jr. 239.

Where a person purchases a ticket, and takes his passage upon a railroad train, and, after the train starts upon the road, he gives up his ticket to the conductor, he can not, at an intermediate station, by virtue of his subsisting contract, leave such train while in the reasonable performance of the contract, and claim a seat upon another train. Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457, followed in Hatten *v.* Railroad Co., 39 O. St. 375.

A passenger with a ticket, who, after demanding a stop-over check, which is refused, gets off at an intermediate station, has no right to resume his journey on this original ticket in the afternoon of the same day, on the same train, with the same conductor. Hatten *v.* Railroad Co., 39 O. St. 375.

A railroad ticket, stating on its face to be from one station named to another station named, does not import a right to make the journey between the stations, by different trains, but only by a continuous trip. Oil Creek, etc., R. Co. *v.* Clark, 72 Pa. 231.

50. Good for one seat.—Dietrich *v.* Pennsylvania R. Co., 71 Pa. 432, 10 Am. Rep. 711.

"That this is the true interpretation of the contract is decided in State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457; Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199, and Cheney *v.* Boston, etc., R. Co. (Mass.), 11 Metc. 121, 45 Am. Dec. 190. Angell on Carriers, ed. 1808. sect. 609. No cases are cited to the contrary, and we remember none. The language of C. J. Green, on this point, in State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671, is so much to the purpose we quote it: 'The question,' he says, 'is obviously a question of contract between the passenger and the company. By paying for passage and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other without interruption. He acquired no right to be transported from one point to another upon the route at different times and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over an entire route for a stipulated price. But it was no part of the contract that they would suffer him to leave the train and resume his seat in another train at any intervening point upon the road.'" Dietrich *v.* Pennsylvania R. Co., 71 Pa. 432, 10 Am. Rep. 711.

51. Where plaintiff's ticket entitled him only to a continuous passage over defendant's railroad, he had no right to take a train running only to an intermediate point and take passage therefrom on another train that could take him to his destination, even though the latter train was the one he should have taken in the first instance, the voluntary breaking of his journey forfeiting his right to enter the second train on his original contract of passage. Gulf, etc., R. Co. *v.* Henry, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318.

52. Same rule applies to street roads.—Bonasera *v.* Buffalo, etc., Tract. Co., 118 N. Y. S. 748, 63 Misc. Rep 644, judgment affirmed in 123 N. Y. S. 1107, 138 App. Div. 917.

53. Tickets with stop-over coupons.—Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100.

54. Reduced-rate ticket.—Pierce *v.* Pennsylvania Co., Fed. Cas. No. 11,146.

ference in rate, and is offered the difference between the rate to such station and what he has paid, which offer he refuses, and leaves the train at the station, the company has done all that is required of it, and plaintiff waives any claim for damages or right to recover what he has paid.[55] Where a passenger stopped over for several months, he was not afterwards entitled to his passage where a regulation of the railroad company provides that tickets only entitled the holder to the passage on the day of their date, or as near to it as possible, although there had been a usage allowing passengers to stop over, and he received no notice from his ticket, or otherwise, of the new regulation.[56]

Exceptions to General Rule.—There may be exceptions to the general rule where, from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he may resume his journey afterwards.[57] And it is held that a railway passenger, with a ticket for a station at which the train does not stop, has the right to ride to an intermediate station at which it does stop.[58]

Right under Agreement.—Where a carrier agrees to transport a passenger between specified points, with the right to stop off at an intermediate point, and there is nothing on the face of the ticket inconsistent with such privilege, nor any rule of the carrier shown contrary thereto, nor knowledge thereof by the passenger, and the carrier's conductor, denying the right to stop off, takes up the passenger's coupon over his objection, such passenger has a right under his contract to resume his journey from the place of stop-over, though the written evidence of such contract is in the hands of the carrier, and though the conductor has denied his right to stop off.[59] The burden is on the passenger to show the existence of such an agreement.[60]

Ticket Allowing Stop Over.—Of course a passenger riding on a first-class ticket calling for the right to stop over "at all points" is entitled to stop over at intermediate points.[61]

Train Not Scheduled to Stop.—A passenger having a "stop-off" ticket can not require a train to be stopped at a station not on its time table.[62]

Ticket with Division Coupons.—While a system of railways, though owned by one company or operated under one management, is divided into separate

55. Notice to passenger—Offer to refund.—Cheney *v.* Boston, etc., R. Co. (Mass.), 11 Metc. 121, 45 Am. Dec. 190.

56. Effect of usage—Notice of change.—Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

Plaintiff, who had a ticket, was a passenger on defendant's train. The train was delayed by a wreck ahead, and plaintiff, who was sick, on being told by the conductor that the train would probably lie where it was all night, asked for a stop-over ticket, which the conductor refused to give him. He left the train, and stopped at an hotel overnight, and took another train in the morning. He offered the check he had received from the conductor the day before in payment of his fare, which was refused. He offered the regular fare, which was refused, and an extra sum demanded for fare paid on the cars. He refused to pay, and was ejected from the train. Held that, under the circumstances, he had a right, under his original contract, to stop over and take another train, without paying additional fare. Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

57. Dietrich *v.* Pennsylvania R. Co., 71 Pa. 432, 10 Am. Rep. 711.

58. Ticket for train not stopping at destination.—Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

59. Right under agreement.—Scofield *v.* Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224.

60. Burden of proof.—State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

61. Ticket giving stop-over privilege.—A passenger traveling on a first-class round-trip ticket, reading "good to stop off at all points," notified the conductor on presenting it of his intention to stop off. The conductor tore off the going coupon, and gave no check or token in return. Subsequently, within the life of the ticket, he resumed his journey with the same conductor, and was ejected from the train for failure to pay fare from the station at which he had stopped. Held, that he could recover for a wrongful expulsion. Cherry *v.* Kansas, etc., R. Co., 52 Mo. App. 499.

62. Train not scheduled to stop.—Dietrich *v.* Pennsylvania R. Co., 71 Pa. 432, 10 Am. Rep. 711.

divisions, a ticket having attached to it a coupon for each of such divisions entitles the holder thereof to break his journey, and stop over at the end of each division, and resume it again upon the next coupon, provided this be done within the final limit fixed by the ticket, and there be no specific contract upon the ticket to the contrary.[63]

Ticket Over Connecting Lines.—While the purchaser of a common ticket over connecting lines is not bound to make a continuous journey from his starting point to his destination, he is obliged, if the contract so requires, to make a continuous journey between each of two points named on a coupon.[64]

Statutory Provisions Regulating Use of Ticket.—The California statute empowers the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months thereafter, under that statute a purchaser of a ticket may stop at any intermediate station, and resume his journey within the six months to the point named as his destination.[65] And where a railroad company maintains several depots in a city, each depot is an "intermediate station," within the meaning of the statute.[66] Nor is the right of a passenger to stop at an intermediate station, and resume his journey affected by the fact that the ticket bought by him gave him the choice of two different routes, and he selected the longer route.[67]

Extraterritorial Effect of State Statute.—A state statute which declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used, applies only to transportation within the territorial limits of that state, and consequently does not apply to a ticket being used beyond the limits of the state.[68]

Rules Regulating Right to Stop Off—In General.—Where a passenger stopped over at an intermediate station without complying with certain regulations of which he was ignorant, the conductor of the train on which he resumes his journey need not recognize the ticket.[69]

Stop-Over Checks or Indorsement.—In some cases the passenger is required to get a stop-over check, before he will be permitted to continue his journey on his ticket,[70] and such regulations have been held valid.[71] It would often

63. Ticket with division coupons.—Spencer *v.* Lovejoy, 96 Ga. 657, 23 S. E. 836, 51 Am. St. Rep. 152.

64. Ticket over connecting lines.—Little Rock, etc., R. Co. *v.* Dean, 43 Ark. 529, 51 Am. Rep. 584.

65. Statutory provision regulating use of ticket.—Cal. Civ. Code, § 490. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

66. "Intermediate station."—Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

67. Effect of right to choose routes.—Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

68. Extraterritorial effect of state statutes.—Carpenter *v.* Grand Trunk R. Co., 72 Me. 388, 39 Am. Rep. 340.

69. Rules regulating right to stop off.—Dunphy *v.* Erie R. Co., 42 N. Y. Super. Ct. 128.

70. Where plaintiff had a ticket from W. to H., and took a train at H., and the conductor punched it twice, and placed it on the seat in front of plaintiff, who stopped off at B., a station between H. and W., without securing a stop-over check, it was proper to charge as a matter of law that the conductor on a subsequent train from B. to W. was not bound to accept the ticket. Dixon *v.* New England R. Co., 60 N. E. 581, 179 Mass. 242.

71. Regulation valid.—A regulation by a railroad that passengers shall not stop over on the route without obtaining stop-over checks is valid. Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

A railroad regulation by which one who has paid his fare between two points, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor, and present it to the conductor of the train on which he completes his journey, as evidence of his right to do so without further payment, is a reasonable regulation. Yorton *v.* Milwaukee, etc., R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23.

"A passenger may have a right to transportation between certain stations because of his connection with a certain ticket, and yet, if the ticket itself is not in order, a conductor is not bound to

be impossible for a conductor to ascertain and decide upon the right of a passenger except in the usual simple and direct way. The passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules and for the time being the passenger must bear the burden which results from his failure to have a proper ticket.[72] In this connection it is said that passengers are not presumed to know the regulations of railroad companies made for the guidance of conductors of trains in relation to stop-over privileges, and unless the passenger has actual knowledge thereof, or the face of his ticket shows the rule requiring a stop-over check, he is entitled to rely upon the representation of the ticket seller as to what is necessary to entitle him to such privilege.[73] Where a regulation of the carrier requires a passenger to get stop-over checks, the passenger will not be allowed to show that it had not been required of him on prior occasions.[74]

Time Limit on Stop-Over Check.—Where a passenger is given a stop-over check limited to use within a certain number of days, he can not resume his journey after the time limit expires although his ticket has not expired.[75]

Regulation Requiring Indorsement.—A regulation requiring persons desiring to stop over to have their tickets indorsed by the conductor is valid.[76]

§ 2524. Duty as to Passenger Boarding Wrong Train.—In General.—Generally, where a passenger by mistake boards the wrong train, it is the duty of the railroad to return him to the place where the mistake occurred, or to leave him at some point where he will not be subjected to any serious annoyance, and to return him to the place where he took the wrong train by the first returning train.[77] Thus, it has been held to be a carrier's duty to carry an aged female passenger, who has no funds, to a certain station where she had funds and relatives.[78] And it has been said that the passenger should be carried to a place

take it in payment of fare. Bradshaw *v.* South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481; Murdock *v.* Boston, etc., R. Co., 137 Mass. 293. See, also, Coleman *v.* New York, etc., R. Co., 106 Mass. 160." Dixon *v.* New England R. Co., 179 Mass. 242, 60 N. E. 581.

72. Dixon *v.* New England R. Co., 179 Mass. 242, 60 N. E. 581.

73. Representations of ticket seller.—New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71.

74. Evidence as to prior trips.—Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Sherman *v.* Chicago, etc., R. Co., 40 Iowa 45.

75. Time limit on stop-over check.—Where a stop-over ticket is good for thirty days, and the holder, on stopping over, received a check good for ten days' stop at such station, he can not resume his journey on such check after the expiration of the ten days, though within the thirty. Kelsey *v.* Michigan Cent. R. Co. (N. Y.), 28 Hun 460.

76. Regulation requiring indorsement.—Beebe *v.* Ayres (N. Y.), 28 Barb. 275.

A passenger, by express permission of the conductor, stopped over at an intermediate point, without having his ticket indorsed, as was required by the regulations of the carrier. On resuming his journey, he stopped over at a second intermediate station, without applying to the conductor of that train for the indorsement of the ticket. On again resuming the journey, his ticket was not recognized, no stop-over having been indorsed thereon. Held, that the privilege granted by the first conductor was exhausted by the first stop-over, and did not authorize a second stop-over without compliance with the regulation. Denny *v.* New York, etc., R. Co. (N. Y.), 5 Daly 50.

77. Passenger boarding wrong train.—St. Louis, etc., R. Co. *v.* Pruitt (Tex. Civ. App.), 79 S. W. 598, writ of error denied in 97 Tex. 487, 80 S. W. 72.

78. Duty to carry to certain station.—Where a passenger informed the conductor of her destination and route, and was told by him that his was the train which she was to take, and he helped her to board the same, but when he saw her ticket, after the train had started, discovered that she was on the wrong train, and compelled her to get off at the next station, in spite of her advanced age, her protests that she had no money, and her information that if he would carry her to a point some six miles distant she would be subjected to no inconvenience, as she had friends and relatives there, whereas by being compelled to get off at the next station she was greatly delayed and caused much suffering and anguish, on account of accommodation, hunger, etc., the duty of the railroad was not discharged by causing the passenger to get off at the next station, and permitting her to return with-

where he could easily reach his destination and obtain good accommodations rather than put him off at some other point and against his request.[79]

§§ 2525-2552. Management of Conveyance—§ 2525. General Rule.—A carrier of passengers is bound to exercise care to operate and manage its conveyance in such a manner as to prevent injury to passengers, and for a failure to exercise the proper degree of care in the discharge of this duty the carrier will be liable in damages.[80] The usual rule that a carrier of passengers is required to exercise the "highest or utmost" degree of care for the safety of its passengers applies to the operation of its cars by a railroad company.[81] And it may be laid down as the general rule that every movement of a passenger train must be made with reference to the safety of passengers, and the utmost care exercised at all times to avoid injury to them.[82]

Amount of Diligence Dependent upon Hazard.—The amount of diligence to be exercised in each case depends upon the hazard. The greater the hazard the greater should be the diligence exercised.[83]

out charge to the place where she got on, but it was the railroad's duty to carry her to the station where her friends and relatives were. St. Louis, etc., R. Co. *v.* Pruitt (Tex. Civ. App.), 79 S. W. 598, affirmed in 98 Tex. 630, no op.

79. In an action for injuries to a passenger resulting from her being carried on the wrong train, the court's charge that if, after the mistake was discovered, she asked to be carried to a certain point, from which she could readily reach her intended destination, and this was refused, she might recover, did not charge that it was negligence not to grant her request. Writ of error. (Tex. Civ. App.), 79 S. W. 598, denied. St. Louis, etc., R. Co. *v.* Pruitt, 80 S. W. 72, 97 Tex. 487.

Where a carrier sold a ticket to a passenger to a station where its train did not stop, it was its duty after finding it impossible to put her off there, to leave her at the nearest station where she could obtain comfortable accommodations, and from which she could travel with the least delay to her destination. Texas, etc., R. Co. *v.* Cole, 66 Tex. 562, 1 S. W. 629.

80. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510, digested in subdivision B. of section IV of note to Chicago City R. Co. *v.* Morse, 197 Ill. 327, 64 N. E. 304, 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215; Kentucky Hotel Co. *v.* Camp, 97 Ky. 424, 17 Ky. L. Rep. 297, 30 S. W. 1010; Costigand *v.* Warren, etc., R. Co., 174 Mass. 553, 55 N. E. 317.

Where the evidence showed that the engineer set the brakes on the engine so taut that when the other cars moved back, taking out the slack, the engine could not move with them, which caused the link or pin to break, and that there was no one on the train to set the brakes, the brakeman having left his post, defendant was guilty of negligence. Prescott, etc., R. Co. *v.* Morris, 123 S. W. 392, 92 Ark. 365.

Derailment of railroad cars.—Where a passenger is injured through the negligence of a railway company in operating its trains so that a car ran off the tracks, the railway company is liable for damages. Braunstein *v.* People's R. Co. (Del.), 2 Boyce 55, 78 Atl. 609.

A railroad company is required to use great care in running its passenger trains, or in stopping or starting trains where passengers get aboard or alight. Missouri Pac. R. Co. *v.* Foreman (Tex. Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

81. Degree of care.—Houston, etc., R. Co. *v.* George (Tex. Civ. App.), 60 S. W. 313; Levy *v.* Campbell (Tex.), 19 S. W. 438; Dallas, etc., St. R. Co. *v.* Broadhurst, 28 Tex. Civ. App. 630, 68 S. W. 315, affirmed in 95 Tex. 676, no op.; Citizens' R. Co. *v.* Sinclair, 36 Tex. Civ. App. 266, 81 S. W. 329; San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex., 719, no op.

The true criterion is such a high degree of care in handling a train such as the one in question, as would be exercised by very prudent, cautious, and competent persons under similar circumstances. Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977.

Generally, as to the degree of care as affected by the mode of conveyance, see ante, "Degree of Care Required," §§ 2290-2342.

82. General rule as to movement of train.—St. Louis, etc., R. Co. *v.* Humphreys, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.

83. Diligence dependent upon hazard.—Rapid Transit R. Co. *v.* Strong (Tex. Civ. App.), 108 S. W. 394, citing Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Gulf, etc., R. Co. *v.* Hodges, 76 Tex. 90, 13 S. W. 64; Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615.

What would constitute a high degree

Operation in Customary or Ordinary Manner Not Proper Test.—Whether or not trains had been "usually and customarily" operated as the train at the time of the accident was operated is not the test by which to measure the care of the railroad company.[84]

Street railways are common carriers of passengers with duties and responsibilities similar to those of a railroad company, and are required to exercise the highest degree of care and skill in the movement of their cars.[85]

Application of Rule Regardless of Nature of Conveyance.—The fact that a passenger accepting passage on a freight train assumes risks not incident to travel on a passenger train does not relieve the carrier from exercising the utmost care in the operation of the train for the safety of the passenger.[86] The fact that a passenger train carries the United States mail can not affect the obligation of the carrier in regard to its proper operation for the safety of passengers.[87]

Acts in Emergency.—Of course it is not necessarily negligent for an employee, when placed in a position of great danger, to do the wrong thing.[88] But where the evidence tends strongly to show that there was no great danger to be apprehended and that the accident to the plaintiff resulted because the employee operated his car in such a manner as to cause the plaintiff to believe himself in danger and to act upon that belief, the carrier will be liable for resulting injury.[89]

§ 2526. Crowded Trains or Cars.—A carrier has a right to refuse to allow a greater number of passengers than can be safely carried to get upon one of its cars or trains, and, if it is unable to prevent the overcrowding, it may refuse to move the train until the condition can be remedied. But if the carrier, instead of pursuing that course, undertakes to transport all the passengers that are on board, whether in the cars or on the platforms, it is bound to take the condition of things into account in the management of the train, and exercise

of care in starting a street car stopped to turn a switch where passengers were not expected to alight might not constitute such a degree of care in starting a car stopped at a place for passengers to get aboard and alight, the amount of the diligence required depending on the hazard involved. Rapid Transit R. Co. *v.* Strong (Tex. Civ. App.), 108 S. W. 394.

84. Operation in customary and ordinary manner not proper test.—St. Louis, etc., R. Co. *v.* Boyer, 44 Tex. Civ. App. 311, 97 S. W. 1070.

The fact that it was customary for the employees of a carrier, in the operation of its freight trains, to act as was done at the time a passenger on a freight train was injured did not relieve the carrier of the duty of exercising the degree of care imposed on it by law, under the circumstances existing at that time. International, etc., R. Co. *v.* Cruseturner, 98 S. W. 423, 44 Tex. Civ. App. 181.

In Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, in which the test given to the jury by the trial court in its charge was "the ordinary and usual movement of said train," that is, the freight train on which appellant was riding, the appellate court in disapproving such charge held that the ordinary and usual movements of that train might have been negligent in the highest degree as directed towards a passenger, and laid down the usual criterion as to the high degree of care required of passengers.

85. Street railways.—San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.

86. Rule applies regardless of nature of conveyance.—Hardin *v.* Fort Worth, etc., R. Co., 33 Tex. Civ. App. 448, 77 S. W. 431.

87. Mail trains subject to same rule.—Williams *v.* International, etc., R. Co., 28 Tex. Civ. App. 503, 67 S. W. 1085.

88. Act in position of danger.—Grunfelder *v.* Brooklyn Heights R. Co., 127 N. Y. S. 1085, 143 App. Div. 89.

89. Negligent failure to avoid collision.—A motorman suddenly discovered a heavy truck on the track, and called to the passengers to jump, and himself jumped; plaintiff being injured in jumping. The car did not strike the truck hard enough to do any damage. Held that, as the event showed that the car could have been stopped before striking the truck, the motorman was negligent in not attempting to stop the car. Grunfelder *v.* Brooklyn Heights R. Co., 127 N. Y. S. 1085, 143 App. Div. 89.

additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars.[90] But a passenger in such cases it seems assumes any risk of danger naturally to be expected from such overcrowded condition.[91] Thus, it is said that a passenger boarding a crowded street car assumes the resulting inconvenience, but the carrier is not relieved from the duty to use due care for the safety of the passengers.[92] If, on the other hand, the car became overcrowded after plaintiff entered it, by his act in pushing through the crowd to the back platform before the car stopped, he passed from a position of safety inside the car to the very place where the overcrowding was likely to be dangerous to him. Under these circumstances, he can not complain as against the defendant on account of the acts of members of the crowd.[93] It has been held that when a street car company stops its cars when they are so crowded with passengers that seats are not obtainable, and permits passengers to get on and to ride on the platforms and footboards of the cars, it is guilty of gross negligence in running the cars, when in that condition, so close to the intersection of a switch with the main track that the cars on each track can not pass without injury to the passengers.[94]

90. Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710. See Oliver *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431, 47 Am. & Eng. R. Cas. 576.

Employees in charge of a street car, so crowded that some of the passengers are required to stand, are bound to operate the car in view of that fact. Kebbe *v.* Connecticut Co., 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167.

Where a street railway loads its cars so as to fill the standing room inside and the footboard outside, care of the passengers' safety must be proportionate to the dangers to which they are exposed. La Barge *v.* Union Elect. Co., 138 Iowa 691, 116 N. W. 816, 19 L. R. A., N. S., 213.

When plaintiff entered defendant's elevated street car, it was so crowded that she could not obtain a seat and was compelled to stand in the vestibule, and when the car stopped to permit passengers to alight the conductor told plaintiff that she was blocking the passageway and must stand aside to permit other passengers to alight, and in the jostling which accompanied the efforts of the other passengers to alight plaintiff was pushed off the car. Held, that the company was required to exercise the highest degree of care for plaintiff's safety which was consistent with a similar duty to the other passengers, and it was not negligent under the circumstances, so as to make it liable for plaintiff's injuries. McCumber *v.* Boston Elev. R. Co., 93 N. E. 698, 207 Mass. 559.

91. Lehberger *v.* Public Service R. Co., 79 N. J. L. 134, 74 Atl. 272.

Where decedent boarded the crowded front platform of a horse car, and the driver with an involuntary motion, resulting from the necessity of properly managing his horses, pushed decedent from the platform, there was no liability on the part of the carrier. Dubnow *v.* New York City R. Co., 107 N. Y. S. 729, 122 App. Div. 723.

92. Lobner *v.* Metropolitan St. R. Co., 101 Pac. 463, 79 Kan. 811, 21 L. R. A., N. S., 972.

Passengers who choose to take passage on a street car which is so crowded that they have to stand on the rear platform or on the steps, and thereby block the exit from the car, assume all inconveniences incident thereto, including that of alighting when necessary to allow a proper exit for passengers who wish to get off. Jacobs *v.* West End. St. R. Co., 178 Mass. 116, 59 N. E. 639.

A street car passenger, who voluntarily entered a crowded car, knowing that she could not get a seat and might have to stand in the vestibule, assumes any risk of injury incident to the crowded condition of the car, including the risk from alighting temporarily to enable other passengers to leave the car, even though she were not negligent in entering it. McCumber *v.* Boston Elev. R. Co., 93 N. E. 698, 107 Mass. 559.

93. Lehberger *v.* Public Service R. Co., 79 N. J. L. 134, 74 Atl. 272.

A declaration alleging that plaintiff was a passenger on a street car which defendant permitted to be crowded, so that plaintiff, desiring to alight, had to push his way through the crowd, but while on the platform preparing to alight, before the car stopped, he was pushed off by the crowd and injured, and alleging that the accident was caused by defendant permitting the car to become crowded, states no cause of action. Lehberger *v.* Public Service R. Co., 79 N. J. L. 134, 74 Atl. 272.

94. Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

§ 2527. Running Trains or Cars in a Manner Calculated to Alarm Passengers.—A railroad or street railway company may be chargeable with negligence in managing its trains or cars in a manner which is calculated to cause reasonable apprehension of danger on the part of the passengers. Thus a passenger on a street car has been allowed to recover damages for physical injury resulting from fright which was caused by negligently running the car across the track of an intersecting cable road, in front of a near and rapidly approaching train.[95] But when a passenger, while in a state of panic or fear, jumps from a train or street car and is injured, the company is liable only if the panic or fear was caused or inspired by some word or act of an employee of the company, which could be construed as negligence calculated to alarm the passenger and cause his act.[96]

§ 2528. Avoiding Dangers Encountered during the Journey.—It is said to be the duty of a carrier of passengers to keep its cars under control, and slow up where danger is imminent, and where by so doing accident may be avoided.[97] Thus, it has been held that where the habitual use of a gateway is known to the carrier and the danger of collision is probable, it is the duty of those in charge of a traction car to approach such place with the car under full control, and particularly so when the footboard next to the gateway is crowded with passengers.[98] While passenger carriers are not responsible for accidents resulting from the act of God or the public enemy,[99] a railroad company may, nevertheless, be liable for the negligence of its servants having charge of a train in failing to anticipate dangers from these causes, and in not managing the train accordingly.[1] When the servants of a railroad company in charge of a train have notice that there has been an unusual and extraordinary storm at a particular point along the road, it is their duty to inform themselves as to whether it is safe to complete the trip, and to exercise care in passing the point of probable danger.[2] A railroad company has been held liable to a passenger for in-

95. Purcell *v.* St. Paul, etc., R. Co., 48 Minn. 134, 50 N. W. 1034, 52 Am. & Eng. R. Cas. 611, 16 L. R. A. 203.

96. Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531, 14 L. R. A. 613. See Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 34 Am. & Eng. R. Cas. 277, 8 Am. St. Rep. 497.

A train upon which plaintiff's intestate was a passenger had been stopped by a snow bank at a point where there was a curve in the track. It was night and snow was falling. Not long after the train had been stopped the passengers saw the head light of an engine attached to a snow plow, which was rapidly approaching from the rear, really on a parallel track, but apparently on the same track as that on which the train was standing. At the same time the engine in front of the passenger train gave several sharp, quick whistles, which the passengers understood to be signals of alarm. Plaintiff's intestate, along with another passenger, jumped from the train and was run into by the advancing snow plow, receiving injuries from which he subsequently died. There was no evidence showing the purpose of the whistles or explaining their meaning, and it was not shown that they were intended for the passengers. It was held that the evidence was insufficient to establish negligence on the part of defendant. Chicago, etc., R. Co. *v.* Felton, 125 Ill. 458, 17 N. E. 765, 33 Am. & Eng. R. Cas. 533, reversing 24 Ill. App. 376.

97. Anticipating danger.—Baldwin *v.* People's R. Co. (Del.), 7 Pen. 81, 76 Atl. 1088, judgment affirmed in 72 Atl. 979.

98. Madl *v.* Chicago City R. Co., 167 Ill. App. 487.

99. See ante, "Liability for Act of God or Public Enemy," § 2277.

1. Sawyer *v.* Hannibal, etc., R. Co., 37 Mo. 240, 90 Am. Dec. 382; Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252.

Liability for negligence in operation concurring with unprecedented rainfall to cause accident.—Where, in an action for injuries to a passenger, the carrier was guilty of negligence in operating its train, which concurred with an unprecedented rainfall, constituting an act of God, in causing the wreck in which plaintiff was injured, the carrier was liable. Chicago, etc., R. Co. *v.* Cain, 84 S. W. 682, 37 Tex. Civ. App. 531.

2. Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 27 Am. & Eng. R. Cas. 88, 57 Am. Rep. 120.

juries sustained in consequence of the negligence of its servants in running a train dangerously close to a washout, and failing to use due diligence to remove the passengers from the vicinity of the danger.[3] But an elevated railway company can not be charged with negligence in continuing to run its trains during a blizzard, unless it is shown that the situation is such that the running of trains is inconsistent with the exercise of the high degree of care which carriers owe their passengers.[4] And it has been held that where there is merely a scintilla of evidence that a defendant railroad was guilty of negligence in running a train through a wind storm, and the presumption of negligence arising from the derailment is overcome by proof, a judgment of nonsuit is proper.[5]

§ 2529. In Passing Through Tunnels.—In passing through tunnels of any considerable length a train should ordinarily be lighted, and the windows, doors, and even the ventilators should be closed to prevent the otherwise inevitable discomfort from smoke, cinders, and gas. In a case in which it appeared that when defendant's train, upon which plaintiff was a passenger, passed through a long tunnel, the coaches were rendered very uncomfortable in consequence of the doors being left open, and plaintiff, who was sitting near the front door of one of the coaches, was injured while attempting to close the door, it was held that defendant was liable.[6]

§ 2530. In Running Trains or Cars on Wrong Track.—A street railway company which operates its cars on double tracks between which are erected trolley poles, and which has equipped its cars with guards on the side next to the poles, may at times find it necessary to run a car on the wrong track so that passengers are deprived of the protection of the guards, and it can not be said as a matter of law that it is negligence to do so; the question of the carrier's negligence must be determined by the jury from all the facts and circumstances existing at the time.[7] But it has been held that a belt line, with north and southbound tracks, that backs a train north over the southbound track without a headlight on the caboose, and without the usual signals for preventing danger, is guilty of gross negligence.[8]

§ 2531. In Approaching Switch Apparently Misplaced.—If, when a train approaches a switch, the engineer discovers that the switch is apparently misplaced, he should at once make every effort to stop the train as soon as possible.[9]

3. Southern Pac. Co. *v.* Tarin, 108 Fed. 734, 47 C. C. A. 648, 54 L. R. A. 240.

4. Connelly *v.* Manhattan R. Co., 142 N. Y. 377, 37 N. E. 462, reversing 68 Hun 456, 23 N. Y. S. 88.

5. Pierce *v.* Great Falls, etc., R. Co., 22 Mont. 445, 56 Pac. 867.

In an action to recover for injuries sustained by plaintiff in consequence of the derailment of the car in which he was riding, the testimony showed that about three or four hours before the accident happened, an unprecedentedly heavy fall of rain occurred in the immediate locality of the accident, but that it had not been sufficient, even on that part of the road, to stop or impede the regular running of the trains. The evidence did not show that the agents and employees in charge of this particular train, either from information or their personal observation, had notice of the character of the rain fall in that locality, or of the damage to the roadbed. On the contrary it appeared that to all external appearance the roadbed and track were sound and in good order, and that the train at the time was running at but little over half-speed, not by reason of any apprehended danger, but to prevent passing a place at which it was intended to take on wood. A verdict for plaintiff was set aside on the ground that it was contrary to the evidence. International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

6. Western Maryland R. Co. *v.* Stanley, 61 Md. 266, 18 Am. & Eng. R. Cas. 206, 48 Am. Rep. 96.

7. Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

8. Fleming *v.* Kansas, etc., R. Co., 89 Mo. App. 129.

9. New York, etc., R. Co. *v.* Daugherty (Pa.), 11 Wkly. Notes Cas. 437, 6 Am. & Eng. R. Cas. 139.

§ 2532. Omission of Signals Required by Statute.—Statutes which require a whistle to be blown, or a bell to be rung, when a train approaches stations or stopping places, crossings, etc., so far as they apply to persons, are intended primarily for the benefit of the traveling public, passengers at stations [10] and others who have a right to be warned of approaching trains, for their personal protection against injury. The observance of the statutory precautions may, of course, sometimes be of advantage to passengers on the trains in preventing such accidents as collisions and derailments, but, ordinarily, such passengers are not included in the letter or spirit of these statutes; they do not need signals of warning for their protection, and, therefore, the statutes can not be construed as intended for their benefit. Accordingly, although the servants in charge of a train fail to ring the bell, or blow the whistle at intervals, when approaching a station, as required by statute, a passenger on the train who is not injured in an accident, such as a collision, to which the omission of the statutory duties contributes, but in an accident to which the omission does not contribute, can not urge the failure to discharge the duty to establish the carrier's negligence.[11]

§ 2533. Moving Disabled Trolley Car.—While a disabled car was being pushed by another car behind it, the trolley pole of the disabled car, at a point where defendant's track was crossed at right angles by that of another company, jumped its own wire, struck and broke the wire of the cross line, thus caused the accident by which plaintiff was injured. There was testimony that the proper course, under such circumstances, was to tie down the trolley pole of the disabled car, and that in this case the conductor was told by the conductor of the rear and operating car to do so, but he refused or neglected. A judgment for plaintiff was sustained, the reviewing court holding that the trial court was right in refusing a peremptory instruction for defendant and leaving the case to the jury.[12]

§ 2534. Absence of Driver or Motorman from Post of Duty.—The act of a driver or motorman in charge of a street car in leaving his post of duty where his presence is necessary for the safety of the passengers, may amount to negligence for the consequences of which the carrier is liable.[13] The principle has been applied in cases where injuries have arisen from the sudden starting,[14] or running away of the car or team,[15] as well as where the injury was caused by

10. Somer *v.* Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84.

11. Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 18 Am. & Eng. R. Cas. 194, 47 Am. Rep. 403.

12. Schenkel *v.* Pittsburgh, etc., Tract. Co., 194 Pa. 182, 44 Atl. 1072.

13. A motorman, in charge of a car loaded with passengers, who sets his brakes, turns off his power, permits his car to descend an 11 per cent grade without a guiding hand, leaves his controller surrounded by passengers, any one of whom may release the brakes or turn on the power at will, and goes so far from his post of duty that he can not return thereto until the car has sped a distance of four or five blocks, without some controlling necessity for such action on his part, is guilty of gross and inexcusable neglect. Mooney *v.* Seattle, etc., Railway (Wash.), 92 Pac. 408.

14. In an action to recover damages for injuries to a child ten years old, who had been invited to ride on one of defendant's cars by the driver, the complaint alleged, in substance, that the driver, after changing the team from one end of the car to the other, upon reaching the end of the line, left the team standing alone and went to the then rear end of the car, and that, while the driver was at the rear platform, the team suddenly started forward, throwing plaintiff from the car, and injuring her. It was held that the complaint stated a cause of action. Evansville St. R. Co. *v.* Meadows, 13 Ind. App. 155, 41 N. E. 398.

15. Running away of car.—Where plaintiff's wife was a passenger on defendant's street car, whose driver left it standing in the street without tying the mules, who ran away, and, in attempting to get off the car, she was thrown to the ground, the defendant is liable for the damages. Texarkana St. R. Co. *v.* Hart (Tex. Civ. App.), 26 S. W. 435.

A stage driver who leaves his horses in the road, unfastened and unattended, is guilty of negligence, and a passenger who is injured by their running away is

the act of some third person or other agency during the driver's negligent absence from his post of duty.[16]

§ 2535. Speed of Trains or Cars.—In the absence of statutory regulation the speed at which a train or street car is run is a matter which must necessarily be left to the regulation and control of the carrier, subject to liability for running the conveyance at such a rate of speed as amounts to negligent management. In other words, railway and street railway companies are permitted to run their trains and cars at such high rate of speed as under all the surrounding circumstances and the conditions of the conveyance, track, etc., shall comport with the obligation to exercise a high degree of care for the safety of passengers.[17] And where this is done the carrier can not be liable for an injury which results from the passenger's own negligence.[18] And it is held that a passenger assumes the risk of the lurching or rocking of trains in passing rapidly over curves on the road.[19] But it is no defense to an action for personal injuries to a street car passenger, by rounding a curve at too high a speed, to show that such speed was usual, where it was not unavoidable.[20] It follows that the fact that a train or car is run at a high rate of speed is not alone sufficient to show negligence; for even a high rate of speed, if the condition of the tracks and machinery will per-

entitled to recover. Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407.

A motorman who was in sole charge of an electric car, in passing a switch, alighted without shutting off the power and went back to readjust the trolley, which had to be done from the rear of the car. After having readjusted the trolley with some difficulty he started on a run for the front end of the car, but stumbled and fell and was unable to regain his place on the car, which ran down a hill and was derailed. Plaintiff's intestate, who was a passenger on the car received injuries from which she died. It was held that even though it was not negligence to have only one man in charge of the car, if the man in charge could have stopped the car by shutting off the power, and changed the trolley to the proper wire, it was negligence for him to leave the motor with the power on, and the car in motion, to go to the other end of the car to adjust the trolley. "The fall of the motorman while attempting to return to the front platform was accidental, but it was not accidental that but one man was put in charge of the car when two were required, or that the one man did not stop the car to adjust the trolley, if the adjustment could be made in that way." Redfield *v.* Oakland, etc., R. Co., 110 Cal. 277, 42 Pac. 822, 1063.

16. In an action to recover for injuries sustained by a child nine years of age who fell from the front platform of a street car, or was thrown therefrom by another boy, while the driver had gone inside of the car to eat his breakfast, it was held that it was negligence for the driver needlessly to withdraw from the front platform, leaving the platform and another boy thereon, and it was negligence not to be there ready to stop the team when the plaintiff fell, or was thrown by the other boy off the platform upon the track in front of the car, the two boys engaging in a scramble to drive the horse, the reins having been left within their reach. Metropolitan St. R. Co. *v.* Moore, 83 Ga. 453, 10 S. E. 730, 41 Am. & Eng. R. Cas. 240.

17. Indianapolis, etc., R. Co. *v.* Hall, 106 Ill. 371, 12 Am. & Eng. R. Cas. 146.

A street railroad company must use reasonable care to regulate the speed of its cars, so as not to endanger passengers. Indiana Union Tract. Co. *v.* Love (Ind.), 99 N. E. 1005.

18. A carrier operating its train at the ordinary rate of speed is not liable to a passenger thrown from the back platform, on which he was riding, while the train was on a curve, on the ground that the train was operated at a dangerous rate of speed. Crawford *v.* Louisville, etc., R. Co. (Ky. App.), 122 S. W. 220.

Where a passenger on an electric car seated on the floor between the seats with his feet on the running board fell off while the car was rounding a curve at the speed usual under ordinary circumstances does not show negligence on the part of the company. Wenzel *v.* City, etc., R. Co., 64 W. Va. 310, 61 S. E. 1001.

19. Assumption of risk from lurches, etc.—Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

But in an action to recover for injuries received by plaintiff, while a passenger on defendant's cable car, by being thrown from the car by a jerk when rounding a curve, the evidence showing that the jerk was caused by a speed which was no more than necessary to carry the car around the curve, it was held that defendant was not liable. Hite *v.* Metropolitan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555.

20. Speed usual.—Witters *v.* Metropolitan St. R. Co. (Mo. App.), 132 S. W. 38.

mit it without increasing the peril to passengers, will not be negligence.[21] Thus, the mere fact that a train or street car was being run at an unusual rate of speed is not of itself sufficient to show negligence.[22] And the schedule time of a train is of no importance in determining negligence proximately causing its derailment, by which a passenger is injured.[23] Of course a rate of speed may be dangerous and negligent per se.[24] And the speed of a vehicle may be so great when taken in connection with the character of the road, the condition of the means of conveyance, and the various other conditions necessarily affecting the question of safety, and rendering the ordinary risks and dangers incident to the particular mode of transportation materially greater, that the carrier will be chargeable with negligence.[25] And in this connection it is held that the servants of a carrier are charged with knowledge of the condition of the carrier's railroad track at a point where excessive speed would be likely to cause derailment.[26] Thus, a high rate of speed may amount to negligence in running a train over a track which is not in good condition,[27] in running a train upon a switch,[28] in

21. Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

What constitutes negligence in running.—The mere speed of motion of the train, or the fact that the train is "behind time," is not, per se, evidence of negligence. Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126, wherein it was said that to submit to the jury the simple question of whether the speed at which a train was run was so high and dangerous as to amount to negligent management of the train, without proof of the condition of the roadway and machinery, or other attending circumstances affecting the safety of the train, was to give unbridled and unguided license to find any speed they might regard dangerous to be negligent management.

Speed of forty-five miles per hour held not negligent.—Hoskins *v.* Northern Pac. R. Co., 39 Mont. 394, 102 Pac. 988.

22. Perry *v.* Malarin, 107 Cal. 363, 40 Pac. 489; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833.

23. Schedule immaterial.—Hoskins *v.* Northern Pac. R. Co., 39 Mont. 394, 102 Pac. 988.

24. St. Louis, etc., R. Co. *v.* Savage, 163 Ala. 55, 50 So. 113.

25. Means of conveyance condition of track, etc.—Whether a given rate of speed constitutes negligence of a carrier depends on the surrounding circumstances of each case. Elgin, etc., Tract. Co. *v.* Wilson, 120 Ill. App. 371, judgment affirmed 75 N. E. 436, 217 Ill. 47.

In an action by a passenger against a railroad company for injuries caused by a car being thrown from the track by reason of the breaking of a wheel, it appeared that the train was running at the rate of sixteen or twenty miles per hour, where the schedule rate was four miles; that the air brakes were defective, but for which the engineer might have stopped the train; that the rails were old and battered, the ties rotten, and the roadbed rough and uneven. Held, that these facts warranted the jury in finding the company negligent. Texas, etc., R. Co. *v.* Hamilton, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182.

The defendant railway company agreed to carry a lumber company's employees to and from work, and, while one of its employees was riding on a car which was being pushed in front of the engine at a speed of 15 to 20 miles per hour, the car was derailed by running over a hog, and the employee was killed. Held, that the evidence was sufficient to sustain a verdict that defendant was guilty of negligence. Trinity Valley R. Co. *v.* Stewart (Tex. Civ. App.), 62 S. W. 1085.

26. Servants chargeable with knowledge.—Houston, etc., R. Co. *v.* Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 777.

27. Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126; Texas, etc., R. Co. *v.* Hamilton, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182; Texas Trunk R. Co. *v.* Johnson, 75 Tex. 158, 12 S. W. 482, 41 Am. & Eng. R. Cas. 122; Galveston, etc., R. Co. *v.* Snead, 4 Tex. Civ. App. 31, 23 S. W. 277.

Evidence, in an action for injury to a passenger while passing from one car to another, held to authorize a finding, in view of the condition of the track, that the train was running at a negligent rate of speed. Galveston, etc., R. Co. *v.* Patillo, 101 S. W. 492, 45 Tex. Civ. App. 572.

Imprudent rate of speed.—A railroad company is liable for any casualty which may occur from running with greater speed than is prudent, or on account of collisions with obstructions which the engineer or conductor saw or might have seen, or which he might have avoided by the most skillful and prompt use of all the means in his power. Nashville, etc., R. Co. *v.* Messino, 31 Tenn. (1 Sneed) 220.

28. Central, etc., R. Co. *v.* Johnston, 106 Ga. 130, 32 S. E. 78, 12 Am. & Eng.

running a train or street car at a high rate of speed around a curve,[29] in running a street car upon a swing-bridge when there is danger that the rails may be out of line,[30] in running a train over a bridge which is not able to support a rapidly moving train,[31] in approaching a down grade on a street railway track which is slippery from snow, rendering it difficult to control the car,[32] and in running a train of passenger street cars down a steep grade at a very great and dangerous speed.[33] It may amount to negligence to run a train at a high rate of speed over a portion of the road which is especially liable to be rendered dangerous by the intrusion of cattle on the track.[34] And in approaching a point where the road may have been rendered unsafe by a recent storm, the engineer knowing of the storm, and apprehending injury to the road, the speed of the train should be regulated accordingly.[35] Approaching a crowded station at a high rate of speed may amount to negligence,[36] especially when the train is running on a track intervening between the station house and a train which is taking on or letting off passengers.[37] It may be negligence to run a train which contains improperly loaded cars at a high rate of speed.[38] The question as to whether a particular

R. Cas., N. S., 286; Seelig *v.* Metropolitan St. R. Co., 18 Misc. Rep. 383, 41 N. Y. S. 656, 75 N. Y. St. Rep. 1042.

In an action for injuries to a passenger by the wreck of a train, alleged to have been caused by an open and defective switch and the excessive speed of the train, held, that under the evidence the questions of the negligence of the defendant in failing to use due care as to the condition of the switch, and of its employees in operating the train and allowing the switch to remain open, were for the jury. Texas, etc., R. Co. *v.* Clippenger, 106 S. W. 155, 47 Tex. Civ. App. 510.

If a carrier in entering a switch runs its car with unusual force and speed and with a speed and force highly calculated to overturn or destroy the equilibrium of passengers standing upon the platform and aisle of the car, negligence as a question of fact is established. Ruch *v.* Aurora, etc., R. Co., 150 Ill. App. 329, petition stricken out for certiorari, Aurora, etc., R. Co. *v.* Ruch, 243 Ill. 474, 90 N. E. 924.

29. *California.*—Johnsen *v.* Oakland, etc., R. Co., 127 Cal. 608, 60 Pac. 170; Samuels *v.* California St. Cable R. Co., 124 Cal. 294, 56 Pac. 1115; Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

Georgia.—Macon, etc., R. Co. *v.* Barnes, 113 Ga. 212, 38 S. E. 756.

Illinois.—Elgin City R. Co. *v.* Wilson, 56 Ill. App. 364.

Indiana.—Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343, 58 Am. & Eng. R. Cas. 304.

Nebraska.—East Omaha St. R. Co. *v.* Godola, 50 Neb. 906, 70 N. W. 491.

New York.—Werle *v.* Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; Lucas *v.* Metropolitan St. R. Co., 56 App. Div. 405, 67 N. Y. S. 833; Francisco *v.* Troy, etc., R. Co., 88 Hun 464, 34 N. Y. S. 859, 68 N. Y. St. Rep. 792.

Virginia.—Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833.

Where a motorman of a street car fails to sufficiently slow down his car in rounding a curve, and a passenger standing on the platform is thrown out by the consequent jolting, the railroad company is liable. McMahon *v.* New Orleans R., etc., Co., 53 So. 857, 127 La. 544, 32 L. R. A., N. S., 346.

30. White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 18 Am. & Eng. R. Cas. 213, 50 Am. Rep. 154.

31. Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310.

32. Danville St. Car Co. *v.* Payne (Va.), 24 S. E. 904.

33. Bishop *v.* St. Paul, etc., R. Co., 48 Minn. 26, 50 N. W. 927. See, also, Wilkerson *v.* Corrigan Consol. St. R. Co., 26 Mo. App. 144. Compare Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

34. St. Louis, etc., R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169, 20 Am. & Eng. R. Cas., N. S., 571, 82 Am. St. Rep. 311; Brown *v.* New York, etc., R. Co., 34 N. Y. 404; Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. 234, 72 Am. Dec. 698.

35. Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252.

36. Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. 690, 41 Am. & Eng. R. Cas. 550, 17 Am. St. Rep. 430. See Gulf, etc., R. Co. *v.* Morgan, 26 Tex. Civ. App. 378, 64 S. W. 688.

37. Terry *v.* Jewett, 78 N. Y. 388, affirming 17 Hun (N. Y.) 395. See § II, D., 6, b, of note to Muhlhause *v.* Mongahela St. R. Co., 201 Pa. 237, 50 Atl. 940, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

38. Keating *v.* Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575, 2 Am. & Eng. R. Cas., N. S., 222.

rate of speed amounts to negligence is usually a question for the jury under all the circumstances of the case.[39] Thus, it has been held that it was a question for the jury whether it was negligence on the part of a street railway company to run a crowded electric car, carrying passengers on the rear platform, at the rate of fifteen or twenty miles an hour down a grade and around a sharp curve.[40] Obviously the speed at which a train is run at the time of an accident can not be considered upon the question of negligence unless it can be connected with the accident. Thus where an accident resulted from the breaking of the side-rods of an engine, and it was not shown that the rate of speed at which the train was running would have tended to contribute to the breaking, it was held that negligence could not be predicated upon the speed of the train.[41] A motorman on a street car must, if possible, descend a grade at such reasonable speed as to enable him to retain control of the car and use all means to stop or check it in case of danger of collision, and if he does so the company is not liable for injuries from collision, if the car was properly equipped for its control.[42] It has been held that an instruction which defined a safe rate of speed by its comparison with the velocity "practised before, with the tacit consent of the community, and without accident," assumed a false criterion, and was erroneous.[43]

Violation of Speed Laws.—It has been held that street railway company in running its trains at a rate of speed prohibited by law is guilty of negligence

39. Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252.

Thus, it has been held that the trial court properly refused defendant's request for an instruction to the effect that a railway company has the right to propel its train over its road at such rate of speed as it sees fit; that no rate of speed is negligence per se or of itself; and that if the jury should find that, at the place where the accident occurred, the railroad track was in good repair, the ties sound, the rails of suitable character and in safe condition, properly spiked and fastened to the ties with proper elevation, the running of the train at a high rate of speed would not be an act of negligence. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

In action by a passenger on a freight train to recover for injuries received by the derailment of the train, the defendant requested the following instruction: "A railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which, by the highest degree of skill and care, could not be discovered, it would not be negligence per se to run the train at a rate of speed of forty miles an hour." The court refused to give the instruction as asked, but modified it by adding "provided that, under all the circumstances of a given case, such rate of speed was reasonable and a safe one," and gave the instruction as modified. On appeal, in sustaining this action of the trial court, the reviewing court said: "Whether it would be correct as applied to a passenger train we need not stop to inquire, for we are here dealing with an injury received upon a freight train. * * * We think many circumstances might exist, even where the track was in good and safe condition and the cars properly equipped, which would render such a rate of speed negligence. The train might be of unusual size, the cars improperly loaded, or loaded beyond their capacity, or there might be at the particular place dangers of collisions with stock because the track was not fenced, or dangers of collisions with teams at crossings on account of the absence of warnings, or many other circumstances which would render it imprudent and unsafe to run a freight train at such a rate of speed." Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860, 52 Am. & Eng. R. Cas. 454.

40. Reber *v.* Pittsburg, etc., Tract. Co., 179 Pa. 339, 36 Atl. 245, 57 Am. St. Rep. 599.

41. Beery *v.* Chicago, etc., R. Co., 73 Wis. 197, 40 N. W. 687.

In Citizens' R. Co. *v.* Wade, 40 Tex. Civ. App. 561, 91 S. W. 645, affirmed in 101 Tex. 631, no op., it was held that the evidence was sufficient to show that the motorman operating the car immediately before and at the time of the accident, negligently ran the same at an excessive rate of speed, and that the appellee's injuries were the proximate result of such negligence on the part of appellant.

42. Speed consistent with control of vehicle.—Eaton *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 435, 75 Atl. 369.

43. Cleveland, etc., R. Co. *v.* Newell, 75 Ind. 542, 8 Am. & Eng. R. Cas. 377. Compare Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

per se.[44] Signals of the approach of a train will not exonerate the carrier from the charge of running its train in violation of a speed ordinance, since such violation would raise a presumption that the rate of speed was the cause of striking a person awaiting another train.[45] But it would seem that as municipal ordinances fixing the speed of street cars are for the benefit of persons crossing the track and not for passengers, a violation of such ordinances would not raise an imputation of negligence per se in favor of an injured passenger.[46] However, the running of a train or street car at a speed prohibited by law is at least evidence of negligence. It has even been held proper to refuse an instruction that a provision in the ordinances by which the franchise of an electric railway is granted limiting the speed of cars, can have no effect upon the question as to whether the speed at which cars are run outside of the municipal lines amounts to negligence.[47] It being provided by statute that every steam vessel shall, when in a fog, go at moderate speed, the theory that full speed is the safest speed can not justify a violation of the statutory rule.[48]

Speed Resulting from Defective Machinery.—A motorman is not negligent because of the excessive speed of his car resulting from defective machinery, preventing him from controlling it.[49]

Uniformity of Speed.—The motorman of an electric street car is not bound to maintain a uniform speed, even though the car is within a few hundred feet of a stopping place for which a signal has been given.[50]

§§ 2536-2539. Jerks and Jolts of Trains or Cars—§ 2536. Management of Train in General.—It is the duty of railroads to operate their passenger trains so as to avoid unnecessary jars and lurches that may injure passengers.[51] And it seems that sudden, violent, and unusual jerks or jars of a passenger train by which a passenger is injured may authorize the conclusion that the railroad company was negligent in the operation of such train, and render it liable to the passenger injured, in the absence of contributory negligence on the part of the latter.[52] It is not necessary for the train servants to know exactly how their negligence would operate to the injury of the passenger. It is sufficient if they do not exercise the care that very cautious and prudent men would exercise under the circumstances, and a passenger, not himself in fault, is thereby injured.[53] But passengers assume the risks naturally and reasonably

44. Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 41 Am. & Eng. R. Cas. 117, 18 Am. St. Rep. 541, 7 L. R. A. 819.

A carrier's breach of Civ. Code, § 501, limiting the speed of electric cars to eight miles an hour, alleged to have caused injury to a passenger, is negligence per se, which, in the absence of evidence that plaintiff's own act or conduct contributed proximately to the injury, is sufficient to sustain a verdict in his favor. James *v.* Oakland Tract. Co., 10 Cal. App. 785, 103 Pac. 1082.

45. Signals as exoneration.—Collison *v.* Illinois Cent. R. Co., 239 Ill. 532, 88 N. E. 251.

46. Municipal ordinance — Purpose.—Walker *v.* Metropolitan St. R. Co. (Tex. Civ. App.), 151 S. W. 1142.

47. Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

48. Clare *v.* Providence, etc., Steamship Co., 20 Fed. 535.

49. Defective machinery.—South Covington, etc., St. R. Co. *v.* Barr, 147 Ky. 549, 144 S. W. 755.

50. McGann *v.* Boston Elev. R. Co., 199 Mass. 446, 85 N. E. 570, 18 L. R. A., N. S., 506.

51. Management of train in general.—Flucks *v.* St. Louis, etc., R. Co. (Mo. App.), 122 S. W. 348.

52. Sudden and unusual jerks.—Ft. Worth, etc., R. Co. *v.* White (Tex. Civ. App.), 51 S. W. 855, affirmed in 93 Tex. 683, no op. See, also, St. Louis, etc., R. Co. *v.* Humphreys, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.; Missouri Pac. R. Co. *v.* Foreman (Tex. Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.

53. St. Louis, etc., R. Co. *v.* Humphreys, 25 Tex. Civ. App. 401, 62 S. W. 791, affirmed in 94 Tex. 710, no op.

Carriers must use a very high degree of care to avoid injuring passengers through sudden jerks, jars, or lurches of the cars. Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

incident to the operation of the mode of conveyance employed by the carrier.[54] Hence the carrier is not responsible for the consequences of concussions which are usual and ordinarily incident to the management of the train. This limitation of the carrier's responsibility, though applicable irrespective of the character of the train, is most frequently expressed in actions for injuries to passengers on freight trains; and it is said, in effect, that a passenger upon a freight train who is injured in consequence of a jolt, caused by coupling cars, which is usual and reasonably necessary in the management of freight trains, has no cause of action against the carrier.[55] There may exist such negligence on the part of the carrier in jerking and jolting passengers on a freight train as to be actionable in case of injury.[56] But the mere fact that the jolting of the train whereby a passenger on a mixed freight and passenger train is injured is usual does not necessarily relieve the company from liability, nor does the fact that it is unusual necessarily impose liability on the company.[57] And whether or not the jerks and jolts causing the injury complained of are unusual and unnecessary in the movement of the train at the time, should be left to the jury in light of the facts.[58] So is the question whether the sudden movement of a train con-

54. Houston, etc., R. Co. *v.* Harris (Tex. Civ. App.), 120 S. W. 550. See ante, "Liability for Negligence — Assumed Risk," §§ 2280-2288.

55. Runnels *v.* Houston, etc., R., Co., (Tex. Civ. App.), 50 S. W. 172.

One who voluntarily takes passage upon a freight train is entitled to look for only such security as that mode of conveyance is reasonably expected to render. In such a case if he receives an injury while on board the train by reason of a jolt or jar such as is usual and necessary in the operation of a train of that character, he can not recover if the exercise of extraordinary diligence on the part of the part of the company is established. Crine *v.* East Tennessee, etc., R. Co., 84 Ga. 651, 11 S. E. 555; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64; Central, R. Co. *v.* Smith, 76 Ga. 209, 2 Am. St. Rep. 31; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

A passenger who, while standing on a seat to remove her parcels from the receptacle provided for them is thrown therefrom and injured by the starting of the train, can not recover for her injuries where it appears that in the movement of the train there was no unusual jerk, that she did not call the attention of any servant of the defendant to the situation of her packages or request any assistance from them in removing them and that the servants were not aware of her position. East Tennessee, etc., R. Co. *v.* Green, 95 Ga. 736, 22 S. E. 658.

56. Passengers and freight.—Plaintiff, while a passenger in a caboose of defendant's train with the consent of the company, was thrown from his seat by a violent jerk of the train and injured. There was evidence that freight cars are jerked with much more violence than passenger coaches. The conductor remarked with an oath, at the time of the accident, that he did not see what the brakeman meant by putting on the brakes so hard. Evidence of other passengers corroborated plaintiff's version of the violence of the jerk. It was held, sufficient to show actionable negligence on the part of the company. Southern R. Co. *v.* Vandergriff, 108 Tenn. (24 Pickle) 14, 64 S. W. 481, 1 R. R. R. 104, 24 Am. & Eng. R. Cas., N. S., 104.

The management of a freight car loaded with household goods and live stock held negligent so as to make the carrier liable for injuries to the persons in the car. Richmond *v.* Missouri Pac. R. Co., 144 S. W. 168, 162 Mo. App. 422.

57. Basis of liability.—Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889.

So a petition which alleges that a passenger on a freight train while standing in the cab waiting for the train to reach the station was thrown and injured by the sudden and violent stoppage of the train, though he had prepared himself for the ordinary and usual jars incident to a freight train, and which states the injuries which he received and the pecuniary damages sustained by him, sets forth a cause of action. Garland *v.* Southern R. Co., 111 Ga. 852, 36 S. E. 595.

In an action by a passenger for injuries received by a sudden jerk of the train the following charge stated the law too strongly against the defendant company: "A carrier is liable for injuries to passengers in the cars, caused by a sudden jolting of the cars in starting or coming to a stop, and a railroad company is not relieved from liability by reason of its failure to equip its train intended for passengers with all the appliances which extraordinary diligence would require on trains adapted for transporting passengers." Macon, etc., R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460.

58. Question for jury.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Gardner *v.* Waycross, etc., R. Co., 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

stitutes negligence one for the jury.[59]

Injuries to Persons in Charge of Stock.—Where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock.[60] And where a shipper, who is loading and securing an animal in a car, is injured by the animal in consequence of the sudden and negligent movement of the car, the carrier is liable.[61] Where the conductor of a freight train on which a drover's horses are to be transported knows the drover intends to ride in the car with the horse and the drover is injured while the car is being switched, it is not material that the conductor has not actual notice that the drover is in the car when it is so roughly handled as to cause the injury.[62]

§ 2537. In Making Up Trains.—In coupling engines or other cars to cars in which there are passengers, care should be exercised to avoid concussion of such violence as to cause injury to the passengers; and the carrier must answer in damages to passengers who are injured in consequence of jars and jolts which are unusual and not ordinarily incident to the proper management of the train, whether it be a passenger, freight or mixed train, and which are caused by the carrier's negligence.[63] And it is said that trainmen, operating a freight train carrying passengers, must, after the caboose has been drawn up to a station to receive passengers, anticipate the presence of passengers in the caboose and ex-

59. Question whether sudden movement constituted negligence one for jury.—In an action by a passenger for personal injuries, whether under the evidence a sudden starting of the car, if there was any, constituted negligence, held for the jury. Northern Texas Tract. Co. *v.* Moberly (Tex. Civ. App.), 109 S. W. 483.

Where a passenger riding on the platform of a car was thrown off by a sudden and unusual jerk of the train, and there was evidence that the engineer was not negligent in applying the brakes, and that the roadbed and track were in a reasonably good condition, and that there was no defect in the train, the question whether the jerk was due to the carrier's negligence is for the jury. Ebert *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 49 S. W. 1105.

Plaintiff, a passenger upon defendant's train, was injured while passing from one coach to another as the train was, as he believed, about to stop for a station other than that if his destination, by being thrown from the platform of the coach by a sudden, jerking motion. There was no evidence that the jerk was an unusual one. Held, that the question of negligence was for the jury. Choate *v.* San Antonio, etc., R. Co., 36 S. W. 247, 37 S. W. 319, 90 Tex. 82.

60. Injury to shipper in charge of stock.—Receivers *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

Where a drover, in charge of stock on a train, is told by the conductor that he will have time to punch up the cattle that are down, and he is injured by the sudden starting of the train, the company is liable, although he might have seen that the train was about to start. Missouri, etc., R. Co. *v.* Jahn, 43 S. W. 575, 18 Tex. Civ. App. 74.

61. Houston, etc., R. Co. *v.* Wilkins (Tex. Civ. App.), 98 S. W. 202.

62. Szczepanski *v.* Chicago, etc., R. Co., 147 Wis. 180, 132 N. W. 989.

63. *Georgia.*—Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848, 52 Am. & Eng. R. Cas. 473; Richmond, etc., R. Co. *v.* Childress, 86 Ga. 85, 12 S. E. 301; Gardner *v* Waycross, etc., R. Co., 94 Ga. 538, 19 S. E. 757; Douglas, etc., R. Co. *v.* Swindle, 2 Ga. App. 550, 59 S. E. 600.

Iowa.—Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523, 34 Am. & Eng. R Cas. 545.

Michigan.—Stoody *v.* Detroit, etc., R. Co., 124 Mich. 420, 83 N. W. 26.

North Carolina.—Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

Texas.—Runnels *v.* Houston, etc., R. Co. (Tex. Civ. App.), 50 S. W. 172.

Washington.—Lane *v.* Spokane Falls, etc., R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821, 14 Am. & Eng. R. Cas., N. S,, 436.

Wisconsin.—Harden *v.* Chicago, etc., R. Co., 102 Wis. 213, 78 N. W. 424.

A passenger who was thrown and injured by the backing of an engine against a car as he was entering the train at a station is entitled to recover for injuries received thereby, especially where it appears that the engine was backed against the car with unnecessary violence. Richmond, etc., R. Co. *v.* Childress, 86 Ga. 85, 12 S. E. 301.

ercise care not to injure them.[64] In coupling cars onto a freight train, a railroad company owes passengers thereon the duty to use such degree of care, prudence, and foresight as would be used by very cautious, prudent, and competent persons under similar circumstances.[65] Thus in a case in which it appeared that a coupling had been made by what is known as a "flying switch," a finding by the jury that the carrier was negligent has been sustained.[66]

§ 2538. In Starting, Stopping, and Running Trains.—Similar principles are to be applied in determining the responsibilities of railway and street railway companies for the consequences of jars and jolts in starting, stopping, and running trains and cars. Care must be exercised in starting, stopping, and increasing or decreasing the speed of a train or car not to imperil the safety of passengers, and if improper management in these respects causes jerks and jolts which are unusual and not ordinarily incident to the operation of the train or car, the carrier is liable in damages for injuries resulting to passengers.[67]

64. Freight drawn up to station.—St. Louis, etc., R. Co. *v.* Gilbreath, 87 Ark. 572, 113 S. W. 200.

65. Degree of care.—Chicago, etc., R. Co. *v.* Buie, 73 S. W. 853, 31 Tex. Civ. App. 654.

Where plaintiff was injured by being in a freight car while defendant was switching the same, it was error to instruct that defendant was not liable for injuries done plaintiff by an unusual violent coupling if none of its servants knew or had notice of plaintiff's presence in the car, since this want of knowledge or notice may have been due to their negligence. Hardin *v.* Fort Worth, etc., R. Co. (Tex. Civ. App.), 100 S. W. 995.

66. White *v.* Fitchburg R. Co., 136 Mass. 321, 18 Am. & Eng. R. Cas. 140.

67. *Arkansas.*—St. Louis, etc., R. Co. *v.* Holmes, 96 Ark. 339, 131 S. W. 692.

California.—Spearman *v.* California St. R. Co., 57 Cal. 432, 8 Am. & Eng. R. Cas. 192.

Georgia.—Garland *v.* Southern R. Co., 111 Ga. 852, 36 S. E. 595.

Indiana.—Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334; Indiana, etc., R. Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004.

Massachusetts.—Work *v.* Boston Elev. R. Co., 207 Mass. 447, 93 N. E. 693.

Missouri.—Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483.

New Jersey.—Burr *v.* Pennsylvania R. Co., 64 N. J. L. J. 30, 44 Atl. 845, 16 Am. & Eng. R. Cas., N. S., 162; Scott *v.* Bergen County Tract. Co., 63 N. J. L. 407, 43 Atl. 1060, affirmed, without opinion, in 48 Atl. 1118.

Pennsylvania.—Sweeney *v.* Union Tract. Co., 199 Pa. 293, 49 Atl. 66.

Texas. — Ft. Worth, etc., R. Co. *v.* White (Tex. Civ. App.), 51 S. W. 855.

The starting up suddenly and without warning of an electric car, with force enough to throw a departing passenger, and then stopping it again after going two or three feet, all this after it had come to a complete stop at the regular stopping place, is not a usual and ordinary movement of the car, on which negligence can not be predicated. Elliott *v.* Metropolitan St. R. Co. (Mo. App.), 138 S. W. 663.

Where a passenger on a street car, though not at his destination, is passing from the platform down the steps with the knowledge of the motorman or conductor while the car is in motion, it then becomes their duty to exercise a high degree of care in the management of the car, so that the passenger will not be thrown therefrom by any extraordinary movement of the car. Ely *v.* Southwest Missouri R. Co., 125 S. W. 833, 141 Mo. App. 708.

When the complaint alleges that plaintiff passenger was injured by the negligence of defendant, which consisted in the violent jerking of defendant's cars, caused by the sudden stopping of the train, throwing plaintiff from the platform, it is sufficient to prove the jerking, and it is immaterial whether it was done by starting or stoppiing the train, as alleged. Houston, etc., R. Co. *v.* Rowell (Tex. Civ. App.), 45 S. W. 763, affirmed 46 S. W. 630, 92 Tex. 147.

A charge that no deduction of negligence is to be made from the mere fact that a moving train gave a violent jerk, is properly refused where the jerk was of an unusual nature. San Antonio, etc., R. Co. *v.* Choate, 22 Tex. Civ. App. 618, 619, 56 S. W. 214, affirmed in 93 Tex. 718, no op.

In an action in which plaintiff's evidence showed that while rightfully on the platform of a car a sudden and unusual jerk of the train, while it was running at a rate of speed prohibited by law, threw him from his balance, and that the railing gave way, and allowed him to fall to the ground, and be injured, it was held to be error to direct a verdict for defendant. Guance *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 33, 48 S. W. 524.

And it is said that even though a street car conductor is not bound to wait until a passenger is seated before giving a signal to start, the motorman is bound to use ordinary care in so starting the car as to avoid injury to the passenger,[68] and this question is usually one for the jury.[69] The responsibility of the carrier is the same whether passengers are being carried upon passenger or upon freight trains; a passenger upon a freight train may recover for injuries sustained in consequence of sudden and violent jerks and jolts which are unusual and unnecessary in the management of trains of that character when carrying passengers.[70] And a similar rule is to be applied when a passenger is carried upon an engine.[71] And it has been held that a railroad company is liable for injuries to a passenger caused by suddenly stopping a train to prevent injuring one on the track, if it negligently failed to use the proper diligence in preventing the person from being on the tracks,[72] or where a person or an animal is run down under such circumstances that it would endanger the lives of passengers to stop the train in such a manner.[73] But it is not every sudden jolt or jar of a train, either passenger or freight, or of a street car, causing injury to passengers, which will authorize a recovery against the carrier; to charge the carrier with liability, the movement of the train or car must be unusual and not an ordinary incident of the operation of conveyances of the particular kind, and must result from the carrier's negligence.[74] Thus, it has been said that a sudden, violent, and un-

68. Care to avoid injury to passenger.—Nolan *v.* Newton St. R. Co., 206 Mass. 384, 92 N. E. 505.

69. Question for jury.—Where plaintiff and her daughter testified that a street car started before plaintiff had a reasonable opportunity to be seated, and the jerk of the car threw her down and injured her, the case is for the jury. White *v.* Columbia, etc., Elect. R. Co., 64 Atl. 676, 215 Pa. 462.

70. *Illinois.*—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas., N. S., 163, 43 L. R. A. 210, 66 Am. St. Rep. 253; Chicago, etc., R. Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204, 58 Am. & Eng. R. Cas. 411, 19 L. R. A. 313.

North Carolina.—Wallace *v.* Western, etc., R. Co., 101 N. C. 454, 8 S. E. 166, 37 Am. & Eng. R. Cas. 159.

Tennessee.—Southern R. Co. *v.* Vandergriff, 108 Tenn. (24 Pickle) 14, 64 S. W. 481, 1 R. R. R. 104, 24 Am. & Eng. R. Cas., N. S., 104.

The same degree of care is required in the operation of a freight train at an intersection of tracks as that required of a passenger train, since in either case human life is at stake. Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185.

71. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510.

72. Dorr *v.* Lehigh Valley R. Co., 136 N. Y. S. 872, 152 App. Div. 342.

73. The duty of a railroad company to safely carry its passengers is paramount to all others, and is superior to the requirements of Shannon's Code, §§ 1574-1576, providing that, whenever any person or animal appears upon a track, every possible means must be employed to stop the train; but the statutory precautions, when human life is in danger, should be observed, unless they will result in serious injury to passengers, but a railroad company will not be liable for slight or even serious injuries to passengers, when they are jolted by the sudden stopping of the train to prevent killing a trespasser, or for injuring trespassers or trespassing animals, when they are run down under such circumstances that it would endanger the lives of passengers to stop the train. Southern R. Co. *v.* Brooks, 125 Tenn. 260, 143 S. W. 62.

74. *Michigan.*—Etson *v.* Fort Wayne, etc., R. Co., 110 Mich. 494, 68 N. W. 298; Bradley *v.* Fort Wayne, etc., R. Co., 94 Mich. 35, 53 N. W. 915; Brown *v.* Congress, etc., R. Co., 49 Mich. 153, 13 N. W. 494, 8 Am. & Eng. R. Cas. 383.

Missouri.—Wait *v.* Omaha, etc., R. Co., 165 Mo. 612, 65 S. W. 1028, 1 R. R. R. 98, 24 Am. & Eng. R. Cas., N. S., 98; Bartley *v.* Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840; Hite *v.* Metropolitan, etc., R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555.

New Jersey.—Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845, 16 Am. & Eng. R. Cas., N. S., 162.

Texas.—Choate *v.* San Antonio, etc., R. Co., 90 Tex. 82, 36 S. W. 247, 37 S. W. 319, affirming 35 S. W. 180; S. C., 22 Tex. Civ. App. 618, 56 S. W. 214; Ebert *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 49 S. W. 1105.

The mere fact that a car started with a jerk and that a passenger fell and was hurt does not make out a case of negligence in starting the car, but the proof must go further and show that the start was unusually sudden or violent. Boston

usual jerk of a car is not sufficient as a basis of recovery because of negligence, unless such jerk was unnecessary at the particular time and place.[75] It is a mat-

Elevated R. Co. *v.* Smith, 168 Fed. 628, 94 C. C. A. 84.

One taking passage on a freight train assumes the risk of injury from such jars and movements as are incident to its operation, if its parts are well constructed and in good repair, and it is properly operated on a safe track. Ray *v.* Chicago, etc., R. Co. (Mo. App.), 126 S. W. 543.

Sudden jolts and jars in starting and stopping a freight train, which can not be avoided in the exercise of due care, are assumed by a passenger as one of the perils of travel by that mode of conveyance. Hawk *v.* Chicago, etc., R. Co., 108 S. W. 1119, 130 Mo. App. 658.

Where there was nothing to indicate that the lurch of a car of an elevated train was anything more than was naturally to be expected in the operatiion of trains, negligence in the operation of the train was not shown. Crowley *v.* Boston Elevated R. Co., 90 N. E. 532, 204 Mass. 241.

The unexpected jarring of a passenger car, variously described as "quite violent," "terrible," "awful," "very severe," and "unexpected," as the train was passing over a cross-over switch used during the repair of one of the railroad company's bridges, which resulted in a passenger, who was standing near the open door of a car, being thrown from the car and injured, did not constitute negligence on the part of the carrier. Foley *v.* Boston, etc., Railway, 79 N. E. 765, 193 Mass. 332, 7 L. R. A., N. S., 1076.

Plaintiff boarded a street car, and, there being no empty seat, stood holding onto a seat. A passenger moved to make room for her, and at that moment the brake was put on to stop the car at a switch, and she feel forward and was injured. The car was running fast when the brake was put on, though, as plaintiff knew, it had but half a block to go before making the required stop. The stop made was sudden, but not extraordinarily so. Held, that actionable negligence was not shown. Ottinger *v.* Detroit United Railway, 166 Mich. 106, 131 N. W. 528, 34 L. R. A., N. S., 225, Ann. Cas. 1912 D, 578.

As said in Etson *v.* Fort Wayne, etc., R. Co., 110 Mich. 494, 68 N. W. 298, "It is a natural law that inertia is not instantly overcome, and that a start, or accelerated motion, tends to throw down one riding upon a car." These things the passenger expects in ordinary travel, but when the car is about to stop for passengers to alight, or after passengers have entered the car, then it is the duty of the company to exercise the highest possible degree of care and foresight consistent with the operation of the car to see that a sudden or violent jerk does not occur. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833.

Plaintiff, on entering an elevated railway car, lingered in the selection of a seat until after the train started, which it did with a jerk, throwing her to the floor. There was no evidence to show that the jerk was sufficient to disturb the equipoise of any other passenger, and that some degree of jerk was inevitable in starting the train by means of an engine. It was held that the evidence was insufficient to show negligence on the part of the railway company, and that its motion to dismiss the complaint should have been granted. De Soucey *v.* Manhattan R. Co., 15 N. Y. S. 108.

The fact that a passenger, who was riding on the platform of a street car and who had stepped off the better to enable passengers to get on, was injured by the sudden starting of the street car as he was in the act of stepping back on the platform was held not to show negligence in the management of the car; "that the car 'gave a sudden movement,'" it was said, "is entirely consistent with the supposition that, having been still, the horses were started in a careful and prudent manner." Hayes *v.* Forty-Second St., etc., R. Co., 97 N. Y. 259, 21 Am. Eng. R. Cas. 358.

On a freight train stopping at a water tank about 150 yards from the depot at an intermediate station, a passenger, thinking it had reached the depot, stepped out on the rear platform to talk to a friend seated on the car steps. Finding it had not reached the depot, the passenger, when the train again started, stepped back into the caboose on his way to his seat, and turned and was standing with his hands against the casings of the rear door, when the train suddenly stopped at the depot with such a jar that he was thrown and injured. Held, that no inference of negligence by the carrier could be drawn from such facts. St. Louis, etc., R. Co. *v.* Gosnell, 23 Okla. 588, 101 Pac. 1126, 22 L. R. A., N. S., 892.

Negligence as a matter of law not shown.—A street car passenger was injured while sitting down by the car giving a sudden jerk. The car started, and then stopped, and then started again. No one else in the car was thrown over. Held, as a matter of law, that the motorman was not negligent in the operation of the car. Craig *v.* Boston Elevated R. Co., 207 Mass. 548, 93 N. E. 575.

75. Jerk must be unnecessary.—Augusta R., etc., Co. *v.* Lyle, 60 S. E. 1075, 4 Ga. App. 113.

Where an engineer of a freight train containing cattle, the shippers of which are riding in the caboose, discovers

ter of common knowledge that from any quality of surface and necessary curves, sureties and guard rails, street cars in their ordinary and proper operation frequently and unavoidable lurch or jolt, and that such occurrence must be considered to be "fairly incidental to the mode of travel, and must be held to have been contemplated by the passenger."[76] And unless the jerk or jolt in starting a street car is so unreasonable or excessive as to show negligence, it is no ground of recovery for injuries to a passenger caused thereby.[77] However, it seems that with the modern appliances with which electric cars are generally equipped, it is not necessary in the proper handling of such cars to start them violently with a jerk.[78] These same rules have been applied to steam railroads.[79] It is not enough to use strong or violent language in describing the jolt.[80] To furnish ground for an action against the carrier, it must appear that the lurch or jolt was more than is ordinarily to be expected, and that it was due to a defect in the car or track, a negligent or dangerous rate of speed or some other cause for which the carrier can be held responsible.[81] Thus, it is said that it is the duty of the motorman of a street car, not to suddenly and violently start the car, though he was unaware that passengers were standing who might be injured thereby.[82] And if the person in charge of a vehicle sets his brake so hard and in such a manner as to cause the car violently to jerk and lurch and thereby and as a direct result thereof one passenger is thrown against another so that such other is pushed or thrust from the platform upon which he was standing,

while between stations a fire in one of the cars, his act in bringing the train to a stop as soon as is consistent with safety to the passengers, though it necessarily results in more or less severe jolting, can not be regarded such negligence as to charge the carrier with liability for injuries resulting to a passenger standing on the platform of the caboose, of whose presence in that place he had no knowledge. Chicago, etc., R. Co. *v.* James (Kan.), 100 Pac. 641.

76. Partelow *v.* Newton, etc., St. R. Co., 196 Mass. 24, 81 N. E. 894, citing Spooner *v.* Old Colony St. R. Co., 190 Mass. 132, 76 N. E. 660.

Jerks while running, and in stopping and starting to let off and take on passengers, jolts in going over frogs or switch points, and lurches in going around curves, are among the incidents in electric cars which every passenger must expect; and if a passenger is injured by such a jerk, jolt, or lurch, the company is not liable. Work *v.* Boston Elevated R. Co., 93 N. E. 693, 207 Mass. 447.

77. Jerk must be unreasonable and excessive.—Tupper *v.* Boston Elevated R. Co., 90 N. E. 422, 204 Mass. 151.

78. Modern appliances on electric cars.—Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

79. Nirk *v.* Jersey City, etc., St. R. Co., 68 Atl. 158, 75 N. J. L. 642, citing Foley *v.* Boston, etc., Railway, 193 Mass. 332, 79 N. E. 765, 7 L. R. A., N. S., 1076; Weinschenk *v.* New York, etc., R. Co., 190 Mass. 250, 76 N. E. 662.

80. Nirk *v.* Jersey City, etc., St. R. Co., 68 Atl. 158, 75 N. J. L. 642, citing Foley *v.* Boston, etc., Railway, 193 Mass. 332, 79 N. E. 765, 7 L. R. A., N. S., 1076; Weinschenk *v.* New York, etc., R. Co., 190 Mass. 250, 76 N. E. 662.

81. Nirk *v.* Jersey City, etc., St. R. Co., 68 Atl. 158, 75 N. J. L. 642, citing Sanderson *v.* Boston Elevated R. Co., 194 Mass. 337, 80 N. E. 515; Timms *v.* Old Colony St. R. Co., 183 Mass. 193, 66 N. E. 797; Byron *v.* Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015; McCauley *v.* Springfield St. R. Co., 169 Mass. 301, 47 N. E. 1006.

If plaintiff, a passenger on a street car, fell from the car as it was running in the usual manner, with only the ordinary motion or swaying of the car, no right of action arises. Jones *v.* Chicago City Ry. Co., 147 Ill. App. 640.

To maintain an action against a street railway company for injuries to a passenger thrown from a car while running over a curve in the track, it must appear that the lurch of the car which threw the passenger off was more than is ordinarily to be expected, and that it was due to a defect in the car or track, or a negligent rate of speed, or some other cause for which the company is responsible. Partelow *v.* Newton, etc., St. R. Co., 196 Mass. 24, 81 N. E. 894.

If the engineer of a train was not negligent in starting it with a jolt so that a passenger was thrown down and injured, the railroad could not be held liable for the injury resulting from such act; the train being properly equipped with air brakes, and the engineer being competent. Usury *v.* Watkins, 67 S. E. 926, 152 N. S. 760.

82. Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, rehearing denied 93 N. E. 1028.

negligence is established.[83] It is no evidence of negligence in a driver of a horse car that he whipped a pair of horses when about to start a car full of passengers, unless there appears to be something unusual in the manner of his whipping them.[84] A carrier can not be held liable for injuries received by a passenger in consequence of the sudden stopping of a vehicle in the effort to avoid a collision, which is not brought about by the negligence of the servant in charge of the car,[85] or where such other negligent act is not alleged as the moving cause of the injury.[86] A train upon which plaintiff and his son were passengers, having run by the station at which the son was to get off, was suddenly stopped by the conductor, and plaintiff who, being apprehensive of danger to his son under the circumstances and having gone to the door of the car, was injured by the door closing upon his hand, which he had rested upon the facing of the door for support when the train came to a stop. It did not appear that plaintiff's exposed position was known to the conductor. It was held that the injury resulted from a mere accident, and that defendant was not liable.[87] A street railway can not be charged with negligence merely because of the up and down motion of a car which is run at a moderate rate of speed, and when there is no defect in the rails or in the roadbed.[88] And a street car company can not be held liable to a passenger who, with articles in both hands and while standing with one foot on the lower step and one on the platform, is jolted from the car by its mere ordinary motion in crossing a railroad track.[89] In an action to recover for injuries received by a passenger in consequence of being thrown to the ground by the jolting or lurching motion of street car as it returned to the main track from a siding, it was held that the evidence, since it failed to show that the jolt was unusual in degree, and caused by some defect in the car or the track, or by an unusual or dangerous rate of speed, was not sufficient to justify a finding of negligence. "Such motions of street cars are of common and frequent occurrence, and are to be expected, to a greater or lesser degree, whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the street."[90]

Usage Test Does Not Apply.—The rule that the unbending test of negligence is the ordinary usage of business in which defendant was engaged does not apply to the question of negligence growing out of a sudden and violent jerking and starting of a street car, by which a passenger is injured.[91]

Where Employee Knows Position.—If street car operatives know that a passenger is standing, it is their duty to operate the car so as not to throw him off irrespective of the reasons causing him to arise.[92]

Passengers Getting on or Off.—As to the carrier's liability for injuries to

83. Jones *v.* Chicago City R. Co., 147 Ill. App. 640.

84. Rochat *v.* North Hudson R. Co., 49 N. J. L. 445, 9 Atl. 688, 30 Am. & Eng. R. Cas. 644, reversing 48 N. J. L. 401, 5 Atl. 276.

85. Cleveland City R. Co. *v.* Osborn, 66 O. St. 45, 63 N. E. 604.

86. Where the engineer of a passenger train failed to obey an order to stop at a station where plaintiff, a passenger on the train, alleged it was to meet and pass a train going in the opposite direction, whereupon the conductor suddenly and violently stopped the train by the application of the air from the rear, throwing plaintiff against one of the seats and injuring her, defendant, though chargeable with negligence in passing the station, in violation of the order, causing the necessity for the sudden and violent stoppage in order to prevent collision, was not negligent in making the stop for that purpose. Todd *v.* Missouri Pac. R. Co., 105 S. W. 671, 126 Mo. App. 684.

87. Hardwick *v.* Georgia R., etc., Co., 85 Ga. 507, 11 S. E. 832. But compare Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338.

88. Holland *v.* West End St. R. Co., 155 Mass. 387, 29 N. E. 622.

89. Barry *v.* Union Tract. Co., 194 Pa. 576, 45 Atl. 321.

90. Byron *v.* Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015.

91. Usage test inapplicable.—Nocita *v.* Omaha, etc., St. R. Co., 89 Neb. 209, 131 N. W. 214.

92. Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, rehearing denied, 93 N. E. 1028.

a passenger by unexpected movement of the train or street car while the passenger is getting on or off, see reference below.[93]

Passenger Moving Forward for Purpose of Alighting.—Undoubtedly if the carrier's agents knew, or by the exercise of the care required of a carrier of passengers could know, that a passenger is leaving his place in the car and going to the platform steps for the purpose of alighting, then the carrier owes to him the duty required of such carriers in receiving and discharging passengers from their cars.[94] And the vehicle in such cases should not be suddenly started forward at a greatly accelerated speed.[95] If a street car passenger is

93. See ante, "Allowing Reasonable Time to Get On or Off." §§ 2461-2471.

94. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833.

And see the following cases on this point Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833; Patterson *v.* Omaha, etc., Bridge Co., 90 Iowa 247, 57 N. W. 880; Etson *v.* Fort Wayne, etc., R. Co., 110 Mich. 494, 68 N. W. 298; Laverty *v.* Interurban St. R. Co., 49 Misc. Rep. 510, 98 N. Y. S. 846; Law *v.* New York City R. Co., 96 N. Y. S. 1019; Hayes *v.* Forty Second St., etc., R. Co., 97 N. Y. 259, 21 Am. & Eng. R. Cas. 358.

Where a street car conductor signaled for the car to stop as it approached a certain street, the operators of the car were bound to know that passengers might act on such signal and go to the platform to alight when the car stopped. Ranous *v.* Seattle Elect. Co., 47 Wash. 544, 92 Pac. 382.

95. If a street car passenger, while preparing to alight was thrown to the ground by the sudden starting of the car after it had been slowed for him to alight, he could recover for resulting injuries, providing he was not himself negligent. Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001.

Where a brakeman announced the station and opened the door of the car, and a passenger desiring to alight arose, and the train made an unusual sudden jerk, throwing the passenger off the platform, the carrier was liable. Illinois Cent. R. Co. *v.* Dallas, 150 S. W. 536, 150 Ky. 442.

In the case of Peck *v.* Springfield Tract. Co., 131 Mo. App. 134, 110 S. W. 659, the court said: "It seems to be clear that, although a passenger may be improperly engaged in the act of alighting from a street car before it has come to a stop, yet it is culpable negligence in the conductor knowing what the passenger was doing to cause the car to be suddenly started forward with such suddenness and force as to throw him to the ground."

Although a passenger on a street car is attempting to alight before the car has come to a stop, yet it is culpable negligence in the conductor, knowing what the passenger is doing, to cause the car to be suddenly started forward with such suddenness and force as to throw the passenger to the ground. Peck *v.* Springfield Tract. Co., 110 S. W. 659, 131 Mo. App. 134.

Where plaintiff, a passenger on defendant street railroad's car, was promised by the conductor that the car would stop at a usual stopping place, and, on the car's slowing down, stood on the step, holding to the handrail, but through a sudden jerk of the car resulting from acceleration of speed was thrown to the ground and injured, defendant was liable; plaintiff being entitled to rely on the conductor's invitation to be prepared to alight. Chalmers *v.* United R. Co. (Mo. App.), 131 S. W. 903.

Where a street car on the signal of a passenger slows down at a customary stopping place, and the passenger prepares to alight, it is negligence for those in charge of the car to suddenly start it just before making the stop. Musick *v.* United R. Co. (Mo. App.), 134 S. W. 31.

After a street car had slackened its speed to enable plaintiff to alight, she arose and went to the rear platform, where she stood holding the guard rail. The car was then moving very slowly, and without coming to a stop suddenly increased its speed, with a jerk to such a degree as to throw plaintiff into the street. Held, that the railway company was negligent, and liable for the injuries plaintiff sustained. Garner *v.* Forty-Second St., etc., R. Co., 107 N. Y. S. 134, 56 Misc. Rep. 500.

If a street car company knew or had reason to believe that plaintiff was about to alight, and with such knowledge permitted the car to be started so as to cause plaintiff while alighting to be thrown down and injured, the company is liable for the injury if plaintiff was free from fault contributing to the injury. El Paso Elect. R. Co. *v.* Boer (Tex. Civ. App.), 108 S. W. 199.

Where a passenger on a street car asked the conductor to stop at a certain street, and he said "all right," and, upon approaching the street, the conductor closed the gates on the platform side of the car, and left the gates open on the opposite side, and then gave the signal to stop, and plaintiff, with a grip in his hand stood at the open gate and when the car slowed down as though to stop alighted, but was thrown and injured by the car starting up at full speed, such

about to reach his destination, and as the car is stopping he proceeds to the platform or steps to alight when the car stops, then if those in charge of the car start it with a sudden jerk, and the passenger thereby sustains injuries, the carrier is liable.[96] This rule finds frequent application in cases where the passenger is moving forward by direction of the conductor.[97] It is a well-known fact that passengers do not wait for the car to be brought to a standstill before leaving their seats and going to the platform for the purpose of alighting. These facts the carrier must take knowledge of, and can not plead ignorance thereto. On the other hand, if the car should stop in the middle of a block or at a place where it is not expected a passenger would attempt to leave the car, then the degree of care in regard to the sudden starting of the car is not the same as where the car has stopped for the purpose of receiving passengers.[98] And it is held that a carrier is not bound to take notice that a passenger wishing to alight at a certain place will leave his seat and proceed to the platform as soon as the car slackens its speed.[99] The duty of a motorman in the management of a street car at a point where passengers are about to get on or off the car is different from the care required when he is operating his car at other places.[1] If a passenger is not at his destination, in order to hold the company in the management of the car to the same degree of diligence required in the former case, there should be some evidence that the conductor knew, or by the exercise of due care might have known, that the passenger was attempting to leave the car at the unusual place.[2] But if the passenger, although not at his destination, is passing from the platform down the steps with the knowledge of the motorman or conductor, then it is their duty to exercise a high degree of care in the management of the car, so that he will not be thrown therefrom by an extraordinary movement of the car.[3] And if the conductor has called a street and the car stops prematurely, but near said street, then the passenger would have the right to assume that the car has stopped for the purpose of letting him alight therefrom, and it would be the duty of defendant's conductor after having called the street to know whether the deceased is preparing to alight, and not start the car while he is in the act of so doing.[4] And it can not be said that the passenger is guilty of negligence in taking a position on the back platform un-

facts were sufficient to show that the motorman and conductor were negligent in starting the car again before plaintiff was safely off. Marbourg *v.* Seattle, etc., R. Co., 94 Pac. 649, 49 Wash. 51.

96. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833.

97. A railroad is liable to a passenger on a freight train for injuries caused by and without warning jerking the train after it had stopped at the station platform at the end of the journey, and he by direction of the conductor had risen in his seat to alight. St. Louis, etc., R. Co. *v.* Cox, 26 Okla. 331, 109 Pac. 511.

98. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833.

99. A carrier is not bound to take notice that a passenger on an electric car will leave her seat and move to the door as the car slackens its speed and approaches the place where she has announced that she wished to alight; so that acceleration of the speed of the car while, unknown to any servant of defendant, she is in such position, is not negligence, where it would not have been negligence had she not assumed such position. Schultz *v.* Michigan United R. Co., 123 N. W. 594, 158 Mich. 665, 27 L. R. A., N. S., 503.

1. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833.

2. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833; Murphy *v.* Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64; Cramer *v.* Springfield Tract. Co., 112 Mo. App. 350, 87 S. W. 24; Rapid Transit R. Co. *v.* Strong (Tex. Civ. App.), 108 S. W. 394; Cole *v.* Chesapeake, etc., R. Co. (Ky. App.), 113 S. W. 822; McGann *v.* Boston Elevated R. Co., 199 Mass. 446, 85 N. E. 570, 18 L. R. A., N. S., 506; Hufford *v.* Metropolitan St. R. Co., 130 Mo. App. 638, 109 S. W. 1062; Hurley *v.* Metropolitan St. R. Co., 120 Mo. App. 262, 96 S. W. 714.

3. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833; Murphy *v.* Metropolitan St. R. Co., 125 Mo. App. 269, 102 S. W. 64.

4. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833; Hufford *v.* Metropolitan St. R. Co., 130 Mo. App. 638, 109 S. W. 1062.

der such circumstances.[5] And the same rule would seem to apply where a passenger on a train has been induced to go upon the platform by a premature call of the station.[6]

Sudden Acceleration for Purpose of Passing Stopping Place.—While a street railway company is not liable to a passenger, who goes to the platform as the car is approaching his destination in order to alight when the car stops, for injuries resulting from ordinary jolting or jerking of the car, or acceleration of speed in order to reach the usual stopping place, it is liable for injuries sustained by such passenger by a sudden acceleration of speed for the purpose of proceeding along the line without stopping in response to the conductor's signal to stop for the passenger to alight,[7] or where he, having notified the conductor of his destination expects him to stop the car, which he fails to do.[8]

Person Attempting to Board Moving Train.—There is a line of cases in which it is held that the carrier is not liable for injuries arising from jerks or jolts, in such cases the holdings being based on the ground that the passengers were not personally invited to get on the car and that no employee knew at the time of the attempt to do so and of their dangerous position.[9] But where a passenger in getting on the train is complying with the directions of the conductor, he being invited to do so, this rule is not applicable and the carrier may be liable.[10]

§ 2539. In Recoupling Trains Which Break Apart.—When a train, as sometimes happens, breaks apart, care should be exercised to recouple it in such a manner as not to cause injury to the passengers by the concussion.[11]

§ 2540. Negligent Handling of Engine.—A carrier is liable in an action for injuries to a passenger caused by the discharge of hot cinders from a loco-

5. Ely *v.* Southwest Missouri R. Co., 141 Mo. App. 708, 125 S. W. 833; Wellmeyer *v.* St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925; Heinze *v.* Interurban R. Co., 139 Iowa 189, 117 N. W. 385, 21 L. R. A., N. S., 715.

6 Where plaintiff was thrown from the platform of a passenger train by a sudden jerk before the train had arrived at its station, he could prove that he was induced to go on the platform by a premature call of the station by the carrier's servants. Midland Valley R. Co. *v.* Hamilton, 104 S. W. 540, 84 Ark. 81.

7. Sudden acceleration and failure to stop.—Ranous *v.* Seattle Elect. Co., 47 Wash. 544, 92 Pac. 382.

A street car passenger, after having notified the conductor of her desire to stop at a certain street, arose from her seat and proceeded to the back platform to alight when the car stopped in response to the conductor's signal. As the car reached the center of the street, its speed was suddenly accelerated and the passenger was thrown and injured. The car did not stop at such street, and the acceleration of speed was not for the purpose of reaching the stopping place on the opposite side thereof. Held, that the carrier was not relieved from liability on the theory that it owed no duty to the passenger not to accelerate the speed before arriving at the stopping place in order to reach it. Ranous *v.* Seattle Elect. Co., 47 Wash. 544, 92 Pac. 382.

8. A conductor accepting the notice of a passenger to stop the car at a designated point for him must without further notice signal the motorman to stop the car at the designated point, and must see that the passenger is afforded an opportunity to alight in safety. Moeller *v.* United R. Co., 112 S. W. 714, 133 Mo. App. 68.

A passenger may rely on the promise of the conductor that he will let the passenger off at a designated place where passengers are regularly received and discharged, and he need not give notice by ringing the bell of his wish to leave the car at such place. Moeller *v.* United R. Co., 112 S. W. 714, 133 Mo. App. 68.

9. Winchell *v.* New York Cent., etc., R. Co., 105 N. Y. S. 425, 121 App. Div. 52, citing Jones *v.* New York, etc., R. Co., 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490.

Where a passenger alighted from a train while it was standing at a water tank and subsequently boarded it while it was moving, and just after he boarded it, and while he was standing on the steps of a car, he was thrown therefrom by a sudden jolt of the train, there was no negligence authorizing a recovery for his injuries. Winchell *v.* New York Cent., etc., R. Co., 105 N. Y. S. 425, 121 App. Div. 52.

10. Distler *v.* Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762.

11. Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

motive, negligently handled, such negligence being the proximate cause of the escape of the cinders.[12] And where a passenger is injured in consequence of a breaking of a coupling, thereby causing the train to part, the carrier is liable if the breaking of the coupling was the result of the negligent handling of the locomotive.[13]

§§ 2541-2550. Collisions—§ 2541. In General.—In the management of the carrier's vehicle, care must be exercised to avoid injury to passengers in consequence of collisions with other vehicles or with obstructions of any kind; if, by negligence in this respect, a passenger, who is himself in the exercise of due care, sustains injury, the carrier is liable. And the carrier can not escape liability for negligence which contributes to an accident of this kind by reason of the fact that the negligence of the other party to the collision contributed to the accident[14] or even by reason of the fact that the other party was more culpable than the carrier.[15] Where there is negligence on the part of the driver of a street car in attempting to cross a railroad track in front of an approaching train, the street railway company can not escape liability on the ground that the negligence of the railroad contributed to the accident.[16] Thus where the driver of a street car attempted to cross a railroad track in front of an approaching train, and an accident happened which would not have taken place but for such negligence, the fact that the negligence of the railroad company in lowering the gates contributed to the happening of the accident could not, it has been held, absolve the street railway from liability.[17] A street railway company is not relieved from responsibility for injury to an alighting passenger caused by colliding cars, though its employees were skillful, if on the particular occasion they did not use due care.[18] In an action against the proprietor of a stage coach to recover damages sustained by plaintiff, while a passenger, in consequence of a collision with another coach, it was held that, although the accident might have been caused immediately by the negligence of the driver of the other coach, defendant was nevertheless liable if his driver did not use all the means which a skillful and prudent driver could and would have used to prevent the injury done.[19] It is negligence for a motorman not to stop his car in time to avoid a collision, although stopping it might result in injury to the electrical apparatus

12. Negligent handling of engine.—Missouri, etc., R. Co. *v.* Mitchell (Tex. Civ. App.), 87 S. W. 841, affirmed in 101 Tex. 649, no op.

13. Negligent breaking coupling.—Galveston, etc., R. Co. *v.* Young, 45 Tex. Civ. App. 430, 100 S. W. 993; see Prescott, etc., R. Co. *v.* Morris, 92 Ark. 365, 123 S. W. 392.

14. *Iowa.*—Kellow *v.* Central, etc., R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858.

Massachusetts.—Eaton *v.* Boston, etc., R. Co. (Mass.), 11 Allen 500, 87 Am. Dec. 730.

Missouri.—Olsen *v.* Citizens' R. Co., 152 Mo. 426, 54 S. W. 470; Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

New York.—Barrett *v.* Third Ave. R. Co., 45 N. Y. 628, affirming 8 Abb. Prac., N. S., 205, 31 N. Y. Super. Ct. 568; Webster *v.* Hudson River R. Co., 38 N. Y. 260.

Washington.—Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

Wisconsin.—Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

Failure to take proper precaution.—A carrier is liable to a passenger injured in a collision at a point of danger, where it has failed to take all measures necessary to guard against accidents of such a character. Chicago City R. Co. *v.* Shreve, 128 Ill. App. 462, judgment affirmed in 80 N. E. 1049, 226 Ill. 530.

15. Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896, 28 Am. & Eng. R. Cas. 193, affirming 19 Ill. App. 145; Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6, 3 Am. & Eng. R. Cas., N. S., 259.

16. Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468.

17. Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468.

18. Circumstances at the time determine.—Basler *v.* Sacramento, etc., Elect. Co., 111 Pac. 530, 158 Cal. 514.

19. Peck *v.* Neil, 3 McLean 22, Fed. Fed. Cas. No. 10,892.

of the company.[20]

Duty to Keep Watchman.—A carrier is not compelled to have a flagman at a particular point, in the absence of statutory or municipal requirements; but, in determining negligence, the failure to provide a flagman may be considered.[21]

§ 2542. Collisions between Trains or Cars Operated on the Same Track.—When more than one train or car is operated upon the same track, the carrier must exercise care to make proper provision for their operation without danger of interference; when necessary for the safety of passengers, the carrier must adopt and conform to proper rules and regulations, some system of signals or other means of giving information as to the movement of the trains or cars, and take every precaution which will be suggested by an observance of the high degree of care which the law exacts.[22] Care must be exercised that the track

20. Anticipated injury to apparatus no excuse.—Cleary *v.* Bloomington, P. & J. Electric Ry. Co., 150 Ill. App. 418.

21. McCherry *v.* Snare, etc., Co., 114 N. Y. S. 674, 130 App. Div. 241, affirmed 92 N. E. 1090, 198 N. Y. 532.

22. Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896, 28 Am. & Eng. R. Cas. 193, affirming 19 Ill. App. 145.

Plaintiff was injured in a collision between two of defendant's electric cars, going in opposite directions on a single track. By the time schedule in force when the accident occurred, the car which collided with the one in which plaintiff was riding, should have turned off on a branch track two minutes before plaintiff's cars was due at the junction of the two tracks, but there was no provision made by signal flag, register or otherwise to inform those in charge of plaintiff's car, when the junction was reached, whether the other car had in fact passed that point. It was held that this was sufficient to establish the fact of defendant's negligence. Bailey *v.* Tacoma Tract. Co., 16 Wash. 48, 47 Pac. 241.

In an action to recover damages for the death of plaintiff's intestate it appeared that the accident happened as follows: The train upon which decedent was a passenger, by mistake of the engineer, moved out of the station at B., leaving the conductor behind and failing to take a sleeper which should have been attached to the train. The engineer's error was due to the fact that he mistook the nightwatchman's signal, directing him to move his train out of the way of an incoming train, for a signal by the conductor, notifying him to leave the station. The conductor and watchman were supplied with the same uniforms, the same kind of lanterns for signaling purposes, and the signal made by the watchman for the train to move out of the way was made in the same way that the conductor would have signaled for the train to proceed on its way to the next station. The engineer did not discover his mistake until he reached E., a station five or six miles from B., and at which there was no night operator. Upon discovering his mistake at E., the engineer, after waiting about one or two minutes, started to back his train to B. There was no light on the rear coach, and he was backing at the rate of fifteen or twenty miles an hour. When the train had gone back about two and one-half miles, it collided with an extra freight, which had been ordered to move out in the rear of the passenger train, and plaintiff's intestate received injuries from the effects of which he subsequently died. It was held that all these acts and omissions were properly considered by the jury on determining the question of defendant's negligence, and a judgment for plaintiff was affirmed. Kansas, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57, 58 Am. & Eng. R. Cas. 140.

In an action to recover for injuries received in a rear-end collision between two elevated trains during a severe snowstorm, it was contended that defendant was negligent in continuing to run the cars, and the question was left to the jury. The facts were these: The storm had apparently abated. The trains of the defendant were crowded with passengers seeking passage to the lower part of the city. It was the duty of the defendant, under its charter, to operate its trains, if practicable, for the convenience of the public. No accidents had, so far as appeared, occurred on that day prior to the accident in question, and the road had continued its efforts to move its trains. Up to about the time of the accident the street-surface roads, although they naturally would be more likely to be impeded by the snow than the elevated roads, had continued their traffic. The forecasts of the weather were favorable. It was held that the evidence did not justify the submission to the jury of the question as to whether defendant was chargeable with negligence in not having wholly suspended the operation of its trains. Connelly *v.* Manhattan R. Co., 142 N. Y. 377, 37 N. E. 462, reversing 68 Hun 456, 23 N. Y. S. 88.

Negligent performance of duties by servants.—Where, if the conductor of a street car caused his car to leave a pass-

at a station is clear when trains are coming in or going out. Thus, a railroad company has been held liable to a passenger for injuries received in a collision which was caused by the negligence of the foreman of a switch engine in failing to notify his engineer that an extra train would arrive at a certain time.[23] And a carrier is liable to a passenger for injuries from a collision while his train was backing out of a depot onto the main line, caused by the failure of the conductor to ascertain whether the track was clear.[24] Where a car in which there are passengers, and which is left standing on the main track near a station, is run into by another train, which is known to be approaching, in consequence of a failure to flag the train, or the reckl'essness of the servants in charge thereof in continuing the speed of the train until they see the danger, the railroad company is chargeable with gross negligence.[25] And it is gross negligence for a brakeman to allow a switch engine to be run against a train so violently as to endanger the safety of passengers when it was in his power to prevent such an occurrence.[26] Railroad trains and street cars should be run a safe distance apart.[27]

ing switch knowing that, under weather conditions, the steadiness of the current could not be relied on, in consequence of which the car was frequently unlighted, and if in the circumstances reasonable prudence and due care for the safety of his passengers required the car to remain at the switch, it was his duty to hold it there, and a failure to perform such duty amounted to actionable negligence if it caused a collision. Briggs *v.* Durham Tract. Co., 147 N. C. 389, 61 S. E. 373.

Running trains by telegraph.—As to the duties of a railroad company which undertakes to regulate the running of its trains by telegraph, see post, "Care Required as to Telegraph Lines, Operators, etc.," § 2552.

Failure to stop train for orders.—Mills' Ann. St., § 1508, giving an action against a railroad company for death resulting from negligence of an employee while managing a train, etc., makes a company liable for death of a passenger in a collision between trains, caused by an operator negligently failing to stop a train for the orders. Whittle *v.* Denver, etc., R. Co., 118 Pac. 971, 51 Colo. 382.

23. Eddy *v.* Letcher, 6 C. C. A. 276, 57 Fed. 115.

24. Out going train—Backing out of depot.—Chicago, etc., R. Co. *v.* Poore, 108 S. W. 504, 49 Tex. Civ. App. 191.

25. Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 15 Ky. L. Rep. 199, 22 S. W. 747.

26. Gross negligence.—East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

27. In an action to recover for injuries received in an accident caused by a freight train running into the rear end of a passenger train in which plaintiff was riding, the facts were as follows: The two trains had left the same station from four to eleven minutes apart; the passenger train consisted of engine, baggage car, and three coaches, and, heavily loaded, had a schedule of twenty-three miles an hour, and was to stop at nine stations. The freight train was a double header that made no stops, and ran at least twenty-five or thirty miles an hour, carrying forty-nine cars. The freight train instead of keeping ten minutes behind the passenger train was run at a speed which caused it to overtake and collide with the passenger train. It was held that the facts presented a clear case of gross negligence. Louisville, etc., R. Co. *v.* Richmond, 23 Ky. L. Rep. 2394, 67 S. W. 25.

While a freight train was ascending a steep grade, on a curved track, a number of cars, including the caboose in which plaintiff and others were seated, became detached and, running backwards, came in collision with the engine of a train which was following eight minutes behind. In affirming a judgment for plaintiff it was said that it could not be said, as a matter of law, upon the facts found, that the company was exercising due care in running trains up a steep grade, on a curved track, where one train could not be seen from the other, without a greater interval between them. Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

In an action to recover injuries sustained in consequences of a collision between two of defendant's street cars, plaintiff's evidence tended to show that he had reached the car, which had stopped for him at a crossing, and was endeavoring to enter it by single low step, in the rear and center of the car, between the rails; that while he was on the step and in the act of opening the door, which opened with difficulty, he heard the noise of another car approaching, which was unexpectedly brought into collision with the one he was entering, and he was thereby struck, knocked down, and severely hurt. Defendant's evidence also tended to show that the forward car had stopped and was waiting for plaintiff, and that he had passed to the rear thereof and stood between the rails, where he was seen by the driver of the rear car before the accident. The collision oc-

And common carriers of passengers, which run freight cars only a short distance after passenger cars, and up and down steep inclines, must exercise a very high degree of care to have their appliances in proper condition and properly managed, and on the first indication of wearing out or of defects of any character it is their duty to inspect them and see that they are in good condition.[28] When a street car, on which plaintiff was a passenger, came to a stop, plaintiff, who was standing on the rear platform, leaning his back against the dasher, was struck in the back by the pole of another car, which was following rapidly, and injured, a judgment for plaintiff was affirmed.[29] When, by the running of other trains on the same track, it is hazardous to run a train several hours out of time, it is negligence to do so.[30] And it may be negligence to run a train behind time, without notifying a train which is following of the fact.[31] When a train or car meets with an accident which causes delay, and there is danger of another train or car coming in collision, steps should be taken to flag the approaching train or car, to remove the passengers to a place of safety, or to do whatever may be demanded by the situation,[32] and the condition in each par-

curred in the evening, and during a storm, but the streets were sufficiently lighted, so that plaintiff and the car which he was about to board could be seen by the driver of the other car. It was held that a motion to dismiss the action was properly denied. Smith *v.* St. Paul, etc., R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

28. Freight trains following passenger trains.—Rouston *v.* Detroit United Railway, 115 N. W. 62, 151 Mich. 237.

29. Thirteenth, etc., R. Co. *v.* Boudrou, 92 Pa. 475, 2 Am. & Eng. R. Cas. 30, 37 Am. Rep. 707.

30. Chicago, etc., R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239.

31. Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660.

32. Kleszewski *v.* Chicago, etc., R. Co., 152 Ill. App. 48.

A train, upon which plaintiff was a passenger, was delayed by the failure of the air-brakes to work. It was overtaken by a construction train of defendant, which was known to those in charge of the passenger train to be but a few minutes behind. A collision occurred, and plaintiff was injured. It was held that the question of defendant's negligence in failing to exercise due care in flagging the approaching train was properly submitted to the jury. Louisville, etc., R. Co. *v.* Minogue, 90 Ky. 369, 12 Ky. L. Rep. 378, 14 S. W. 357, 29 Am. St. Rep. 278.

The train, upon which plaintiff's husband was a passenger, became stalled in snow, and could proceed no further. Thereupon a brakeman was sent back for aid. This brakeman, meeting an engine with a snow-plow attached, communicated the fact that the train was stalled, and undertook to inform the conductor and the engineer where the stalled train was located. He got on the engine, which proceeded toward the train, and, without stopping, ran into the rear end of the caboose attached to the stalled train, and injured deceased so that he died a short time thereafter. It was snowing at the time the accident took place, and the wind was blowing so as to render it difficult, it not impossible, for those on the engine behind the snow-plow to see the stalled train, towards which they were approaching, when the engine was in motion. There was no flagman placed on the track behind the stalled train to give warning to the approaching engine and snow-plow, nor was there any bell rung or whistle sounded on the stalled train. The brakeman who went back for the snow-plow said that he placed three torpedoes on the track behind the stalled train, but the evidence showed that these were entirely inadequate to give warning to the approaching engine, and were probably swept off by the snow-plow and not exploded, or, if exploded, the wind and drifting snow prevented those on the engine behind the snow-plow from hearing the explosion. It was held that, upon the evidence, the question of defendant's negligence was for the jury. Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

Where a train was stopped to avoid running into a wagon, which obstructed the track and could not be removed, and a flagman was sent back to stop another train which was almost due, but the passengers were not removed from the cars, it was held that whether the failure to notify the passengers to leave the cars amounted to negligence, was a question for the jury. Eaton *v.* Boston, etc., R. Co. (Mass.), 11 Allen 500, 87 Am. Dec. 730.

As the freight train, upon which plaintiff was a passenger, reached the top of a hill, several cars, including the caboose in which the conductor, two brakemen, and plaintiff, who was asleep, were riding, became detached, ran backward, and came to rest at the bottom of the grade, some two miles from the place where the train parted. Without awaking plaintiff, one of the brakemen went back about a

ticular case regulates the carrier's duty in this respect.[33] And it has been held that it is negligence not to control the colliding car so that it can be stopped before it strikes the car which is delayed and kept in a place of danger.[34] A collision of the several parts of a train which has broken apart may be predicated upon the want of proper inspection, the absence of the trainmen from their posts, and stopping an engine which is following the train in close proximity to one of the sections.[35] But it has been held that a railroad company is not liable for injury to a passenger in collision of trains, caused by failure of the air-brakes to work, if its employees, upon discovering that fact use such care and effort to prevent the collision, as persons of ordinary care and prudence would exercise.[36] And in an action in which it appeared that the collision of a street car with another car ahead of it, was caused by the fracture of the brakechain, so that the driver could not control the car, although he made every effort to do so, it was held that no negligence on the part of the driver was shown, notwithstanding that he may have used more force in applying the brake than was absolutely necessary, and that he did not shout to those in charge of the car ahead, it not being shown that shouting would have been of service in preventing the accident.[37]

Disobedience of Orders.—A collision which is caused by a disobedience of

quarter of a mile to flag another freight train, which was known to be in the rear, and which would approach on a long down grade. It appeared that this rear freight train had met with a like accident at the top of the hill, and the forward part of the train, composed of some sixteen of eighteen cars, had but one brakeman on it, so that the train was not under the control of the engineer. It was held that there could be no doubt that the evidence tended to show negligence on the part of the trainmen. "They knew there was a freight train just behind them; that it would reach them on a long down grade; that the freight trains were liable to, and frequently did, break in two, and then not be under the complete control of the engineer; and that there was frost on the rails. The evidence tends to show that the rear train could have been heard for two miles, and there was ample time to have given a danger signal further from the standing caboose. Under the circumstances, to flag the train at a distance of only a quarter of a mile from the caboose, and without warning to the boy, who knew nothing of what was going on, furnishes evidence of even gross negligence." Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

Where a passenger sued a carrier to recover for injuries resulting from a collision, it appearing that the passenger train had stopped forty minutes before the flagman was sent to warn a freight train, which the conductor on the passenger train knew was coming, and the freight train did not receive the flagman's signal in time to avoid the collision, defendant was guilty of negligence. Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608, see 93 Tex. 684, no op.

In an action to recover for injuries received in a rear-end collision between two of defendant's electric cars, caused by the trolley of the first car, upon which plaintiff was a passenger, coming off the wire, there was evidence to show the following facts: At the place of the accident, the tracks of the railroad ran through woods, on a down grade, with frequent curves. The curve just before the place of the accident was of such a kind that the motorman of the second car could see only about one hundred and fifty feet ahead. A light rain had fallen, and the tracks were very slippery, so that the brakes would not hold well. The second car left two minutes after the first. All this was known to the conductor of the first car, and yet, when the trolley came off, instead of letting his car go by its own momentum down the grade, he signalled to stop it, and when it stopped, after going some distance, instead of giving warning to the other car which was approaching from behind, he proceeded to get on the top of the car to adjust the trolley; and the collision occurred. It was held that there was evidence to warrant a finding of negligence on the part of the conductor. Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

33. Gulf, etc., R. Co. *v.* Brown, 40 S. W. 608, 16 Tex. Civ. App. 93.

34. Kleszewski *v.* Chicago, etc., R. Co., 152 Ill. App. 481.

35. Delaware, etc., R. Co. *v.* Ashley, 14 C. C. A. 368, 67 Fed. 209.

36. Failure of air-brakes to work.—Missouri, etc., R. Co. *v.* Edling, 18 Tex. Civ. App. 171, 45 S. W. 406, affirmed in 93 Tex. 734, no op.

37. Wynn *v.* Central Park, etc., R. Co., 133 N. Y. 575, 30 N. E. 721, 4 Silvernail Ct. App. 24, reversing 14 N. Y. S. 172.

orders is the result of negligence.[38] Thus, it is held that the negligence of a flagman in failing to notify a train, as ordered by the dispatcher, that another train is approaching it on the same track, is negligence of the carrier, as respects a passenger injured by collision of the trains.[39]

Condition of Track as Exoneration.—Common carriers are bound to anticipate changes in weather conditions common to the climate or country in which the service is carried on and to provide against them, and hence a carrier is not absolved from liability for injuries occurring through a car sliding and colliding with another car owing to the rails being wet from rain.[40]

§ 2543. Collisions of Trains with Cattle and Other Obstructions.—The care demanded of railroad companies in the management of their trains requires that they should maintain proper lookouts, moderate the speed of trains at especially dangerous points, and take every reasonable precaution to prevent injury to passengers in consequence of collisions with cattle and other obstructions on the track.[41] A railway company may not escape liability for injury to a passenger in a collision, caused by an obstruction on the track, merely because the obstruction was caused by an agency over which it had no control. In addition it must show that it could not, by the highest degree of care and diligence, consistent with the practical operation of the road, have discovered and removed the obstruction prior to the collision.[43] When a train comes to a curve in the road and it is impossible for the engineer to see both sides of the track, it may be negligence for the fireman to omit keeping a lookout on his side of the cab.[44] Where the engineer of defendant's train, upon which plaintiff was a passenger, ran the train in broad daylight at the rate of ten or fifteen miles an hour against obstructions, lying directly across the track, and visible to him at a distance of more than a quarter of a mile, his excuse for the act being that, although he saw the obstructions in season to stop, he thought he could knock them out of the way, it was held that defendant was guilty of negligence.[45]

§ 2544. Collisions of Street Cars with Road Vehicles.—The driver of a street car, whether operated by horses or machinery, should be vigilant in ob-

38. Disobedience of employee. — St. Louis, etc., R. Co. *v.* Sommerland, 140 Ill. App. 184.

39. Failure to notify train that another train following on same track.—Harris *v.* Puget Sound Elect. Railway, 100 Pac. 838, 52 Wash. 289.

40. Condition of track.—Indiana Union Tract. Co. *v.* Ohne, 45 Ind. App. 632, 89 N. E. 507.

Where a passenger is injured in a collision, the fact that the track is slippery and greasy, and in a muddy condition will not exonerate the carrier. Fuhry *v.* Chicago City R. Co., 144 Ill. App. 521, judgment affirmed in 88 N. E. 221.

41. *Arkansas.*—St. Louis, etc., R. Co. *v.* Stewart, 69 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311, 20 Am. & Eng. R. Cas., N. S., 571; Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

New York.—Brown *v.* New York Cent. R. Co., 34 N. Y. 404.

Texas.—Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; Trinity Valley R. Co. *v.* Stewart (Tex. Civ. App.), 62 S. W. 1085.

Washington.—See, also, Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

Where an animal strays on the track in the nighttime, and is not discovered by the trainmen until struck by the train, though it could have been seen 400 yards away, there is such negligence on the part of the company as to render it liable to a passenger injured in the resulting accident. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Where the derailment was caused by a collision with a calf on the track, which could have been seen 600 feet in advance of the train, and the railroad company failed to fence its track, having that right, it is sufficient to show negligence. Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

43. Duty to discover and remove obstructions.—Walters *v.* Seattle, etc., R. Co., 93 Pac. 419, 48 Wash. 233, 34 L. R. A., N. S., 788.

44. Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. 528, 597.

45. Willis *v.* Long Island R. Co., 34 N. Y. 670, affirming 32 Barb. 398.

serving his track, and prompt in the exercise of every reasonable precaution to guard against accident, and if negligence in this respect results in collision with other vehicles and injury to passengers the carrier will be liable,[46] notwithstanding the driver of the other vehicle is himself negligent.[47] Thus, it is said that it is the carrier's duty to surrender any paramount right it may have to use the street in order to protect its passengers.[48] The due performance of the duty to exercise a high degree of care for the safety of passengers in the management of the carrier's vehicle, does not permit of the person in charge of a street car taking it for granted that a vehicle on the track ahead will turn out in time to allow the car to pass; at least in the absence of some indication on the part of the driver of the vehicle of an intention to turn out, it is the duty of the person in charge of the car to bring it under control so that it can be stopped in time to avoid a collision in case the vehicle does not turn off the track.[49] Thus, where a wagon on the track ahead of an electric street car was seen by the motorman at a distance of at least four hundred feet, but he made no attempt

46. A street car company owes to its passengers the duty to exercise ordinary care to avoid collisions with vehicles. Hanley *v.* Brooklyn Heights R. Co., 111 N. Y. S. 575, 127 App. Div. 355.

A street railway is not liable for injury to a passenger from collision of a car and a runaway team, though the motorman was signaled to stop, there being to show that stopping would have prevented the accident, at least nothing to show that the motorman had reason to believe it was safer to stop than to attempt to run the car forward out of the way of the team. Ellis *v.* New York City R. Co., 111 N. Y. S. 544, 127 App. Div. 328.

It has been held that where the testimony, in an action to recover damages for injuries sustained by plaintiff while a passenger upon a street car, showed that the car was being driven with unusual speed, and was suddenly struck by the pole or shaft of a truck which penetrated through the front panel of the car with sufficient force to throw plaintiff from her seat and inflict serious bodily injuries, enough was proved to raise a question for the jury to render improper the granting of a judgment of nonsuit. Hill *v.* Ninth Ave. R. Co., 109 N. Y. 239, 16 N. E. 61, 34 Am. & Eng. R. Cas. 522.

Motorman held not negligent.—Where an ice wagon which collided with a street car at a crossing was not within the motorman's ordinary range of vision as he was looking ahead when he started to cross the track, but was approaching the crossing at a high rate of speed, and when the motorman saw that a collision was imminent, and stopped the car in the middle of the street, the wagon was only ten or twelve feet distant, and to have kept the car in motion would have increased the force of the collision, the mortorman was not negligent in failing to observe the wagon earlier or in stopping the car. South Covington, etc., St. R. Co. *v.* Crutcher (Ky. App.), 123 S. W. 268.

47. Hanley *v.* Brooklyn Heights R. Co., 111 N. Y. S. 575, 127 App. Div. 355.

Where a passenger on a street car, free from contributory negligence, was injured in a collision between the car and a wagon of a third person, the negligence of the third person was no defense where the street railway company's negligence, in whole or in part, caused the injury, owing to the passenger the highest care. Forsythe *v.* Los Angeles R. Co., 87 Pac. 24, 149 Cal. 569.

In an action for the death of a passenger on a street car in a collision between the car and a wagon of a third person, the evidence showed that the motorman saw the wagon approaching the track but did not check the speed of the car till he was so close to the wagon that a collision was inevitable. Held that, though it might have been the duty of the driver of the wagon to have stopped until the car had passed, the motorman did not exercise the highest care toward the passenger because he failed to stop the car, though knowing that a collision would ensue. Forsythe *v.* Los Angeles R. Co., 87 Pac. 24, 149 Cal. 569.

Though a street car's collision with a wagon resulted from the driver's negligence in crossing the track, the company was liable to a passenger for her injury, if the motorman's negligence in running the car at a very rapid and unusual rate of speed, or too close to a car in front, after the passing of which the driver drove his wagon across the track, prevented him from avoiding the collision. Strong *v.* Burlington Tract. Co., 66 Atl. 786, 80 Vt. 34, 12 L. R. A., N. S., 197.

48. It was so held in an action for injuries to a passenger from a collision with a wagon, where there was evidence of the motorman's negligence in looking ahead only on the track on which he was running, and in not seeing that the wagon with which it collided was in a dangerous position. Tucker *v.* Brooklyn Heights R. Co., 115 N. Y. S. 224, 131 App. Div. 97.

49. Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

to stop the car, although the driver of the wagon neither looked back, nor paid any attention to the ringing of the bell on the car, nor increased his rate of speed, nor attempted to leave the track until the car was so close that a collision could not be avoided by putting on the brakes or reversing the motion of the wheels of the car, it was held that there was negligence on the part of the motorman.[50] Certainly where the track ahead of a moving street car is obstructed by a vehicle which has broken down on or near the track, the person in charge of the car has no right to assume that the track will be cleared in time to allow the car to pass.[51] And the person in charge of a street car has no right, as to a passenger, to assume that one driving a wagon along the street in the same direction the car is going will not attempt to cross the track "midblock," but owes her the duty to exercise the most watchful care and the most active diligence for her safety against collision with the wagon.[52] But a street car company is not liable for injuries received by a passenger in a collision which is caused by a vehicle suddenly and unexpectedly turning upon the track so close to a car that the servants in charge thereof, though exerting every effort, can not prevent the accident.[53] Nor is the carrier liable where a collision between the car and an ice wagon was caused by a sudden movement of the horses attached to the wagon, if the car was not running at an excessive speed.[54] Where there

50. Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

51. Plaintiff was injured in a collision of the cable car, upon which he was a passenger, with a coal wagon which had broken down on or near the track. The testimony of several witnesses tended to show that the gripman could have seen the broken-down wagon on the track, or its close proximity thereto, from 50 to 120 feet; that the train was running at full speed, and that no effort was made to stop, until about the time of the collision. The driver of the wagon, who was supported by another witness, testified that he ran fifty or sixty feet along the track to warn the gripman, who paid no attention to the warning. The gripman, however denied that he either saw or heard the witness when he was trying to attract his attention. The track was at the time what a witness called a "clean wet track." The evidence, as is usual in such circumstances, was conflicting with respect to the distance in which the train could have been stopped under the then existing conditions; some saying within forty feet, others in not less than 75 to 100 feet. There was evidence tending to show that at the time of the accident the gripman was not looking down the track in front of the cars, but was talking to a passenger, and looking in a different direction. It was held that there was ample evidence to justify a finding of negligence on the part of defendant. Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

52. Strong *v.* Burlington Tract. Co., 80 Vt. 34, 66 Atl. 786, 12 L. R. A., N. S., 197.

53. Cleveland City R. Co. *v.* Osborn, 66 O. St. 45, 63 N. E. 604.

Plaintiff was a passenger upon one of defendant's street cars, which was proceeding on its way along one of defendant's two tracks. Coming in the opposite direction, and using the rails of the other track, was a wagon heavily loaded with lumber. When this wagon was abreast of the car, its driver suddenly turned off the track, and in doing so the ends of the lumber, which projected from the afterpart of the wagon, were jerked or thrust, by the sudden movement of turning, through one of the car windows, striking the plaintiff a blow in the back. The driver, happening to look at his mirror, saw the wagon in the act of turning, and, fearing some injury from the load, at once set the brake and stopped the car. It was held that a nonsuit should have been granted. Alexander *v.* Rochester, etc., R. Co., 128 N. Y. 13, 27 N. E. 950, 48 Am. & Eng. R. Cas. 46, reversing 59 Hun 616, 12 N. Y. S. 685.

Plaintiff got upon the side or footboard of an open street car at about the middle of the car while the car was moving slowly. Before he could enter the car, about six or eight feet from where he got on, he was struck by the hub of the hind wheel of a truck in the street. There was no evidence that the driver or the conductor of the car saw the truck or perceived the danger, and it did not even appear that the conductor was in a position to see the truck. The probabilities were that plaintiff, when he got on the car, was nearer, and had a better opportunity to see, the truck than the conductor. On the ground that plaintiff's injuries resulted from an accident or his own negligence, a judgment for plaintiff was reversed. Moylan *v.* Second Ave. R. Co., 128 N. Y. 583, 27 N. E. 977, 3 Silvernail Ct. App. 461, reversing 59 Hun 619, 13 N. Y. S. 494.

54. Sudden movement of vehicle.—Niland *v.* Boston Elevated R. Co., 208 Mass. 476, 94 N. E. 703.

is a safe clearance between a street car and a vehicle going in the same direction, if those in charge of the car attempt to pass, the carrier can not be held liable for a collision which results when the road vehicle is for some unaccountable reason thrown against the car.[55] But the carrier's liability in such cases is usually for the jury.[56] Thus where the driver of a dummy engine observed a balky team ahead and near the track, instead of stopping the car until the horses and wagon could be moved to a safe distance, attempted to pass at full speed, it was held that the question of his negligence was properly submitted to the jury.[57] The fact that the driver of a buggy knows that a car is behind him and coming in the same direction does not, as a matter of law, relieve the operator of the car of the duty to sound the gong.[58]

Stationary Vehicle.—Where a road vehicle is stationary, the carrier is liable if its car collide with such vehicle.[59]

Crossing Intersecting Streets.—A street railway company must exercise care in running its cars across a street not to come in collision with vehicles which may be travelling along the intersecting street[60] and it has no superior right to cross first, which it can set up as a defense to an action by a passenger for negligence in this respect.[61] But where a street car, in making a sharp turn, and while the driver was stopping for passengers, was run into by a herdic coming in the opposite direction and down the street into which the car was turning, it was held that no negligence on the part of the street railway company was shown.[62] And in another case the court, after stating the facts, said: "The motorman had no reasonable ground to believe that the chauffeur would not stop or turn his machine before the collision became evitable, and, a fortiori, that he would recklessly drive his machine against the side of the car. No negligence is therefore imputable to him for not having seen the approach

55. Rosenblum *v.* Brooklyn Heights R. Co., 137 N. Y. S. 1087, 153 App. Div. 304.

56. In an action by plaintiff to recover for injuries received in a collision of the cable car in which he was a passenger with an ice wagon, although the testimony was conflicting, there was evidence to show the following facts. The car was going up a grade at a speed of about eight miles an hour. An ice wagon was coming in the opposite direction at a speed, according to some testimony, of about five miles an hour, but according to other testimony at a much greater speed. About twenty feet from the car the horses drawing the ice wagon, being frightened by an object at the side of the street, swerved upon the track but did not slow up. The driver released the cable and applied the brake, which stopped the car within six feet. It was held that it was not error to refuse to direct a verdict for defendant. Mt. Adams, etc., R. Co. *v.* Lowery, 20 C. C. A. 596, 74 Fed. 463.

57. Cook *v.* Clay St. Hill. R. Co., 60 Cal. 604, 6 Am. & Eng. R. Cas. 175.

58. West Chicago St. R. Co. *v.* Tuerk, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

59. Stationary vehicle.—Niland *v.* Boston Elevated R. Co., 208 Mass. 476, 94 N. E. 703.

60. Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

In an action to recover for injuries received by plaintiff in consequence of the collision of defendant's street car, in which she was a passenger, with a hook and ladder wagon, there was evidence to show the following facts: As the street car was approaching a cross-street, the wagon was rapidly coming toward the street car track on the cross-street. The evidence for plaintiff was that the gong on the wagon was being constantly sounded, and tended to show that it could be heard several blocks. There was also much evidence that the people in the street and on the sidewalks screamed at the motorman, and made gestures and signs to stop, whereas defendant's evidence tended to prove that the gong was not sounded, and the people did not halloo to the motorman. He did not stop, and when he saw the wagon approaching he undertook to avoid a collision by running his car at full speed across the intersection of the streets ahead of the approaching wagon, but the two vehicles collided and plaintiff was injured. A judgment for plaintiff was affirmed. Olsen *v.* Citizens' R. Co., 152 Mo. 426, 54 S. W. 470.

61. O'Neill *v.* Dry-Dock, etc., R. Co., 129 N. Y. 125, 29 N. E. 84, 52 Am. & Eng. R. Cas. 573, 26 Am. St. Rep. 512, affirming 59 N. Y. Super. Ct. 123, 15 N. Y. S. 84.

62. Hamilton *v.* West-End St. R. Co., 163 Mass. 199, 39 N. E. 1010.

of the automobile in time to avoid the injury."[63]

Duty on Part of All Employees in Charge.—It is the duty of the conductor of a street car, as well as the motorman, to use all means at hand to prevent collision with a fire department hose wagon at a street crossing, if he could have discovered the approach of the wagon by the exercise of ordinary care in time to have averted a collision; the railroad company being responsible alike under such circumstances for the negligence of either conductor or motorman.[64]

§ 2545. Collisions with Structures Alongside the Track.—In approaching an obstacle in the street, of which the person in charge of a street car has knowledge, and which is so close to the track that it may graze or come in such close proximity to the car as to be dangerous to passengers thereon, care must be exercised in the management of the car to avoid exposing the passengers to the danger.[65] Where a street car approached a point where the wall of a building was being torn down, a person in the middle of the street called to the motorman to stop, but he paid no attention to the warning, and, when the car came alongside a pile of bricks near the track, the wall fell, forcing some of the bricks into the car, whereby plaintiff was injured. It was held that the facts would justify a finding of negligence on the part of defendant.[66]

§ 2546. Collisions with Cars on Parallel or Side Tracks.—Where the vehicles of a carrier of passengers are intended to pass each other on parallel tracks, the tracks must be laid a sufficient distance apart so as not to injure the passengers by the vehicles colliding with each in passing; and if they are not placed a safe distance apart the carrier, through its operators, must exercise a high degree of care,[67] not to injure such passengers by a collision between its vehicles at such places.[68] Plaintiff was injured, while riding on the foot-board

63. The court used the above language in a case in which it appeared that, plaintiff, a street car passenger, was injured in a collision between the car and an automobile approaching each other at a street crossing at right angles. There was conflicting evidence as to how far down the avenue the motorman could have seen the lamps of the automobile, but he actually discovered the automobile when it was only 80 or 100 feet from him, and moving at a rapid rate. The chauffeur did not see the car until he was within 12 feet of it, when he turned suddenly to the right to avoid a collision, but in the effort to do so his machine skidded and struck the car on the side, and plaintiff was injured either by some jerk of the car incident to the handling of it by the motorman, or by some jolt occasioned by the impact of the automobile, and was thrown or fell against the corner of a seat near which she was standing, and received the injury complained of. Minneapolis St. R. Co. *v.* Odegaard, 104 C. C. A. 496, 182 Fed. 56.

64. Duty on part of all employee's in charge.—Williamson *v.* St. Louis, etc., R. Co., 133 Mo. App. 375, 113 S. W. 239.

65. Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739, 58 Am. & Eng. R. Cas. 395. See ante, "Tracks and Appliances," §§ 2389-2402.

In an action to recover for injuries received by plaintiff, while a passenger on defendant's street car, in consequence of the contact of plaintiff's hand, which was partly outside the open car window, with upright planks placed by the city near the track in constructing a sewer across the street and under the track, it was held that the question of defendant's negligence in the management of the car when approaching the obstruction was for the jury. Dahlberg *v.* Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545, 18 Am. & Eng. R. Cas. 202, 50 Am. Rep. 585.

66. Buehler *v.* Union Tract. Co., 200 Pa. 177, 49 Atl. 788, 1 R. R. R. 92, 24 Am. & Eng. R. Cas., N. S., 92.

67. See ante, "Degree of Care Required," §§ 2290-2342.

68. The motorman of a street car, on which plaintiff was riding, drove the same onto an embankment, where the tracks were so close that cars could not pass. At this time, a car having the right of way approached from the opposite direction, a third of a mile away, and could have been seen by the motorman, but he failed to stop his car. The motorman of the car having the right of way saw the danger, and stopped his car before it reached the danger point, but a collision occurred, the only excuse given for which being the slippery state of the rails. Held, that the motorman of the car on which plaintiff was riding was guilty of gross negligence. Goodloe *v.* Metropolitan St. R. Co., 96 S. W. 482, 120 Mo. App. 194.

of an open street car which was so crowded with passengers that he was unable to obtain a seat. The car was passing along a switch or side track, provided for the purpose of enabling cars going in opposite directions to pass. It was run so close to the intersection of the side track with the main track that a closed car, passing along the main track, ran so near the open one upon which plaintiff was riding that he was squeezed against one of the posts which supported the roof of the open car and was injured. It was held that defendant was chargeable with gross negligence.[69]

Improperly Loaded Cars Passing Each Other.—A railroad company has been held liable to a passenger who was injured by being struck by a timber projecting from a negligently loaded freight train which was passing on a parallel track,[70] and in such a case there may be such want of care and prudence on the part of the carrier's agents as to amount to gross negligence.[71]

Collision from Negligently Running into Open Switch.—Where it is the custom on a trolley line for each motorman to move the switch to suit his purpose and leave it for the next to do the same, the motorman on the second car is negligent in approaching the switch at such a rate of speed that he is not able to stop after he takes the switch until he collided with the car in which a passenger is injured.[72]

§§ 2447-2549. Collisions between Vehicles of Different Carriers—§ 2547. In General.—Railroad and street railway companies whose trains or cars run upon intersecting roads must exercise due care to guard against collisions at the crossings. And each carrier owes this duty, not only to its own passengers, but also to the passengers of the intersecting roads. But the liability of the respective carriers to their own passengers and to those of the intersecting line are governed by different rules. As to its own passengers, each carrier owes the exercise of the high degree of care generally imposed upon passenger carrier, but as to the passengers of the other carrier, each carrier owes the exercise of only ordinary care.[73] Since, therefore, the liability of a railroad or

69. Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754. In delivering the opinion of the court Simpson, C., said: "It must be held that when a street-railway company undertake to carry large numbers of people, vastly in excess of the seating capacity of their cars, and permit passengers to ride on the platforms and foot-boards, without objection, and collect fare from them, and stop their cars when in such a crowded condition that no seats are attainable, and permit persons to get upon them to be carried from place to place, and when the cars are in such a crowded condition, with passengers riding on the foot-boards, place them so near the intersection of a switch with the main track that they can not pass without injury to passengers, the company is guilty of gross negligence."

70. Curtis *v.* Central Railway, 6 McLean 401, Fed. Cas. No. 3,501.

71. Gross negligence.—Where the person in charge of a freight train loaded with lumber observes that there is a projection from one of the cars which makes it dangerous for the train to attempt to pass a passenger train standing on a parallel track, and a passenger is injured by reason of this projection, there is such want of care and prudence on the part of the conductor of the freight train as to amount to gross negligence, and the fact that the officers in charge of the passenger train did not observe the projection or, if they did, permitted the passenger to be endangered thereby, strengthens the case of negligence against the carrier. Western, etc., Railroad *v.* Drysdale, 51 Ga. 644.

72. Negligently running into open switch.—Stevens *v.* New Jersey, etc., R. Co., 74 N. J. L. 237, 65 Atl. 874.

73. Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531, 14 L. R. A. 613; Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988, reversing 16 App. Div. 152, 44 N. Y. S. 742; Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, 4 Silvernail Ct. App. 232, modifying 15 N. Y. S. 557, 59 N. Y. Super. Ct. 536; Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. 91, 2 Am. & Eng. R. Cas. 172. See, also, Central Passenger R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309. But see Kansas, etc., R. Co. *v.* Stoner, 1 C. C. A. 231, 49 Fed. 209; New York, etc., R. Co. *v.* Cooper, 85 Va. 939, 9 S. E. 321, 37 Am. & Eng. R. Cas. 33.

street railway company to the passengers of an intersecting line who are injured in consequence of a collision, is not governed by the law of passenger carriers, this discussion will be confined to the duties and liabilities of the carrier to its own passengers.

Degree of Care.—The rule that a person driving across a street railway track need only exercise ordinary care has no application in an action by a passenger in an omnibus against its owner for injuries received in a collision at such crossing, as the carrier should exercise a greater degree of vigilance.[74]

§ 2548. Collisions between Trains of Intersecting Railroads.—As a general rule, in approaching the track of an intersecting railroad, a proper lookout should be kept, and the train should be under proper control, so that, if need arises, it can be promptly stopped.[75] It is the duty of trainmen to watch for passing trains on an intersecting track notwithstanding an interlocking device, and, if they see danger, to use every precaution to protect their passengers by stopping their own trains, if possible, in time to avoid a collision, whatever the cause of the approach of the train on the intersecting track.[76] As aids in securing the exercise of proper care by trainmen, railroad companies frequently place, at proper points, stopping posts upon their roads, and adopt rules requiring all trains to be stopped at the posts before proceeding. It is the duty of the trainmen to conform to the rule, and a failure to do so may amount to negligence.[77] In some of the states, it has been provided by statute that trains shall come to a stop at crossings.[78] It has been held that, when there is a statute to this effect, it is gross negligence to stop a train seven hundred feet from a crossing, and then start on to cross the intersecting track without again stopping.[79] In a case in which the evidence tended to show that the speed of a train when approaching a crossing was from thirty to forty miles the hour, and that the train was not brought to a full stop near the crossing, as required by statute, nor its speed even slackened, so that it could not be stopped after the train on the intersecting line came in view in time to avoid a collision, it was held that the jury was authorized to find defendant guilty of wanton negligence.[80] The duty of a railroad company to its passengers is not fully discharged merely by bringing a train to a stop at the proper distance from a crossing, and doing whatever may be necessary to entitle the train to precedence of a train on the intersecting road. The object of stopping is to enable the engineer to take observation of the track he is about to cross, as to whether there are any trains thereon with which there is danger of collision, and to have his train under proper control if there is danger of collision. And he must be vigilant in taking advantage of the opportunities for observation, and the safe management of his train, which are thus afforded him. Although his train may be entitled to cross ahead of a train on the intersecting track, he is not always warranted in assuming that the right will be respected. Although a train is entitled to the right

74. Degree of care.—Parmelee Co. *v.* Wheelock, 79 N. E. 652, 224 Ill. 194, affirming judgment, 127 Ill. App. 500.

75. Kansas, etc., R. Co. *v.* Stoner, 2 C. C. A. 437, 51 Fed. 649, 52 Am. & Eng. R. Cas. 462.

76. Duty of trainmen.—Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185.

77. See Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

Where a train was not halted at the stop post, but at a point some three hundred and fifty to four hundred feet from the crossing, where, owing to trees and other obstructions, it was difficult, if not impossible, to see any distance along the track of the intersecting railroad, and then proceeded at so great a rate of speed that, when it was found that the crossing was occupied, the train could not be stopped in time to avoid a collision, it was held that a finding of negligence was justified. Kansas, etc., R. Co. *v.* Stoner, 2 C. C. A. 437, 51 Fed. 649, 52 Am. & Eng. R. Cas. 462.

78. For example, see Ind. Rev. Stat. 1881, § 2172.

79. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480.

80. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

of way, and the proper signal has been given to indicate the intention of going ahead, it may be negligence for engineer to assume that a train on the intersecting track, which he sees approaching the crossing, will come to a stop, and to go ahead without waiting to see that it actually does come to a stop.[81] In a recent case, it was said: "While the train which reaches its stopping-board first has the right of way, and, in the absence of anything indicating the contrary, the engineer would have a right to act on the presumption that a train on the other track, which has not yet reached its stopping-board, would stop at the proper place, and concede the right of way, yet he would have no right to proceed, and attempt to make the crossing, so as to endanger his train, if he saw that his right of way was being disregarded by those in charge of the approaching train. If he saw that it had passed, its stopping-board without stopping, or that it was approaching it at such a rate of speed as to indicate that it would not or could not stop, and hence that there would be danger of collision in case he proceeded, he would not be justified in doing so, if he could stop his train before reaching the crossing."[82] It may be negligence on the part of a railroad company to stop a train, for the more convenient handling of baggage, or taking on and setting down passengers, with some of the cars standing on a crossing, and to keep it standing there while the transfer of baggage, etc., is being made, without making provisions against the dangers to which the position of the train exposes the passengers.[83]

Effect of Contract between Carriers.—A contract between carriers as to the stopping of trains at an intersection of their roads can not affect the care which a carrier owes to its passengers to avoid collisions.[84]

§ 2549. Collisions between Street Cars and Trains or Cars of Intersecting Railroad or Street Railway Companies.—A street car, when approaching the track of an intersecting railroad or street railway, should be kept under control, and, before attempting to cross over, every reasonable precaution should be exercised to ascertain whether it is safe to do so,[85] especially where the

81. Chicago, etc., R. Co. *v.* Ransom, 56 Kan. 559, 44 Pac. 6, 3 Am. & Eng. R. Cas., N. S., 259.

82. Pratt *v.* Chicago, etc., R. Co., 38 Minn. 455, 38 N. W. 356.

83. Kellow *v.* Central, etc., R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858; Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

84. Effect of contract between carriers.—Washington, etc., R. Co. *v.* Trimyer, 67 S. E. 531, 110 Va. 856.

85. West Chicago St. R. Co. *v.* Martin, 154 Ill. 523, 39 N. E. 140, affirming 47 Ill. App. 610; Augustus *v.* Chicago, etc., R. Co., 153 Mo. App. 572, 134 S. W. 22.

A conductor who fails to proceed sufficiently in advance of his car so as to warn his driver in time of the approach of a train upon the railroad crossing tracks about to be crossed is guilty of negligence, notwithstanding the crossing gates may have been open, likewise is the driver of such car guilty of negligence who follows such conductor with his car so closely as not to be able to avail of a warning if given. Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627. Judgment affirmed in 80 N. E. 716, 226 Ill. 178.

Where the driver of a street car, on which plaintiff was a passenger, approached and ran his car across an intersecting street railway track at a speed of about six miles an hour, colliding with a car of the intersecting company, which could have been seen at a distance of seventy-five feet from the crossing when the car on which plaintiff was riding was sixty-five feet therefrom, a judgment for plaintiff was affirmed. Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, 4 Silvernail Ct. App. 232, modifying 15 N. Y. S. 556, 59 N. Y. Super. Ct. 536.

While an electric street car was standing at a railroad crossing, the gates of which had been lowered, while a train was passing, an inspector was engaged in examining the controller, which had been reported to be out of order. Suddenly, and without any apparent reason, and without any cause which the defendant company seemed to be able to explain, the power or the electrical current suddenly came on, and there was a flash of light, and the car gave a plunge or bound forward, breaking off the end of the safety gate, and coming in contact with

carrier to which it belongs has no superior right of way at the crossing.[86] The motorman operating a street car on a railroad crossing must know of the presence of trains there, and he can not attempt to cross so long as a train is in striking distance,[87] and the failure of a brakeman on the train to warn the motorman of the approach of the train does not affect the charge of negligence of the motorman.[88] And the employee in charge of a street railway is not excused from the exercise of the highest degree of care in crossing a railroad track, merely because a flagman is stationed at that crossing.[89] It is undoubtedly negligence for a street car driver to attempt to cross a track when the least interruption or delay in crossing will probably lead to an accident. Thus where a driver of a street car attempted to cross a track in front of an approaching train, but was prevented from doing so by the gates being negligently lowered so as to come down between the car and the horses, it was held that the jury were justified in finding that he was chargeable with negligence, even though the street car would have been able to cross the track safely but for the lowering of the gates.[90] If the driver of a street car sees danger of collision in time to avoid it, it is his duty to do so without running any risk. A driver of a street car who, in approaching an intersecting railroad track, takes no pains to inform himself of the approach of a train, and who, when he discovers that a train is approaching, attempts to cross in front of it, when, by the exercise of slightest

the rear car upon the railroad train. Plaintiff, a passenger, was injured in attempting to escape from the car. In sustaining a judgment for plaintiff, it was said that there was no doubt as to the negligence of defendant company. Willis *v.* Second Ave. Tract. Co., 189 Pa. 430, 42 Atl. 1.

86. If the cars of one traction company have no superior right of way to the cars of another company at crossings, the jury in an action for injuries caused by a collision is justified in finding that such company having no superior right of way was guilty of negligence if its motorman when approaching such crossing saw the car of the other company at a stop and proceeded for ward without keeping his car in such control as to enable him to avoid a collision with such other car if it should suddenly be started. Schmidt *v.* Chicago City R. Co., 144 Ill. App. 512, judgment affirmed in 88 N. E. 275.

87. Augustus *v.* Chicago, etc., R. Co., 153 Mo. App. 572, 134 S. W. 22.

88. Augustus *v.* Chicago, etc., R. Co., 153 Mo. App. 572, 134 S. W. 22.

89. Presence of flagman.—Parker *v.* Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174.

90. The court said: "Upon the evidence, the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam-car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates, and the consequent obstruction to his passage across the steam-car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligence to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain; and such fact would support a finding of negligence in attempting to cross before the steam-car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz. the lowering of the gates, was not anticipated. The important fact was that there existed a possibility of delay, and therefore of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes. The horses might stumble. The harness might give way. The car might jump the track. A hundred things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of; and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates." Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101, affirming 5 App. D. C. 468.

care, he may avoid all danger, is guilty of negligence.[91] It is also the duty of a motorman operating a car across a railroad crossing to hold his car in a place of safety until the crossing is clear, and until it is beyond the action of a train resulting either from its recoil or the reversing of its engine, and for him to run his car in immediately behind a slowly receding string of cars that may stop and return is negligence, notwithstanding any signal from the flagman.[92]

Duty to Stop, Look and Listen.—In the jurisdictions where it is held that it is negligence, as a matter of law, for any person, although bound to exercise only ordinary care, to fail to stop, look and listen, before entering upon a railroad track, the higher degree of care which the law imposes upon a carrier for the safety of passengers, undoubtedly makes it the duty of the driver of a street car to stop, look and listen before crossing an intersecting railroad track, and charges the carrier with negligence, as a matter of law, if he fails to do so.[93] But it is extremely doubtful whether this rule will ever be generally adopted; in the jurisdiction where the "stop, look and listen rule" has been rejected it is probably not the law that it is negligence, per se, in every case, to fail to stop, look and listen. But, of course, if the circumstances are such that a due regard for the safety of passengers demands that these precautions be taken, it should be done. Indeed, it may be necessary to do more. It may, under some circumstances, as where the view of the railroad is obstructed, be the duty of the driver of a street car, when about to cross a railroad track, to stop his car and go ahead on foot to the crossing to see if a train is approaching.[94] The management of street cars at railroad crossings has, in some of the states, been regulated by statutes and municipal ordinances, some of which merely require street cars to be stopped at crossings, while others also require some employee of the carrier to go ahead of the car to ascertain whether

91. Central Passenger R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309.

A street car company is negligent, where it runs its car across the track of a steam railroad directly in front of an approaching train, without any effort to stop the car, and without any attempt by the conductor to ascertain whether the way is clear. Indianapolis Tract., etc., Co. *v.* Romans, 40 Ind. App. 184, 79 N. E. 1068.

In an action to recover for injuries received by plaintiff, while a passenger in defendant's street car, in consequence of the car colliding at a crossing with a car of the intersecting road, it was shown that the night was dark and foggy, and it was not easy to discern objects in the distance, and the evidence of at least one of the plaintiff's witnesses was, that the defendant's car, before reaching the point of intersection of the two roads, was proceeding on a down grade at an unusual speed; that just before the point of intersection was reached the speed was greatly increased, and that at the time of collision the horses were on a full run; that the car approaching on the other road was seen by a person standing by the side of the driver when one hundred and fifty to two hundred feet distant, and that the defendant's car could have been broken up and stopped while passing over less than thirty feet. In sustaining a judgment for plaintiff, the court said: "This evidence, unexplained and uncontradicted, with the other circumstances in the case, raised a fair question to be submitted to the jury upon the alleged careless and reckless management of the defendant's car by the persons in charge, and whether the collision was attributable in whole or in part to those acts, and whether by a proper performance of their duty the collision might not have been avoided." Barrett *v.* Third Ave. R. Co., 45 N. Y. 628, affirming 8 Abb. Prac., N. S., 205, 31 N. Y. Super. Ct. 568.

92. Duty to wait for clear crossing.—Augustus *v.* Chicago, etc., R. Co., 153 Mo. App. 572, 134 S. W. 22.

93. Downey *v.* Philadelphia, etc., R. Co., 161 Pa. 588, 29 Atl. 126, 58 Am. & Eng. R. Cas. 594.

94. Central Passenger R. Co. *v.* Kuhn, 86 Ky. 578, 6 S. W. 441, 32 Am. & Eng. R. Cas. 16, 9 Am. St. Rep. 309.

A street car approached to within a few feet of a train which was standing on a crossing, and stopped. The train was opened, and the street car moved forward until it came to another track of the railway, when it was struck by a passing engine. It did not appear that the conductor, in going ahead of the car to look for trains, went farther than across the track which had been vacated by the train. It was held that the question of the conductor's negligence in not going farther was properly submitted to the jury. Douglas *v.* Sioux City St. R. Co., 91 Iowa 94, 58 N. W. 1070.

it is safe to cross. In one case it seems to have been held that the violation, by the driver of a street car, of a city ordinance which required him to bring his car to a "complete stop before going on to or passing over" a railroad crossing, amounted to negligence.[95] No doubt the violation of an ordinance of this kind is competent evidence of negligence, and even, in some jurisdictions, prima facie evidence of negligence. But as to whether the violation of an ordinance constitutes negligence per se, or as a matter of law, or is conclusive evidence of negligence, there is considerable conflict of opinion. In one of the states in which the violation of a statute or ordinance is not regarded as negligence per se, it seems to have been held that the mere fact that a street car was not stopped at a crossing, as required by an ordinance, was not alone sufficient to establish the carrier's negligence.[96] Elsewhere, however, it has been held that, when it is provided by statute that, before a street car shall cross a railroad track, the car shall be stopped within a prescribed distance of the track, and some employee of the street railway company shall go ahead of the car and see if the way is clear and free from danger,[97] it is negligence, at least in the absence of extraordinary circumstances, to cause a car to cross a railroad track without stopping the car and going ahead as required by the statute.[98] And it was doubted whether a violation of the statute can be justified or excused by any circumstances whatever.[99] It was further held that the facts that a crossing is provided with gates and a watchman is stationed thereat, are not alone sufficient to justify or excuse a failure to discharge the statutory duties.[1] Nor is the failure to discharge the duties excused by the fact that there is only one person in charge of the car.[2]

Effect of Information by Railroad Employee.—In crossing a railroad track the driver of a street car, who is not informed that there is danger in going ahead, and has no opportunity to see for himself what the situation may be, ordinarily has the right to act upon the directions of the railroad company's watchman, who is stationed at the crossing to direct the movement of vehicles.[3] But in a case in which it appeared that the driver of defendant's street car, though beckoned by the flagman of the railroad company "to come on," yet at the same time was expressly warned of the danger by a passerby, but, in spite of this warning and of an unobstructed view of the railroad track, which he might have had, ventured to cross, it was held that he was guilty of gross negligence.[4] And where a statute requires that, before a street car shall cross over a railroad track, the car shall be stopped within a prescribed distance of the track, and some employee of street railway company shall go ahead of the car, and ascertain if the way is clear and free from danger, the fact that the watchman stationed at a crossing, which is provided with gates, does not let down the gates, or invites those who are in charge of the car to go ahead, does not excuse them from discharging the statutory duties, and if a failure to discharge those duties proximately results in injury to a passenger, the carrier is liable.[5]

As between two carriers whose tracks cross, each has the right to presume that the other will comply with the law in approaching the crossing. But the high degree of care which the law exacts of passenger carriers does not

95. Selma St., etc., R. Co. *v.* Owen, 31 So. 598, 132 Ala. 420.

96. Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. 91, 2 Am. & Eng. R. Cas. 172.

97. Act of May 4, 1891, 88 Ohio Laws 582.

98. Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72.

99. Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72.

1. Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72.

2. Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72.

3. Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531, 14 L. R. A. 613.

4. Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. 91, 2 Am. & Eng. R. Cas. 172.

5. Cincinnati, etc., R. Co. *v.* Murray, 53 O. St. 570, 42 N. E. 596, 30 L. R. A. 508, affirming 9 O. C. C. 291, 3 O. Dec. 72.

permit of this presumption being indulged in at the risk of injury to passengers.[6] Thus, the negligent conduct of a steam railway in crossing a street railway upon a public highway could not, it has been held, excuse the negligence of the street railway in running its car in the way of the approaching engine.[7]

Condition of Track No Excuse.—A street car company is bound to so run its cars at railroad crossings as to avoid collisions, and to take notice of the condition of its tracks and exercise care accordingly, and its failure to stop a car at a crossing at which the gate was down but ran through the gate and came into collision with an engine, is not excused by the fact that its tracks were wet, having recently been sprinkled.[8]

§ 2550. Collision between Automobile Carrier and Other Vehicle.—The driver of an automobile carrying passengers is bound to use at least reasonable and ordinary care for the protection of his passengers in driving the machine through the streets of a city, and is required to anticipate that he may meet persons or vehicles and to keep a proper lookout for them, and use care to have his machine under such control as to enable him to avoid collisions.[9]

§ 2551. Upsetting Coach.—If a coach is upset in consequence of having too much baggage on the top, the proprietors are liable for any injury sustained by a passenger by such upsetting of the coach. And the prima facie presumption is, that it occurred by the negligence of the driver; and the burden of proof is on the proprietors of the coach, to show that there was no negligence whatsoever.[10]

§ 2552. Care Required as to Telegraph Lines, Operators, etc.—A carrier undertaking to manage and conduct its business of running trains by telegraph, is bound to have proper and fit telegraph stations and operators to properly conduct and control the movements of the trains, and whether or not it has performed this duty is for the jury.[11]

§§ 2553-2566. Duty to Protect Passengers—§ 2553. General Rule.—Out of the general obligation of carrier of passengers to exercise care to transport their passengers safely, there arises the duty to exercise care to protect them against the negligence or willful acts of their fellow passengers, or of strangers. The general rule which determines the carrier's liability in this respect may be stated as follows: A carrier is responsible for an injury suffered by a passenger through the negligence or willful act of another passenger, or of a stranger, if the carrier has knowledge of the wrong or trespass at the time of its commission, or if he knows, or with proper care can know, that the safety of the passenger is in peril, or that injury to him is reasonably to be apprehended, and can, by the exercise of due care, prevent or mitigate the injury.[12]

6. Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307.

7. Hammond, etc., R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47. In this case the railroad engine's bell and whistle were not sounded as required by law.

The failure of a railroad company to exercise reasonable care to avoid a collision with a street car at a crossing did not excuse the street railway company's failure to exercise the highest degree of care to protect its passengers. Wills *v.* Atchison, etc., R. Co., 113 S. W. 713, 133 Mo. App. 625.

8. **Condition of track.**—Chicago City R. Co. *v.* Casey, 139 Ill. App. 655, judgment affirmed in 86 N. E. 606.

9. **Automobile carrier.**—Johnson *v.* Coey, 237 Ill. 88, 86 N. E. 678, 21 L. R. A., N. S., 81.

10. **Upsetting coach.**—Farish & Co. *v.* Reigle, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

11. **Care required as to telegraph lines, operators and stations.**—Grand Trunk R. Co. *v.* Walker, 154 U. S. 653, 25 L. Ed. 977, 1 S. Ct. 1189.

12. **Acts of strangers or other passengers.**—New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109, 52 Am. & Eng. R. Cas. 447; Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237; Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538; Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind.

This is not upon the ground that the carrier is liable to answer for the acts of all those whom it undertakes to carry, but it is because of the failure in its duty to afford reasonable and proper protection to other passengers.[13] It is the duty of a common carrier to use the utmost care and diligence to protect a passenger against assault and ill-treatment from whatever source arising which might reasonably be anticipated or naturally expected to occur.[14] A common carrier is responsible for the proper treatment of its passengers, and is bound to pro-

App. 190, 59 N. E. 394; Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 487, 57 Am. St. Rep. 786, 32 L. R. A. 792; Holly *v.* Atlanta Railroad, 61 Ga. 215, 34 Am. Rep. 97; Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104; Gulf, etc., R. Co. *v.* Adams, 3 Texas App. Civ. Cas., § 422. See, also, Texas, etc., R. Co. *v.* Storey, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op.

Carriers of passengers are bound to protect their passengers against injury and unlawful assault by third persons riding upon the same conveyance, so far as due care can secure that result. In such case their liability depends upon the question of negligence, whether they improperly admitted the passenger inflicting the injury upon the train. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109, 52 Am. & Eng. R. Cas. 447.

The carrier's duty to protect its passengers against insult and abuse is not limited to acts of its servants but it must also guard him against such acts on the part of strangers. Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474, 31 S. E. 107, 12 Am. & Eng. R. Cas., N. S., 14; Holly *v.* Atlanta Railroad, 61 Ga. 215, 34 Am. Rep. 97.

One who has been accepted as a passenger is lawfully on the train, and the carrier must provide reasonable facilities for his transportation in safety, and protect him from violence and annoyance from fellow passengers or strangers. Hull *v.* Boston, etc., Railroad, 96 N. E. 58, 210 Mass. 159, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147.

A railroad company owes a duty to its passengers to take proper precautions to protect them from the acts of other persons in the railroad depot which is under its control; and if it permits an express company to unload its freight and merchandise in the passenger depot, where passengers are expected to pass, and where it is necessary for them to pass in making their exit from the cars in the depot, then it is incumbent on it to provide such rules and regulations as to reasonably and properly protect them. Ferrell *v.* C. H. & D. R. Co., 12 Wkly. L. Bull. 234, 9 O. Dec. Reprint 361.

13. Upon what principle based.—Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

14. Degree of care.—Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538; Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Texas, etc., R. Co. *v.* Storey, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op.; Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58, affirmed in 93 Tex. 730, no op.

A carrier must carry passengers safely and conserve by every reasonable means their safety throughout the journey and protect them from insult or personal violence from other passengers or strangers, and such duty continues until the passenger is safely landed at his destination. Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142.

A common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow passenger that it is to carry him safely. Farrier *v.* Colorado Springs, etc., R. Co., 95 Pac. 294, 42 Colo. 331.

Common carrier is bound to exercise the utmost diligence in guarding its passengers against assaults by other passengers which might reasonably be anticipated. Jansen *v.* Minneapolis, etc., R. Co., 112 Minn. 496, 128 N. W. 826.

A carrier is bound to use the highest degree of care to protect a passenger from attacks of fellow passengers. Spires *v.* Atlantic, etc., R. Co., 92 S. C. 564, 75 S. E. 950.

A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by third persons. Missouri, etc., R. Co. *v.* Gerren, 57 Tex. Civ. App. 34, 121 S. W. 905.

The conductor of a railroad train is bound to use a high degree of care to protect a passenger from an assault upon him by another passenger. Norfolk, etc., R. Co. *v.* Birchfield, 54 S. E. 879, 105 Va. 809.

Protection from jostling.—A female passenger with a small child in her arms was entitled to protection from being jostled, etc., by other passengers, commensurate with the impairment of her ability to care for herself from carrying the child. Glennen *v.* Boston Elevated R. Co., 207 Mass. 497, 93 N. E. 700, 33 L. R. A., N. S., 470.

As to the liability of carriers for assaults, offensive conduct, or language of employees, see post, "Assaults upon Passengers," §§ 2570-2592.

tect them from insults as well as from physical injury, even where the offending party is a fellow passenger.[15] The contract of carriage of female passengers implies that the carrier will protect them against obscenity, immodest conduct or wanton approach.[16] Language which, by common consent among civilized people, is vulgar, and offensive to ordinary female sensibilities, or disrespectful to the female presence, if indulged in by others in the presence or hearing of a female passenger, is actionable.[17] The law exacts from a carrier the prompt employment of all means at his command to protect the passenger. In an emergency, the duty of the carrier is said to be the same as that which he is under in other respects, to do all that can be done to insure the safety of the passengers,[18] and to this end police powers are conferred on conductors and when it is necessary it is incumbent upon them to make a reasonable use of the authority so conferred.[19] And where a railroad is permitted to swear in officers to take charge of excursion trains, it is bound to have officers enough to preserve order.[20]

15. Offensive language and insults.—*Georgia.*—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899.

Kentucky.—Illinois Cent. R. Co. *v.* Gunterman (Ky. App.), 122 S. W. 514.

Louisiana.—May *v.* Shreveport Tract. Co., 127 La. 420, 53 So. 671, 32 L. R. A., N. S., 206.

Texas.—St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 10 Am. St. Rep. 766, 1 L. R. A. 667.

"A contract to carry passengers is not one of mere toleration and duty to transport the passengers on its cars, but it also includes the obligation on the part of the carrier to guarantee to its passengers respectful and courteous treatment, and to protect them from violence and insult from strangers." Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

It is the duty of carriers of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence, ill-treatment and insults of other passengers. Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; International, etc., R. Co. *v.* Kentle, 2 Texas App. Civ. Cas., § 303; Texas, etc., R. Co. *v.* Johnson, 2 Texas App. Civ. Cas., § 185.

The duty of protection which the carrier owes to a passenger includes responsibility for the unlawful acts of fellow passengers, when, by the exercise of the highest degree of care, those acts might have been foreseen and prevented. Texas, etc., R. Co. *v.* Johnson, 2 Texas App. Civ. Cas., § 185.

16. Contract to carry female passenger.—Birmingham R., etc., Co. *v.* Parker, 161 Ala. 248, 50 So. 55.

It is the duty of a carrier's employees to prevent, as far as possible, use by passengers of profane and insulting language in the presence of a female passenger. Southern R. Co. *v.* Lee, 167 Ala. 268, 52 So. 648.

17. Vulgar and offensive language.—Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

Mutual suffering, etc.—A passenger may recover for mental suffering, unaccompanied by physical pain, caused by vulgar, profane, and indecent language of others permitted to remain on the car. Houston, etc., R. Co. *v.* Perkins, 52 S. W. 124, 21 Tex. Civ. App. 508.

Where defendant railroad company permitted indecent and disorderly conduct on the part of passengers in a car in which plaintiff's wife was traveling, and failed to provide her with better accommodations, and she was thereby frightened, shocked, and made sick, defendant was liable in damages. Texas, etc., R. Co. *v.* Hughes (Tex. Civ. App.), 41 S. W. 821.

The plaintiff is not precluded from recovery on the ground that his damage consisted of mental anguish and humiliation only, unaccompanied by physical or bodily injury. International, etc., R. Co. *v.* Henderson (Tex. Civ. App.), 82 S. W. 1065.

18. Watson *v.* Southern R. Co., 132 Ga. 552, 64 S. E. 549.

A railroad company is bound to use extraordinary care to protect its passengers from violence or outrage by third persons, which protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law. Hillman *v.* Georgia R., etc., Co., 56 S. E. 68, 126 Ga. 814, 8 Am. & Eng. Ann. Cas. 222.

Carriers are bound to take proper steps to guard against injury to passengers by harmful misconduct on the part of other passengers. Coy *v.* Boston Elevated R. Co. (Mass.), 98 N. E. 1041.

Generally, as to the right of a carrier to expel disorderly persons, see post, "Ejection of Passengers," Chapter XXV.

19. Police powers.—Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 52 Am. & Eng. R. Cas. 438, 32 Am. St. Rep. 87, 17 L. R. A. 571.

20. Officers to take charge of excursion.—Stanley *v.* Southern R. Co., 160 N. C. 223, 76 S. E. 221.

Colored passengers upon a railway train are entitled to the same protection against drunken and violent men seeking to molest, outrage and humiliate them as white passengers. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has knowledge that there is occasion for his interference, will subject the company to liability in damages.[21]

Contagious Disease.—A passenger who contracts a contagious disease from a ticket agent of a carrier while purchasing his ticket, can not, it has been held, recover damages, if the carrier does not know, and has no reason to know, that the agent has the disease.[22] Where a passenger died from measles, communicated to him from a fellow passenger, while riding on defendant railroad train, the carrier was not liable for failure to exercise ordinary care to ascertain that such fellow passenger had a contagious disease, but was only bound to exercise ordinary care to protect decedent from contagion after the affliction of such fellow passenger had been either discovered or called to the attention of the carrier's conductor.[23]

Passengers at Station.—Where a person enters the waiting room at a railroad station for the purpose of procuring a ticket and taking a passage on a train, which is due to arrive in a short time, he becomes entitled to the protection and care due a passenger by a carrier. And speaking generally it may be said that while this relationship of carrier and passenger continues to exist, it is the duty of the employees of the carrier to protect him from violence or insult of other passengers or by strangers, and a failure on the part of said employees to exercise such care will render the carrier liable for injury thereby caused the passenger.[24] And in pursuance with the rule that a passenger on a railway train remains such after alighting therefrom, and while on the depot

21. Colored passengers—Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 52 Am. & Eng. R. Cas. 438, 32 Am. St. Rep. 87, 17 L. R. A. 571.

22. Contagious disease.—Long *v.* Chicago, etc., R. Co., 48 Kan. 28, 28 Pac. 977, 53 Am. & Eng. R. Cas. 45, 15 L. R. A. 319, 30 Am. St. Rep. 271.

23. Measles—Fellow passenger.—Bogard *v.* Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 36 L. R. A., N. S., 337.

24. Passengers at station—Duty begins with relation.—McCardell *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 102 S. W. 941, citing Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Missouri, etc., R. Co. *v.* Russell, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op. See, also, Houston, etc., R. Co. *v.* Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124, affirmed in 93 Tex. 710, no op.

A railroad company owes to a passenger in its station house waiting to take a train, the duty to protect against assaults or offensive conduct by third persons. Houston, etc., R. Co. *v.* Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868, reversing 67 S. W. 915; Judgment (Tex. Civ. App.), 67 S. W. 915, reversed. Houston, etc., R. Co. *v.* Phillio, 69 S. W. 994, 59 L. R. A. 392, 96 Tex. 18, 97 Am. St. Rep. 868.

In railroad stations a passenger is as much entitled to proper treatment and protection as when he is aboard a conveyance, and employees put there to be brought in contact with passengers and to render to them services due to them from the carriers are as fully within the principle stated as are such employees upon trains and vessels. Texas Mid. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943, reversing 82 S. W. 524.

Illustrations.—A woman who enters a railroad station with the intention of becoming a passenger is entitled to protection against insult, though she has not yet purchased a ticket. Texas, etc., R. Co. *v.* Jones (Tex. Civ. App.), 39 S. W. 134.

A woman who enters a railroad station with the intention of becoming a passenger, may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference. Texas, etc., R. Co. *v.* Jones (Tex. Civ. App.), 39 S. W. 134, affirmed in 93 Tex. 674, no op.

Where plaintiff, a negro, entered the waiting room of defendant's passenger station to procure a ticket and take passage on defendant's train, which was shortly to arrive, when he was assaulted, thrown out of the station, and shot by a stranger in the presence of defendant's employees, who did nothing to assist him, defendant was guilty of a breach of its duty to plaintiff as a passenger, and was responsible for his injuries. McCardell *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 102 S. W. 941.

premises of the company, for a period of time reasonably necessary to enable him to leave the premises, he is entitled to the protection of the company's agents and servants from assaults of third persons during such time.[25] But the same exceptions hold good in this case that prevail in other cases and it may be said that a carrier is not liable for injuries to a passenger from the conduct of third persons on the station premises, unless it knew of the existence of the danger or of circumstances from which the danger might have been reasonably anticipated.[26]

Duty of Carrier in Case of Attempt to Arrest Passenger.—But this duty on the part of the carrier does not require it to make active resistance to an officer who is attempting to arrest a passenger, or to inquire into the authority under which the officer assumes to act.[27]

§ 2554. Knowledge of the Commission of the Wrong.—There can, of course, be no question but that the carrier is liable for injuries sustained by a passenger at the hands of fellow passengers, or of strangers, if he knows, at the time, of the wrong being done the passenger, and does not make every reasonable effort to prevent or mitigate the injury.[28] Thus, if the agents and servants of the carrier have knowledge that an assault is being committed upon a passenger, and do not make every reasonable effort to protect him, the carrier

25. Duty terminates when relation terminates.—Texas, etc., R. Co. *v.* Dick, 26 Tex. Civ. App. 256, 63 S. W. 895, affirmed in 94 Tex. 697, no op., 95 Tex. 688, no op.

It is the duty of a carrier to protect its passengers not only on the train, but while they are alighting, and until they have a reasonable time to leave the platform. Illinois Cent. R. Co. *v.* Gunterman (Ky. App.), 122 S. W. 514.

26. Taylor *v.* Atlantic, etc., R. Co., 59 S. E. 641, 78 S. C. 552.

27. In cases of attempted arrest.—Judgment (Tex. Civ. App.), 82 S. W. 524, reversed. Texas Mid. R. Co. *v.* Dean, 85 S. W. 1135, 98 Tex. 517, 70 L. R. A. 943.

A railroad company would not be liable for damages for the arrest of a passenger, a resident in another state, and her removal from the train by peace officers under the belief that she was a criminal wanted for murders committed in another state, if the officers were, under the circumstances, authorized to make the arrest, as it would have been illegal for the company's employees to have refused to permit the arrest. Burton *v.* New York, etc., R. Co., 132 N. Y. S. 628, 147 App. Div. 557.

It is not the duty of the conductor of a railroad train to resist a known officer of the law in arresting a passenger on the train. Bowden *v.* Atlantic, etc., R. Co., 144 N. C. 28, 56 S. E. 558, 12 Am. & Eng. Ann. Cas. 783.

28. McCardell *v.* Gulf, etc., R. (Tex. Civ. App.), 102 S. W. 941.

Where the conductor and other servants on a train could have prevented injuries to a passenger from assault committed by other passengers, by interfering to protect him, and knowingly or willfully failed to do so after knowing of the threatened danger to the passenger assaulted, their failure to interfere was a breach of duty to the passenger assaulted for which the carrier would be answerable. Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

Plaintiff and two friends, all colored persons, took seats in the smoker of defendant's excursion train. Their presence in the car proved obnoxious to the white passengers who subjected them to annoyance and insult. When they appealed to the conductor for protection, he told them that he could do nothing, but advised them to remove to a car set apart for colored passengers. However, he did not insist on their doing so, although they could see that there was probability of trouble. The ill-treatment continued, and the conductor was appealed to again, but he did nothing to protect them, except to repeat his advice to leave the car. Finally, plaintiff and her friends were assaulted and expelled from the car by the white passengers. It was held that defendant was liable for the conductor's failure to afford plaintiff proper protection. Britton *v.* Atlanta, etc., R. Co., 88 N. C. 536, 18 Am. & Eng. R. Cas. 391, 43 Am. Rep. 749.

A common carrier is liable for an injury to a passenger where its agents know, or have the opportunity of knowing, of a threatened injury, and neglect to take proper means to prevent or mitigate the injury. Twichell *v.* Pecos, etc., R. Co. (Tex. Civ. App.), 131 S. W. 243.

Evidence held to show employee's knowledge of improper conduct of passengers.—Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.

is liable for the injuries which the passenger may sustain.[29] If the threats of a conductor and fellow passengers induce a passenger to jump from a moving train, the carrier is responsible for his injuries.[30] And if a passenger is aided and abetted by the conductor of a train in expelling a passenger from one of the cars, the company is responsible for injuries inflicted by the use of excessive and unnecessary force.[31]

§ 2555. Knowledge, or Duty to Know, of Passenger's Peril.—While a carrier is not to be regarded as an insurer of his passenger's safety against every possible source of danger, it is none the less his duty to use extraordinary care and diligence to protect the passenger from injuries, including injuries by fellow passengers or third persons. As a part of this protection, the carrier is bound to use that extreme care and caution contemplated of very prudent and thoughtful persons to anticipate an injury threatened to the passenger by fellow passengers and third persons.[32] Even if the carrier has no knowledge of the mistreatment of a passenger, at the time, yet, if he has knowledge, or with proper care can know, that an injury to the passenger is imminent, the carrier is liable for a failure to make every reasonable provision for the protection of the passenger,[33] and whether a carrier in the exercise of extraordinary care re-

29. Murphy *v.* Western, etc., R. Co., 23 Fed. 637; Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 52 Am. & Eng. R. Cas. 438, 32 Am. St. Rep. 87, 17 L. R. A. 571; Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394; Evansville, etc., R. Co. *v.* Darting, 6 Ind. App. 375, 33 N. E. 636.

Where a passenger on defendant's train, who had been assaulted by other passengers, appealed to the conductor for protection, and the conductor remonstrated with the disorderly passengers, but became frightened and ran away, and made no further effort to protect plaintiff when he was again assaulted, it was held that defendant was liable. New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689. Curiously enough, this case, though followed, has been subjected to some criticism in the later Mississippi cases. See Royston *v.* Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320; Illinois, etc., R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 52 Am. & Eng. R. Cas. 441, 16 L. R. A. 627.

Plaintiff entered defendant's railway station with the intention of becoming a passenger. While in the waiting-room, she was subjected to insulting and abusive language by the wife of the station agent. The agent was present and overheard the abuse, but did not interfere. It was held, that defendant was liable. Texas, etc., R. Co. *v.* Jones (Tex. Civ. App.), 39 S. W. 124.

A railroad company has been held liable for an assault upon a female passenger in the waiting-room at one of its stations, in the presence, or with the knowledge of the company's agent, by a drunken and disorderly man, whom it permitted to enter and remain in the waiting-room. Houston, etc., R. Co. *v.* Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868, reversing 67 S. W. 915.

30. Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74, 26 Am. & Eng. R. Cas. 252; S. C., 101 Mo. 417, 14 S. W. 880; S. C., 116 Mo. 617, 22 S. W. 690.

31. International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233.

32. Duty to anticipate injury.—Grimsley *v.* Atlantic, etc., R. Co., 1 Ga. App. 557, 57 S. E. 943. See Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553; Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538; Irwin *v.* Louisville, etc., R. Co., 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

A carrier must exercise the highest degree of care to anticipate and protect passengers from violence from other passengers or other persons; the extent of the care required depending upon the particular circumstances. Glennen *v.* Boston Elevated R. Co., 93 N. E. 700, 207 Mass. 497, 33 L. R. A., N. S., 470.

While not an insurer against assault upon passengers by fellow passengers and intruders, a carrier must guard them against such assaults as may reasonably be expected. Penny *v.* Atlantic, etc., R. Co., 69 S. W. 238, 153 N. C. 296, 32 L. R. A., N. S., 1209.

33. Where a passenger upon a railroad train was assaulted by a fellow passenger, and appealed to the conductor for protection, but the conductor, instead of affording him protection, went away and left him, whereupon the passenger was again assaulted, it was held that the company was liable. Flannery *v.* Baltimore, etc., R. Co., 4 Mackey (15 D. C.) 111.

Where a carrier knows, or should know, that the actions of a passenger threaten the safety of other passengers, the duty to exercise the highest degree of care to insure the safety of the other

quired, should have apprehended a particular injury to a passenger, is in most, if not all, cases a question for the jury,[34] to be determined by a consideration of all the surrounding circumstances.[35]

§§ 2556-2562. Reason to Apprehend Passenger's Peril—§ 2556. In General.—A carrier may neither have knowledge that a passenger is being mistreated, nor have knowledge, actual or imputed, that he is in peril, and yet be liable for injuries sustained by him at the hands of fellow passengers, or of strangers. If the carrier knows, or, with proper care, can know, that injury to the passenger is reasonably to be apprehended, and does not make every

passengers arises, and the carrier is liable for a failure to do so. McWilliams *v.* Lake Shore, etc., R. Co., 109 N. W. 272, 146 Mich. 216.

When the conductor of a train, upon being informed that plaintiff, a woman, had been abused and called foul names by a man who was under the influence of liquor, failed to interfere, but kept on collecting tickets, and the disorderly passenger afterwards continued his abuse, a judgment for plaintiff was sustained. Lucy *v.* Chicago, etc., R. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551.

Plaintiff was a passenger upon a train which carried a number of nonunion laborers. Notwithstanding the fact that the car containing the laborers had been attacked at a previous stop, the train was again stopped at a place which was not a regular station, in the midst of an excited mob of striking workmen, and a number of nonunion men, against whom the animosity of the mob was excited, were taken into the smoker where plaintiff was riding, without warning to him. At the next railroad crossing, about one and three-eighths miles distant, the train was captured by a mob of strikers, who broke into the smoker, beat the nonunion men, and fired pistols in and around the car, wounding plaintiff grievously. The railroad company was held liable for plaintiff's injuries. Chicago, etc., R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483, rejecting opinion in 8 N. E. 803.

In an action to recover for injuries received by plaintiff at the hands of a number of men, who robbed and assaulted him just as he had boarded defendant's train, it was held that, although there was nothing to show that the assault upon plaintiff could have been anticipated, or could possibly have been foreseen, yet, if plaintiff's cry for help could have been heard by the agents and servants, if each of them was at his post of duty on, or near, the train, it should be presumed that they heard the cry and the carrier would be liable. Wright *v.* Chicago, etc., R. Co., 4 Colo. App. 102, 35 Pac. 196.

In an action against a railroad company to recover for injuries inflicted on an intending passenger by a crowd of students at the station, it is proper for the court to charge that: "If for a considerable time prior to the accident there was a large crowd of students and followers in the station, indulging in such boisterous conduct as manifestly threatened personal injury to passengers, and the defendant could, by the exercise of due vigilance, have ejected this mob or reduced it to order and control, before the plaintiff was injured, then its failure to do so renders it answerable to the plaintiff if she was subsequently injured by a rush of this crowd." Kennedy *v.* Pennsylvania R. Co., 32, Pa. Super. Ct. 623.

34. Question of fact for jury.—Whether, in the exercise of the extraordinary care required, the carrier should have apprehended that an intoxicated passenger, who was armed with a pistol and who had been shooting it while on the train, would jump from the train at a station and fire the pistol into the coach, injuring another passenger, is a question to be decided by the jury, and not by the court on demurrer. Grimsley *v.* Atlantic, etc., R. Co., 1 Ga. App. 557, 57 S. E. 943.

35. In determining whether a street car company exercised the requisite degree of care to protect a passenger from injury from a crowd which rushed on the car at a public amusement place, the kind of assembly, and of the people likely to attend it, the time of the day, and the natural impatience and turbulence of a crowd boarding the car at such a place, should all be considered. Glennen *v.* Boston Elevated R. Co., 207 Mass. 497, 93 N. E. 700, 33 L. R. A., N. S., 470.

Where a street railway passenger so carried a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car and striking another passenger, the test of negligence by the carrier is whether, in view of the condition of the roadbed, the position of the trucks, and consequent rocking motion of the cars, and all the surrounding conditions, the conductor ought, as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which a passenger held his hoe, that this or a similar accident would likely happen. Farrier *v.* Colorado Springs, etc., R. Co., 95 Pac. 294, 42 Colo. 331.

reasonable effort to protect the passenger, he is responsible for the injuries which the passenger may sustain.[36] To render a carrier of passengers liable for failure to protect a passenger or other person to whom it owes protection from insult or injury at the hands of the fellow passengers or third persons, where it has no knowledge that such injury is threatened, the circumstances must be such that those in charge of the train, using the utmost vigilance and care, or that extreme care and caution which very prudent persons exercise, should have foreseen that the injury is threatened. When such circumstances come to their knowledge it is the duty of the employees to take all reasonable precautions to prevent the injury. If there is nothing to cause an extremely prudent person to apprehend such an injury the carrier is not liable.[37] Thus, it is said that the duty of a carrier to provide accommodations sufficient for the safe transportation of its passengers extends to taking extra precautions, when the carrier has reasonable grounds to anticipate unusual hazard to its passengers, and to the employment of a sufficient force of employees to protect innocent passengers from the assaults of other passengers, when it has reasonable grounds to apprehend such assaults from passengers in such numbers or force as to be beyond the control of the ordinary train crew.[38]

§ 2557. Presence of Dangerous Persons on Vehicle or Vessel.—If the agents and servants of a carrier have knowledge of the presence on the vehicle or vessel of disorderly or dangerous persons, from whose language or actions there is reasonable ground to apprehend danger to passengers, and fail to take proper precautions to avert the danger, the carrier is liable for resulting injuries to passengers.[39] Thus, if the conductor of a train has reason to believe that one of the passengers is a dangerous lunatic, it is his duty to take action at once for the security and protection of his passengers against the violence of the insane man.[40] And, similarly, a passenger carrier must keep a

36. Apprehending peril.—Pittsburgh, etc., R. Co. *v.* Richardson, 40 Ind. App. 503, 82 N. E. 536; Grimsley *v.* Atlantic, etc., R. Co., 1 Ga. App. 557, 57 S. E. 943.

37. Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104.

In International, etc., R. Co. *v.* Giesen (Tex. Civ. App.), 69 S. W. 653, citing Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op., the court held that the facts were sufficient to warrant the conclusion that the conductor in charge of the train would and should have anticipated that the assault complained of would be committed and were of opinion that a high degree of care rests upon a railway company to protect one of its passengers from an unjustifiable assault committed upon him by another passenger.

Firearms in possession of tramps stealing ride.—The carrier's servants are not bound to foresee that one to whom it owed the duty of protection would be injured by firearms in the possession of tramps who are attempting to escape while under arrest for stealing a ride on the train. The failure of the company's servants to search such persons for weapons and to securely bind them or place a guard over them does not constitute negligence per se. Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104.

38. Sufficient member of employees.—Anderson *v.* South Carolina, etc., R. Co., 61 S. E. 1096, 81 S. C. 1.

Where a carrier operates an excursion train, it is bound to provide a police force adequate to protect passengers from disturbance, which due precaution requires it should have anticipated. Spires *v.* Atlantic, etc., R. Co., 75 S. E. 950, 92 S. C. 564.

39. Spires *v.* Atlantic, etc., R. Co., 92 S. C. 564, 75 S. E. 950; Kline *v.* Milwaukee Elect. R., etc., Co., 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 276.

Where a carrier fails to perform its duty in preserving order and removing dangerous and offensive persons from a car, it is liable for any injury to other passengers which might reasonably be anticipated in view of the circumstances, and where the fact of the riotous conduct of offending passengers is made known to a guard, it is his duty to avoid injury to other passengers, and he should suppress the disturbance or remove the offenders, summoning proper aid, which was at his command, and the company is liable for his failure to do so. McMahon *v.* Interborough Rapid Transit Co., 110 N. Y. S. 876, 59 Misc. Rep. 242.

40. St. Louis, etc., R. Co. *v.* Greenthal, 77 Fed. 150, 23 C. C. A. 100, 6 Am. & Eng. R. Cas., N. S., 261, affirming Meyer *v.* St. Louis, etc., R. Co., 54 Fed. 116, 4 C. C. A. 221, 58 Am. & Eng. R. Cas. 111.

vigilant supervision over a drunken and quarrelsome passenger to prevent him from injuring or annoying fellow passengers,[41] and to prevent injury or annoyance to fellow passengers, the carrier through its agents should refuse to further carry such a passenger,[42] or at least should compel him to take a seat and remain seated so as to keep away from other passengers,[43] and the failure of the carrier's servants to do their duty is no defense for the carrier where injury has resulted.[44] On this ground a railroad company has been held liable for the death of a passenger at the hands of a fellow passenger, whose condition of intoxication and conduct had been such that the conductor, as a man of common understanding, knowledge and experience, should have apprehended that he might attack some of the other passengers, but who was permitted to remain on the train unguarded.[45] In another case, which was an action to recover for the death of a passenger at the hands of an intoxicated fellow passenger, it appeared that while deceased was a passenger upon defendant's street car, the car was boarded by a person who was very drunk, boisterous, and disorderly, and who assaulted a passenger on the rear platform and acted like a maniac. He was ejected from the car but got on again when the car started, and no further effort was made to eject him, notwithstanding his continued disorderly conduct. He remained on the car until he assaulted deceased, without the slightest provocation, and inflicted injuries which resulted in death. A verdict against defendant carrier was sustained.[46] The question of negligence in all such cases is one for the jury.[47]

41. Drunken man—Care to prevent injury.—Kline *v.* Milwaukee Elect. R., etc., Co., 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912 C, 276.

Common carriers are held to a very high degree of care for the protection of passengers against drunken or disorderly persons. Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

It is the duty of the brakeman and conductor of a train to prevent an intoxicated passenger from attacking and injuring another passenger. Starr *v.* Chicago, etc., R. Co. (Iowa), 136 N. W. 524.

42. Where a passenger conductor knew of the boisterous and quarrelsome condition of a passenger, but ignored requests from fellow passenger to expel such passenger, and left the fellow passengers to protect themselves, the jury might find that the conductor failed to protect the fellow passengers, rendering the carrier liable for injuries inflicted by such passenger on a fellow passenger. Kline *v.* Milwaukee Elect. R., etc., Co., 131 N. W. 427, 146 Wis. 134, Ann. Cas. 1912 C, 276.

Where a railroad conductor apprehended that a drunken passenger would do bodily injury to another passenger, and advised the latter to go into another car the conductor was guilty of negligence in failing to protect plaintiff or eject the drunken passenger. Ft. Worth, etc., R. Co. *v.* Stewart (Tex. Civ. App.), 146 S. W. 355.

43. A carrier's servant may eject a drunken and disorderly passenger, when necessary to protect other passengers against his insults or violence; but, if injury to another passenger could have been avoided by requiring the drunken passenger to be and remain seated, the carrier can not avoid liability for the injury by the servant's failure to perform that duty. Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538.

If an intoxicated street car passenger weighing about 225 pounds was unable to stand, and his condition was known to the conductor, the conductor was negligent toward other passengers in permitting him to walk up and down the aisle while car was in motion. Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538.

44. Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538.

Plaintiff was insulted by another passenger, who was intoxicated and seated opposite him; and plaintiff left his seat and appealed to the conductor, who laughed at him. He returned to his seat, and the drunken passenger kicked him. He again appealed to the conductor, and again returned to his seat, when he was assaulted and injured by the drunken passenger. Held, that the carrier was liable; it having been the conductor's duty to protect the passenger by compelling the intoxicated man to behave himself, or ejecting him, and the passenger not having been guilty of contributory negligence. Wachser *v.* Interborough Rapid Transit Co., 125 N. Y. S. 767, 69 Misc. Rep. 346.

45. King *v.* Ohio, etc., R. Co., 22 Fed. 413, 18 Am. & Eng. R. Cas. 386.

46. United R., etc., Co. *v.* Deane, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453.

47. Where passengers are injured by riotous fighting by other passengers, it

§ 2558. Disorder Among Passengers.—If the safety of passengers is threatened by disorder among some of them, it is the duty of the carrier to make every reasonable effort to restrain the disorderly passengers, or, if necessary, to remove them from the vehicle or vessel, and, if the carrier is guilty of any neglect of this duty to preserve order among the passengers, he is liable for any injury to passengers which may reasonably be anticipated, or naturally be expected, to occur, in view of all the circumstances and the number and character of the persons who are being carried.[48] Thus, a railroad company is responsible for injuries received by a passenger, in consequence of a quarrel and fight betweeen two of his fellow passengers, which is witnessed by the conductor, who refuses to interfere, although some of the passengers request him to suppress the disturbance.[49] A carrier by steamboat is responsible for injuries to a passenger by a shot fired from a gun negligently handled by a fellow passenger, if the servants of the carrier fail to preserve order on the boat, but permit the promiscuous handling and firing of guns by the passengers.[50] In an action to recover damages for an injury received by plaintiff, a passenger on defendants' steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in an affray, and occupying a part of the boat assigned to passengers, it appeared that plaintiff had been suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and that defendant made no effort to preserve the peace or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge Shipman in his charge to the jury instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." [51] It has

is for the jury to say under all the facts whether the carrier was negligent in not providing a suitable conductor to preserve order, or whether the person in charge of the car was negligent in the preservation of order thereon, and a safe carriage of the passengers to the place of destination. Holly *v.* Atlanta Railroad, 61 Ga. 215, 34 Am. Rep. 97.

48. Holly *v.* Atlanta Railroad, 61 Ga. 215, 34 Am. Rep. 97; Partridge *v.* Woodland Steamboat Co., 66 N. J. L. 290, 49 Atl. 726; Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. 512, 91 Am. Dec. 224; Missouri, etc., R. Co. *v.* Russell, 8 Tex. Civ. App. 578, 28 S. W. 1042, affirmed in 93 Tex. 668, no op.

Explosion of dynamite.—Where certain passengers boarded defendant's train, and, while under the influence of liquor, exploded dynamite sticks in the car, and on the platforms, and fired pistols, but the carrier's servants, though knowing or having an opportunity to know of such acts, neglected to take proper precautions to prevent injury to others until plaintiff, another passenger, was shot by the alleged accidental discharge of one of such weapons, the carrier was liable for the injury so sustained. Nashville, etc., R. Co. *v.* Flake, 114 Tenn. 671, 88 S. W. 326, 108 Am. St. Rep. 925.

49. Pittsburgh, etc., R. Co. *v.* Pillow, 76 Pa. 510, 18 Am. Rep. 424.

50. West Memphis Packet Co. *v.* White, 99 Tenn. (15 Pickle) 256, 41 S. W. 583, 38 L. R. A. 427.

51. Flint *v.* Norwich, etc., Transp. Co., 34 Conn. 554; S. C., 6 Blatchf. 158, Fed. Cas. No. 4,873, new trial denied in 7 Blatchf. 536, Fed. Cas. No. 4,874, affirmed, 80 U. S. 3, 20 L. Ed. 556.

There were present, upon defendant's excursion train, a number of drunk and disorderly negroes, who, with other passengers, were standing in the aisle of one of the front cars. The conductor, when appealed to by passengers to suppress the disorder, did nothing, although he could have sent the offensive passengers to the rear cars where there were vacant seats. When a row began in the car in which plaintiff was seated, and a race collision seemed imminent, the conductor merely removed them to the next car, where they also created a disturbance. The conductor, then, simply put the negroes out of the car, leaving them on the platform, to renew the conflict as soon as opportunity offered. It was held that the jury were warranted in concluding that the subsequent shooting, in which plaintiff was struck, was a result reasonably to be apprehended from the surrounding circumstances, and which might have been avoided by ordinary care on the part of defendant. Louis-

been held that if a passenger on a street car, who becomes frightened by a fight on the car between some of the passengers, asks the conductor to let her off, the company is responsible for injuries sustained by her in consequence of the negligent failure of the conductor to comply with her request.[52]

§ 2559. Intermingling of White and Colored Passengers.—It has been held that if the conductor of a train allows white passengers to remain in a car or compartment set aside for the exclusive use of colored passengers, the company becomes responsible for their conduct, and is liable for their mistreatment of colored passengers, even though the carrier's servants may not know what is taking place.[53] And the same rule is applicable where colored passengers occupy white compartments.[54] And the carrier is not exempt from liability by reason of the fact that, by custom prevailing on its road, it has permitted colored passengers, when their own compartment was crowded, to ride in that set apart for white passengers.[55] But a statute requiring railroad companies to furnish separate coaches for white and negro passengers, does not make it negligence per se for a railroad company to permit a negro to enter a coach reserved for white passengers, and there assault a white passenger,[56] and where a carrier uses that degree of care, skill and caution required of him to prevent such intermingling and resulting injury, it can not be held liable.[57] A carrier is

ville, etc., R. Co. *v.* McEwan, 21 Ky. L. Rep. 487, 51 S. W. 619; S. C., 17 Ky. L. Rep. 406, 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438.

52. Cross *v.* Detroit Citizens' St. R. Co. 120 Mich. 137, 79 N. W. 11.

53. Wood *v.* Louisville, etc., R. Co., 101 Ky. 703, 19 Ky. L. Rep. 924, 42 S. W. 349, 8 Am. & Eng. R. Cas., N. S., 711; Quinn *v.* Louisville, etc., R. Co., 98 Ky. 231, 17 Ky. L. Rep. 811, 32 S. W. 742.

Under Ky. St., § 799 (Russell's St., § 5347), requiring railway conductors to segregate white and negro passengers, the conductor is the only employee directly responsible for the segregation, and it is only through his neglect that the company can be made liable for resultant injury to a passenger, but, if the brakeman, porter, or other employee connected with the passenger department of the train knows or is informed that a passenger is riding in a wrong compartment, he must notify the conductor as soon as practicable, and if he fails to do so, or if the conductor fails to act on such notification as soon as practicable, the company is liable for resultant injuries. Louisville, etc., R. Co. *v.* Renfro, 135 S. W. 266, 142 Ky. 590, 33 L. R. A., N. S., 133.

54. Ky. St. 1903, §§ 795-800, impose on railroads the duty of furnishing separate compartments for the acommodation of white and colored passengers, and upon the roads' agents the duty of assigning such passengers to their respective compartments. Section 799 requires conductors to refuse to carry any passenger declining to occupy a compartment to which he is assigned and authorizes conductors to put such passenger off the train. Held, that where defendant railroad's conductor permitted a negro to occupy a seat in the coach reserved for white passengers, and thereafter, on an altercation over the payment of fare, attempted to eject such negro, thereby creating a panic among the other passengers, defendant was liable for injuries received by plaintiff, a white passenger, through falling from the platform of a car while attempting to escape from the difficulty. Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049.

55. Effect of custom.—Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049.

56. Statutory provision—Separation of white and colored passengers.—Segal *v.* St. Louis, etc., R. Co., 80 S. W. 233, 35 Tex. Civ. App. 517.

57. The conductor, discovering in the coach for negroes a white man who had been drinking, but who was not then boisterous or disorderly, called his attention to his being in the wrong car, and he, without objection, immediately left. Thereafter, while the conductor was in the ladies' coach, and without notice to him or any other employee, the white passenger returned and insulted a negro passenger. Held, that there was no failure of the carrier in its duty to use, for the protection of passengers, the utmost care and skill which prudent men are accustomed to use under similar circumstances, so as to make it liable, independent of the separate coach law. Hale *v.* Chesapeake, etc., R. Co., 135 S. W. 398, 142 Ky. 835.

Under the statute requiring a carrier to furnish separate coaches for black and white passengers, where the conductor on discovering a white man in the car for negroes called his attention to his being in the wrong car, and he, without ob-

not liable for the death of a negro killed by a white passenger in the negro compartment if the conductor is in another car when the white man enters the compartment.[58]

Passenger Killed in Self-Defense.—A carrier is not liable for the death of a negro passenger killed by a white passenger riding in a negro compartment in violation of a state law, if the white passenger acted in necessary self-defense.[59]

§ 2560. Negligence of Passengers in Getting On or Off the Vehicle.—A street railway company, it has been held, is liable for injuries received by a passenger, on alighting from a street car at a transfer point, where the transfer was required to be made hurriedly, in consequence of the violent efforts of another passenger to get out of the car, while loaded with bundles, if the transfer, by reason of the character of the place where, and the circumstances under which it was made, was fraught with danger to passengers, which the conductor, who left the car before reaching the point of transfer, had reasonable grounds to apprehend.[60] And a street railway company has been held liable for the death of a child in consequence of being thrown from the platform of a street car, where the conductor compelled him to stand, by the hasty exit of another passenger.[61] But in a case wherein it appeared that when plaintiff, a passenger upon defendant's street car, was about to alight, the conductor stepped off the car to help her child to alight, and that as plaintiff was following, she was jostled and pushed by other passengers, it was held that defendant was not responsible for plaintiff's injuries.[62] Nor is a carrier liable for injury to an alighting passenger, pushed from the steps of a car by other passengers, where the company could not have foreseen such accident.[63] While plaintiff, a boy fourteen years of age, was riding as a passenger, on the front platform of one of defendant's street cars, leaning against the dasher, he either fell off the car, or was pushed off by a rush of passengers from the car. It was held that the jury was properly charged that the company was not liable for the conduct of the passengers unless their conduct was unusual and disorderly, and could have been prevented by the persons in charge of the car.[64]

jection and without being disorderly or boisterous, immediately acquiesced, and left the car, and thereafter, while the conductor was in the ladies' car, and without notice to him or any other employee of the carrier, the white man returned to the negroes' coach and insulted a negro passenger, there is no liability of the carrier; the conductor having acted promptly when he had notice of the presence of the white passenger in such car. Hale *v.* Chesapeake, etc., R. Co., 135 S. W. 398, 142 Ky. 835.

58. Knowledge of intermingling.—Louisville, etc., R. Co. *v.* Renfro, 142 Ky. 590, 135 S. W. 266, 33 L. R. A., N. S., 133.

59. Passenger killed in self-defense.—Louisville, etc., R. Co. *v.* Renfro, 142 Ky. 590, 135 S. W. 266, 33 L. R. A., N. S., 133.

60. Baldwin *v.* Fair Haven, etc., R. Co., 68 Conn. 567, 37 Atl. 418.

61. Sheridan *v.* Brooklyn, etc., R. Co., 34 How. Prac. 217, 36 N. Y. 59, 93 Am. Dec. 490.

62. Furgason *v.* Citizens' St. R. Co., 16 Ind. App. 171, 44 N. E. 936.

63. Marr *v.* Boston, etc., Railroad, 94 N. E. 692, 208 Mass. 446.

64. Randall *v.* Frankford, etc., R. Co., 139 Pa. 464, 22 Atl. 639.

Injury by crowd.—Where the congestion of passengers resulting from their number and eagerness to board cars waiting for them, is not an extraordinary circumstance, but rather a condition which should have been foreseen from the nature of the business, and provided for by the adoption of reasonable expedients, any physical harm suffered by a passenger may be said to have arisen through the defendant's negligence in permitting a combination of passengers to press violently upon him, and while not an assault, the wrong finally inflicted is none the less a violation of its duties, for which compensation in damages can be recovered. Kuhlen *v.* Boston, etc., St. R. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A., N. S., 729, 118 Am. St. Rep. 516; Magee *v.* New York, etc., R. Co., 195 Mass. 111, 80 N. E. 689; Jackson *v.* Old Colony St. R. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A., N. S., 1046, 9 Am. & Eng. Ann. Cas. 615; Glennen *v.* Boston Elevated R. Co., 207 Mass. 497, 93 N. E. 700, 33 L. R. A., N. S., 470. Kelley *v.* Boston Elevated R. Co., 210 Mass. 454, 96 N. E. 1031, 1032.

Where plaintiff, as she was about to board a street car at a terminal, was

§ 2561. Scuffling of Hackmen Near Station.—In an action to recover for injuries received by plaintiff, while passing from the ticket office to the baggage room in defendant's station, by being run into and knocked down by one of a couple hackmen who were engaged in a scuffle, there being evidence that hackmen were accustomed to await trains near the place where plaintiff was injured, and that they had frequently engaged in similar scuffles, it was held that defendant was liable for the injuries sustained by plaintiff, even though caused by the acts and conduct of intruders or strangers, if such acts and conduct were so continued, and so notorious that the servants of the defendant company in charge of the station, and the passage-ways thereof, devoted to the use of passengers, knew of such acts and conduct, or should have known of them and of the dangers arising therefrom.[66]

§ 2562. Servants of Express Companies, etc., at Station.—A carrier owes to passengers, and others, lawfully using its station platform the duty to protect them from dangerous habits of the servants of an express company in negligently moving trucks about the platform without warning.[67]

§§ 2563-2566. Limitation of Carrier's Liability—§ 2563. In General.—Since carriers of passengers do not insure, or warrant, the safety of their passengers, and are liable only for the exercise of care for their safety, it follows that they are not liable to their passengers for the consequences of the negligence or wilful acts of fellow passengers, or of strangers, in every case. This particular liability is subject to certain well-defined limitations, which, though implied by what has already been said, will now be discussed in detail.

§ 2564. Absence of Knowledge, etc., of Passenger's Peril.—In the first place, to charge a carrier with liability for injuries suffered by a passenger at the hands of fellow passengers, or of strangers, the carrier must have knowledge, or a reasonable opportunity to know, of the existence of danger to the passenger, or of facts or circumstances from which danger may reasonably be anticipated.[68] The duty of the carrier to protect passengers from the assaults

gradually encompassed by other passengers moving towards the same car, until she was pushed over the platform and into a pit, receiving injuries complained of, and no measures were taken by the carrier to protect her or control the press of people seeking to board the car, it was guilty of actionable negligence. Kelley *v.* Boston Elevated R. Co., 96 N. E. 1031, 210 Mass. 454.

A street railway company maintained an amusement park and a platform at which cars stopped for passengers. The platform was not equipped with a railing or fence to hold back the crowd, and though the railway company had reason to expect a large crowd on the occasion of plaintiff's injury, only one policeman or guard was provided to preserve order among passengers in boarding a car, and plaintiff, while endeavoring to board the car, was pushed under it by the crowd from behind her, and injured. Held, that the railway company was negligent in failing to provide sufficient guards. Cousineau *v.* Muskegon Tract., etc., Co., 115 N. W. 987, 152 Mich. 48.

66. Exton *v.* Central R. Co., 62 N. J. L. 7, 42 Atl. 486, 14 Am. & Eng. R. Cas., N. S., 240, affirmed, without opinion, in 63 N. J. L. 356, 46 Atl. 1099.

67. Servants of express companies.—St. Louis, etc., R. Co. *v.* Shaw, 94 Ark. 15, 125 S. W. 654.

68. St. Louis, etc., R. Co. *v.* Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; Wright *v.* Chicago, etc., R. Co., 4 Colo. App. 102, 35 Pac. 196; Louisville, etc., R. Co. *v.* McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438; S. C., 21 Ky. L. Rep. 487, 51 S. W. 619; Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

Where neither the carrier nor its agents know of danger to a passenger, and could not reasonably anticipate or provide against injury, the carrier is not liable for an injury suffered at the hands of a stranger. Irwin *v.* Louisville, etc., R. Co., 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

A rapid transit company is not liable for injuries sustained by a passenger from a fellow passenger jumping over the gate of its closed car and striking her, unless such act could reasonably have been anticipated by its employees.

and insults of third persons arises only when the threatened wrong occurs in the presence or within the knowledge of its agents or when from the facts and circumstances attending or preceding the injury the carrier might have foreseen and prevented it. This is too well settled in some states to admit of controversy.[69] And ordinarily a railroad company is not required to anticipate that a missile will be thrown through a car window by a stranger and injure a passenger, and is not required to see that the blind is closed or lowered to prevent it, the glass and blinds being intended only to admit and exclude light and air for the comfort and pleasure of passengers; and, in the absence of any showing that such

Victorson *v.* Interborough Rapid Transit Co. (App. Term), 137 N. Y. S. 860.

Where a person getting on a street car is injured by a passenger standing on the platform, and the conductor has no opportunity to interfere and prevent the injury, the street railroad company is not liable. Widener *v.* Philadelphia Rapid Transit Co., 73 Atl. 209, 224 Pa. 171.

The rule that it is the duty of a carrier to use the highest degree of care to protect the passenger from wrong or injury by a fellow passenger applies only when the carrier has knowledge of the existence of the danger, or of the facts and circumstances from which the danger may be reasonably anticipated. Norris *v.* Southern Railway, 65 S. E. 956, 84 S. C. 15.

In an action for injuries to a passenger from the violence of a fellow passenger, an instruction that, if the injury complained of was so unexpected that defendant's employees could not have seen and prevented it by the highest degree of care, plaintiff could not recover, was proper. Anderson *v.* South Carolina, etc., R. Co., 58 S. E. 149, 77 S. C. 434.

The carrier is not an insurer of the safety of the passenger and liable at all hazards, and if a passenger receives an injury through the wilful act of his fellow passenger, the carrier is liable only when, by the exercise of the degree of care required of carriers, such act, in view of all the circumstances, might have been reasonably anticipated or foreseen and prevented. Texas, etc., R. Co. *v.* Storey, 37 Tex. Civ. App. 156, 83 S. W. 852, affirmed in 101 Tex. 663, no op., citing Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485; International, etc., R. Co. *v.* Williams, 20 Tex. Civ. App. 587, 50 S. W. 732, affirmed in 93 Tex. 644, no op.

The mere fact that plaintiff's wife, a passenger, while seated alone in a dark waiting room, was assaulted, does not show that defendant's agents should have foreseen the assault. Prokop *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 520, 79 S. W. 101, affirmed in 98 Tex. 628, no op.

To make a carrier liable for injuries inflicted on a passenger by a fellow passenger, it must be shown that the conductor knew, or had opportunity to know, that some injury was threatened or was probable, and that by his prompt intervention he might have prevented or mitigated such injury. Kline *v.* Milwaukee Elect. R., etc., Co., 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912 C, 276.

No liability in absence of conductor's knowledge of misconduct.—Damages for the humiliation caused by profane language used by the negroes in the presence of plaintiff's wife can not be recoverable, where it is not shown that the misconduct of the negroes was known to the carrier's conductor. Missouri, etc., R. Co. *v.* Ball, 61 S. W. 327, 25 Tex. Civ. App. 500.

69. Thweatt *v.* Houston, etc. R. Co., 31 Tex. Civ. App. 227, 71 S. W. 976; Houston, etc., R. Co. *v.* Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868; Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.; Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485; Jones *v.* Missouri, etc., R. Co., 32 Texas Civ. App. 286, 73 S. W. 1090.

A carrier is not responsible for injury to a passenger from the acts of another passenger, unless the circumstances are such that, by the exercise of ordinary care, he could have anticipated the danger and guarded against it. Adams *v.* Louisville, etc., R. Co. (Ky. App.), 121 S. W. 419.

A railroad company is not liable for injuries to a female passenger who is shocked and made sick by improper language and conduct of fellow passengers during the absence of its servants, when they have no reason to know or anticipate improper conduct. International, etc., R. Co. *v.* Duncan, 55 Tex. Civ. App. 440, 121 S. W. 362.

Carriers not being responsible for acts of third persons not under their control which they could not reasonably foresee, a street railroad company is not liable for injury to a passenger injured while standing in the rear vestibule of a car through the meddlesome act of a fellow passenger in suddenly releasing a brake in such manner that the hands swung around with great force; there being no showing of previous and similar meddlesome acts of passengers. Sure *v.* Milwaukee Elect. R., etc., Co. (Wis.), 133 N. W. 1098.

an assault or injury could have been reasonably anticipated, the carrier can not be held liable for the injury.[70] The general possibility of injury from such sources has never, so far as we are advised, been held to call this duty into action.[71] It is well settled that a carrier can not be held liable for the consequences of disorder among passengers which can not reasonably be anticipated,[72] nor for injuries to a passenger in consequence of the unnatural appearance and conduct of a lunatic passenger,[73] while, as has been seen,[74] a carrier may sometimes be liable for injuries to passengers which are inflicted by a dangerous person, who is allowed to come and remain upon the carrier's vehicle or vessel, this liability attaches only when the carrier knows, or should know, that the person is dangerous, and can reasonably be expected to anticipate trouble in consequence of his presence.[75] Thus, it has been held that a carrier is not re-

70. Irwin *v.* Louisville, etc., R. Co., 161 Ala. 489, 50 So. 62, 18 Am. & Eng. Ann. Cas. 772.

Nearly all day on July 4, 1905, one O. had been discharging a cannon loaded with blank cartridges from his yard toward the street on which defendant's street railway was operated. When the cannon was fired a jet of flame and smoke extended as far as the sidewalk, but several feet short of defendant's tracks, and defendant had no reason to anticipate any danger to its passengers from such source. About 5:30 p. m. plaintiff, a passenger on defendant's street car, was struck and injured by a wad shot by O. from the cannon. Held, that the street car company was not negligent in failing to anticipate danger to passengers from such source, nor in failing to ascertain whether the cannon was properly loaded or pointed. Ormandroyd *v.* Fitchburg, etc., St. R. Co., 78 N. E. 739, 193 Mass. 130.

71. General possibility of injury.—Prokop *v.* Gulf, etc., R. Co., 34 Tex. Civ. App. 520, 79 S. W. 101, affirmed in 98 Tex. 628, no op.

72. Cleveland *v.* New Jersey Steamboat Co., 125 N. Y. 299, 26 N. E. 327.

In an action to recover damages for the death of a passenger, who was riding on a flat car, by reason of being thrown from the car by fellow passengers, with whom he got into an altercation, the jury having found that defendant could not reasonably have anticipated that an assault would be committed on deceased as a result of employing flat cars to carry the passengers, and that prior to the accident, there was nothing in the conduct of any of the passengers, of which the trainmen had knowledge, to indicate that the deceased was in danger of being killed or injured, it was held that the company was not liable. Felton *v.* Chicago, etc., R. Co., 69 Iowa 577, 29 N. W. 618, 27 Am. & Eng. R. Cas. 229.

And it has been held that a street railway company is not, as to its passengers, guilty of negligence in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or ought reasonably to anticipate, that it can not do so and at the same time guard from violence, by the exercise of due care on its part, those who accept its implied invitation to become passengers. Fewings *v.* Mendenhall, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713.

While plaintiff, a woman, was seated in the women's waiting-room at one of defendant's stations, awaiting a train, two or three unknown men entered, and behaved in a very disorderly manner, using vulgar and profane language, and being guilty of indecent exposure of the person. The company had no notice of the occurrence at the time. Neither did it have notice of any facts justifying the expectation of such a wanton and unusual outrage. It was held that defendant was not liable. Batton *v.* South, etc., R. Co., 77 Ala. 591, 23 Am. & Eng. R. Cas. 514, 54 Am. Rep. 80.

73. Act of lunatic.—Louisville, etc., R. Co. *v.* Brewer, 147 Ky. 166, 143 S. W. 1014, 39 L. R. A., N. S., 647, Ann. Cas. 1913 D, 151.

74. See ante, "Presence of Dangerous Persons on Vehicle or Vessel," § 2557.

75. The carrier is not liable for the negligent or unlawful act of a passenger, which may result in an injury to a fellow passenger, upon the principle of respondeat superior, unless prior to the accident the conduct of the offending passenger has been such as to indicate a disposition to be violent, and give rise to a reasonable apprehension of injury to other parties. Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

In the case of Clark *v.* Louisville, etc., R. Co., 49 S. W. 1120, 20 Ky. L. Rep. 1839, Clark was a passenger on the defendant's train. Another passenger took a quantity of gasoline into the same coach in which Clark was riding. It ignited and exploded, by reason of which he was severely injured. The trial court peremptorily instructed the jury to find for the defendant. In the opinion, affirming the judgment, it is said: "It may be stated briefly, in assuming the liability of a railroad to its passenger for injury done by another passenger, only where the conduct of this passenger has been

sponsible for the results of a sudden, unlooked-for, and violent attack by a passenger on a fellow passenger, although the assailant is intoxicated, and has addressed insulting remarks to his fellow passenger, but remained quiet after being admonished by the conductor.[76] Nor is the carrier liable where one pas-

such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in that case asserting it to be the duty of the conductor of the railroad train to use all reasonable means to prevent such injury, and if he neglects this reasonable duty, and the injury is done, that then the company is responsible; otherwise, it is not." Bogard *v.* Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 857, 36 L. R. A., N. S., 337.

In Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, the plaintiff was injured by alcohol which had been carried upon the train by another passenger. In the opinion in that case it is said: "It was but a short period of time after the alcohol was spilt when it was set on fire and the accident occurred, and it was not shown that appellant's employees knew that the jug contained alcohol. In fact, it is not shown that the conductor or any other employee knew that Harris had a jug with him until it fell out of a sack, though the conductor had collected his fare, and doubtedless knew he had the sack on the seat with him. It can not be successfully denied that Harris had the right as a passenger to carry baggage in the train, and that he had a right to carry it in a sack if he choose to do so. We think it equally clear that, in the absence of some intimation or circumstance indicating that the sack contained something dangerous to other passengers, it was not the duty of appellant's conductor or other employees to open the sack and examine its contents." Citing Quinn *v.* Louisville, etc., R. Co., 98 Ky. 231, 32 S. W. 742, 17 Ky. L. Rep. 811; Wood *v.* Louisville, etc., R. Co., 101 Ky. 703, 42 S. W. 349, 19 Ky. L. Rep. 924; Louisville, etc., R. Co. *v.* Vincent, 96 S. W. 898, 29 Ky. L. Rep. 1049; Louisville, etc., R. Co. *v.* Renfro, 142 Ky. 590, 135 S. W. 266, 33 L. R. A., N. S., 133; Bogard *v.* Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 858, 36 L. R. A., N. S., 337.

In Long *v.* Chicago, etc., R. Co., 48 Kan. 28, 28 Pac. 977, 15 L. R. A. 319, 30 Am. St. Rep. 271, Long, in purchasing a ticket to ride on defendant's railroad, contracted the smallpox, from Clayton, its agent, who sold him the ticket, and he sought to recover of the railroad company damages for the injury thus sustained. The trial court sustained a demurrer to the petition. On the appeal the supreme court of Kansas held that the plaintiff was without right of recovery, saying in the opinion: "In this case it is not charged that the railroad company or any of its superior officers knew that its agent at Annis was afflicted with any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person, because such person has contracted a contagious or infectious disease from an agent, when the master or company has no knowledge that the agent is afflicted." Bogard *v.* Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 858, 36 L. R. A., N. S., 337.

A passenger on a railway train, who was somewhat intoxicated, and walked a number of times through the cars, looking for some one, though he conducted himself without offense towards the other passengers, accidentally stumbled over some baggage; and a revolver fell from his pocket and was discharged, wounding another passenger in the foot. Held, that the carrier had no reason to anticipate such an accident, and was not liable for the injury. Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

76. Putnam *v.* Broadway, etc., R. Co., 55 N. Y. 108, 15 Abb. Prac., N. S., 383, 14 Am. Rep. 190, reversing 36 N. Y. Super. Ct. 195.

Plaintiff sustained injuries in consequence of another passenger, who was standing in the aisle of the car and supporting himself by one of the straps, stepping upon her foot. The passenger who caused the injury was intoxicated, and lurched at every turn, but was well behaved. It was held that plaintiff had no cause of action. Thomson *v.* Manhattan R. Co., 75 Hun 548, 27 N. Y. S. 608, 59 N. Y. St. Rep. 621.

Plaintiff was injured by the discharge of a pistol which dropped from the pocket of another passenger. The passenger who dropped the pistol was intoxicated, and, prior to the accident had passed through the train several times, smoking a cigar, staggering somewhat, and peering into the faces of the passengers. He was otherwise orderly. On the ground that no connection between the passenger's intoxication and the dropping of the pistol appeared, and that the trainmen could not reasonably be expected to anticipate any trouble from his presence on the train, it was held that the carrier was not liable for the injury to plaintiff. Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

In an action to recover for injuries sustained by plaintiff in consequence of

senger pushes another from the vehicle, in the absence of some act rendering the carrier negligent.[77] In an action to recover damages for the mistreatment of plaintiff, a colored person, by white fellow passengers, while she was riding in a car set apart for the exclusive use of negroes, it was held that the trial court properly instructed the jury that plaintiff was not entitled to recover unless the jury should believe from the evidence that the conductor permitted the white passengers to enter the compartment set apart for colored passengers, or, knowing of their presence there, permitted them to remain in the car.[78] A carrier is not responsible for the consequences of the criminal acts of passengers or strangers which can not reasonably be foreseen.[79] A carrier is under no obligation to protect a passenger from the criminal assault of persons in no way connected with the carrier, and which assault there was no reason to antici-

the act of a drunken passenger in uncoupling the rear coach of a train, and thereby causing a collision between that car and the rest of the train, it was held that the question as to whether the company should have anticipated the happening of an event like that which caused the accident should have been submitted to the jury. Texas, etc., R. Co. *v.* Storey, 29 Tex. Civ. App. 483, 68 S. W. 534.

77. A passenger on a crowded car stood near the door with his hand resting on the door jamb. There were people between him and the door and some on the steps. The conductor in pushing his way through the crowd pressed the passenger against a third person sitting in a seat who gave the passenger a push, throwing him from the car. Held, that the proximate cause of the injury was, as a matter of law, the action of the third person, for which the carrier was not liable. Snyder *v.* Colorado Springs, etc., R. Co., 85 Pac. 686, 36 Colo. 288, 8 L. R. A., N. S., 781, 118 Am. St. Rep. 110.

78. Bailey *v.* Louisville, etc., R. Co., 19 Ky. L. Rep. 1617, 44 S. W. 105.

79. Thus, it has been held that a railroad company is not liable for the death of a passenger upon one of its trains, who is shot by some unknown person, a passenger or intruder, who enters the car in which the passenger is riding with intent to commit murder or robbery, if the company, through its servants, does not know, or have reasonable grounds for suspecting, that the passenger is in danger. Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792.

And it has been held that the presence upon a train of two negro tramps, secreted and stealing a ride thereon, would not alone be sufficient to cause the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought into the train under arrest they might endeavor to escape, and while an employee was attempting to prevent the escape make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection, and who was taking no part in effort to prevent the escape. Savannah, etc., R. Co. *v.* Boyle, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104.

Where plaintiff and another passenger, with whom he had become involved in an altercation and fight, were separated by the conductor as soon as possible, and there was nothing to indicate that the trouble would be renewed, but plaintiff's assailant suddenly and unexpectedly renewed the assault, it was held that the carrier was not liable. Mullan *v.* Wisconsin Cent. R. Co., 46 Minn. 474, 49 N. W. 249, 47 Am. & Eng. R. Cas. 649.

A loaded freight train had been placed by the employees of a railroad company on a side track with the brakes set tight and the switch set to throw the cars off should anything happen. A boy turned the switch so as to let the cars on to the main track, and opened the brakes, thus starting the cars, which, reaching the main track, collided with an approaching passenger train upon which plaintiff was a passenger. It was held that the company was not liable for the injuries sustained by plaintiff in the collision. Fredericks *v.* Northern Railroad, 157 Pa. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306.

While the crew of a train which had stopped at a regular meal station were eating their dinner, a passenger, who had remained in the car, was assaulted by an intruder and another passenger. Held, that the company was not liable, as the leaving of the train with no one in charge while the crew were taking their meals was a reasonable regulation, and the assault one which could not reasonably have been anticipated by them. Thweatt *v.* Houston, etc., R. Co., 71 S. W. 976, 31 Tex. Civ. App. 227.

A railway company is not liable for an assault committed by a negro on a white female passenger alone in a lighted coach while the train was stopping at a station, and while the company's employees were absent from the coach. Segal *v.* St. Louis, etc., R. Co., 80 S. W. 233, 35 Tex. Civ. App. 517.

pate.[80] The fact that a passenger is in need of special protection, while traveling, ordinarily does not charge the carrier with liability for the consequences of not affording him the necessary protection, if the fact that he needs special protection is unknown to the carrier at the time of entering into the contract to carry.[81]

Liability for Violation of Rules by Strangers.—Having provided reasonable rules for the protection of its passengers, a railroad company will not be liable for the violation of those rules by a stranger. Railroad companies are not insurers of the safety of passengers; they are bound to exercise a high degree of care, but are not liable for the acts of strangers.[82]

§ 2565. Performance of Duty, or Inability, to Protect.—Even though the carrier may have knowledge, or be charged with knowledge, of the passenger's peril, or of facts or circumstances from which danger may reasonably be apprehended, he can not, of course, be held liable unless there has been an omission of duty on his part to protect the passenger. If a carrier's servants, when they learn that a passenger is in danger of being harmed by fellow passengers, make every reasonable effort to protect him, the carrier's duty is discharged, and he can not be held responsible for injuries which the passenger may sustain.[83] Where a train is boarded by disorderly persons, who rush upon

80. Criminal assault on female.—Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

Plaintiff a female passenger, who was on the wrong train, was put off at one of defendant's stations to await the arrival of the proper train. There was nothing to show that the station was an unsafe or inappropriate place for a young and unexperienced female, traveling alone, to remain between trains. A male passenger who left the train when she got off offered to escort her to a hotel, to which the conductor assented. Instead of taking her to a hotel, he took her to a saloon, where he committed an assault upon her. On the ground that, under the circumstances, the conductor had no reason to believe that the assault upon plaintiff would be committed, it was held that defendant was not liable. Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 58 Am. & Eng. R. Cas. 538, 37 Am. St. Rep. 386.

81. It was so held, and judgment was rendered for defendant carrier, and an action for assaults upon plaintiff, while traveling upon defendant's railway, committed as follows: Plaintiff had been employed in the eviction of pitmen from their houses, and had thereby incurred the ill-will of the pitmen in the neighborhood in which he was traveling. When he took his ticket defendant's servants had no notice that he was exposed to greater danger than one of the traveling public, although he was threatened with violence by a number of pitmen at the station, in the hearing of some of defendant's servants, before the train started, and got into the guard's van for safety, but was removed and placed in a third class carriage by defendant's servants, who at this time knew that he had been engaged in the evictions, and feared violence from the pitmen. The pitmen crowded into the compartment in which he was, thereby greatly overcrowded. Defendant's servants when applied to by him did nothing towards attempting to get the pitmen out, or to get plaintiff a seat in another carriage, and he was assaulted and injured by the pitmen during the journey to the first station at which the train stopped. At that station the pitmen got out of the compartment and others got in and the assaults upon plaintiff were repeated by them. This happened at each station at which the train stopped and at each station he complained of the assaults to the guard, who did nothing to secure his safety. Pounder *v.* North Eastern R. Co., 1 Q. B. 385, 52 Am. & Eng. R. Cas. 433.

While the general principle, which is enunciated in this case, as to the duty of a carrier to afford a passenger special protection, is undoubtedly correct, it is doubtful whether the carrier's servants performed their full duty to the passenger, after becoming acquainted with his dangerous position. See the criticism of Chicago, etc., R. Co. *v.* Pillsbury, 123 Ill. 9, 14 N. E. 22, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483.

82. Violation of rules by stranger.—Ferrell *v.* C. H. & D. R. Co., 12 Wkly. L. Bull. 234, 9 O. Dec. Reprint 361.

Thus, where there was a rule of the company that an express car should be unloaded outside of the depot, and not in the depot, a violation of that rule by an employee of the express company would be an act for which the railroad company would not be liable. Ferrell *v.* C. H. & D. R. Co., 12 Wkly. L. Bull. 234, 9 O. Dec. Reprint 361.

83. Tall *v.* Baltimore Steam-Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120.

When two men, acquaintances who had been drinking together, boarded a

the cars with such violence and in such numbers as to overwhelm the conductor, as well as the passengers, the railroad company is not responsible for the consequences of the disorderly persons being on the train. "It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary transportation, but they are not bound to anticipate or provide for such an unusual occurrence."[84]

§ 2566. Acts for Which Carrier Liable.—As is shown by the preceding sections, most of the cases in which it has been sought to charge carriers with liability for the consequences of negligence and wilful acts of fellow passengers and strangers, have been based upon acts of violence. But the liability of the carrier is not limited to acts of violence; passengers, especially women and children, are entitled to be protected against the use of profane or obscene language, insults and abuse, and similar misconduct, by fellow passengers, or strangers.[85] It has been held that though a rule of a railroad or a state law prohibited colored passengers from riding in the same coach with white passengers, this did not justify the carrier's employees in permitting other passengers to use profane and indecent language in their effort to compel a colored servant accompanying a white passenger to leave the coach.[86] However, the carrier's liability is subject to the limitation that he can not be expected to guard against the consequences of mere rudeness or bad manners on the part of strangers, or other passengers, which does not amount to a breach of the peace.[87] The officers of the law can take no cognizance of it, and carriers are

train, and, after a while, one of them began abusing the other and assaulted him, it was held that the conductor, in separating them and preventing the assault from being repeated, did all that he could reasonably be expected to do. Kinney *v.* Louisville, etc., R. Co., 99 Ky. 59, 34 S. W. 1066, 17 Ky. L. Rep. 1405.

Two passengers upon a steamboat became involved in a quarrel over a game of cards. One of them applied an insulting epithet to the other, who left the room but returned in a few minutes, and approached the passenger with whom he had been playing. The captain, whose attention had been called to possibility of trouble, sprang forward and intervened, but not in time to prevent the man who had remained in the room striking the other, and knocking him down. The latter drew a pistol and fired, but missed his aim and hit plaintiff. It was held that, the captain having done everything in his power to prevent the occurrence, the carrier was not liable. Tall *v.* Baltimore Steam-Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120.

A carrier was not liable for an assault by C., a passenger, on another passenger, though the conductor was informed that there was ill feeling between such passengers, and that an assault might occur, where C. and the person assaulted occupied separate coaches, and the conductor passed through the train several times to observe the conduct of C., and found that he was acting in a peaceable manner, and the assault, when made, was entirely unexpected. Pecos, etc., R. Co. *v.* Twichell (Tex. Civ. App.), 145 S. W. 319.

84. Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. 512, 91 Am. Dec. 224.

85. *Alabama.* — Batton *v.* South, etc., R. Co., 77 Ala. 591, 23 Am. & Eng. R. Cas. 514, 54 Am. Rep. 80.

Arkansas.—St. Louis, etc., R. Co. *v.* Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74.

Texas.—St. Louis, etc., R. Co. *v.* Mackie, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 10 Am. St. Rep. 766, 1 L. R. A. 667; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518; Collins *v.* Texas, etc., R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643; Texas, etc., R. Co. *v.* Jones (Tex. Civ. App.), 39 S. W. 124.

86. Employees not justified.—Southern R. Co. *v.* Lee, 167 Ala. 268, 52 So. 648.

87. Thus, it has been held that a woman is not entitled to recover damages from a railroad company for personal injuries where it appears from her own testimony that, when she was about to descend from the lower step of a car to the ground, she was jostled off by another passenger rudely pushing by her to enter the car. Ellinger *v.* Philadelphia, etc., R. Co., 153 Pa. 213, 25 Atl. 1132, 58 Am. & Eng. R. Cas. 429, 34 Am. St. Rep. 697.

And a railroad company is not liable for injuries sustained by a passenger through the act of an intending passenger, who, in hastily entering a station, violently pushes the door open, causing it to strike the passenger with force, just

not bound to prevent it or liable in damages for its appearance about their stations or trains.[88] A railroad company it has been held, is not liable to a passenger on account of men and boys around one of its stations jeering and laughing at her.[89]

§§ 2567-2629. Liability for Acts and Omissions of Servants—§ 2567. In General.—The degree of care demanded of a railroad company extends to the employment of a sufficient number of good, steady, and competent agents and employees to so conduct and control the train as to insure its careful and skillful management.[90] The legal purport of a receipt for stage fare is that the carrier agrees to provide careful drivers of reasonable skill and good habits.[91] It is incumbent upon the owner of a department store to exercise such care in its selection of elevator boys as the proper discharge of that duty and the situation and circumstances demand, having regard to the serious consequences likely to flow from negligence in the management of the elevator.[92]

Application of General Master and Servant Law.—The old and thoroughly established doctrine that a master is responsible to third persons for damage caused by the wrongful acts or omissions of his servants, in the course of their employment as such, is, of course, fully applicable to hold a carrier responsible to his passengers for the wrongful acts and omissions of his servants. Since a carrier owes to his passengers the exercise of a much higher degree of care that a master ordinarily owes to third persons, the considerations of public policy which justify the respondeat superior rule when the master sustains to third persons only the ordinary relations of life, are of especial force when the rule is to be applied to hold a carrier liable to his passengers. In fact, as will appear later, the rule which holds a master, who is a carrier for hire, liable to his passengers is somewhat more rigorous than that which holds him liable to third persons to whom he sustains no special relation.

Carrier's Liability.—The misconduct or negligence of the carrier's servants while transacting business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the carrier, which constituted them agents for the performance of its contract with the passenger.[93] Where a car-

as she is about to pass out. Graeff *v.* Philadelphia, etc., R. Co., 161 Pa. 230, 28 Atl. 1107, 58 Am. & Eng. R. Cas. 431, 41 Am. St. Rep. 885, 23 L. R. A. 606.

88. Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

89. Missouri, etc., R. Co. *v.* Kendrick (Tex. Civ. App.), 32 S. W. 42.

90. Duty to employ competent servants.—International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; St. Louis, etc., R. Co. *v.* McAnellia (Tex. Civ. App.), 110 S. W. 936.

It is the duty of a street railroad company to provide careful and competent servants to manage its cars. Baldwin *v.* People's R. Co. (Del.), 7 Pen. 81, 76 Atl. 1088, judgment affirmed in 72 A. 979.

Duties and liabilities of carriers by stage.—It is the duty of a carrier by stage to employ a competent driver, and of the driver to use the "utmost care" for the safety of passengers; and an omission to charge, in an action for personal injuries, that the negligence of the driver is that of the carrier, can not prejudice the carrier. Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407.

91. Legal purport of stage fare.—Sawyer *v.* Dulany, 30 Tex. 479.

92. Elevator boys. Jones *v.* Co-Operative Ass'n, 109 Me. 448, 84 Atl. 985.

93. Misconduct or negligence of employees—Acts within scope of employment.—New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039; New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109, 52 Am. & Eng. R. Cas. 447; Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 37 L. Ed. 97, 13 S. Ct. 261; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Carpenter *v.* Washington, etc., R. Co., 121 U. S. 474, 30 L. Ed. 1015, 7 S. Ct. 1002; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161.

"Whatever care and precaution may be taken in conducting its business (the business of a common carrier of passengers) or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence." Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161.

rier intrusts to its servants the performance of its duty to carry a passenger safely and properly, and to treat him respectfully, it is responsible for the manner in which the servants execute the trust.[94] A passenger contracts, not only for transportation, but for good treatment and against personal rudeness and wanton interference with his person either by the carrier or its agents employed in the management of the conveyance, and a passenger is under the protection of the carrier and those of its servants to whom it commits the performance of the various duties to the passenger which it assumed by the contract.[95]

Test as to Liability.—The test of a master's liability is whether the act was within the scope of the servant's duties under his employment, and not the spirit or motive animating the servant in his action,[96] nor whether the particular act was unauthorized and unlawful.[97] The duty of proper treatment owed by a carrier to his passenger covers the conduct of all employees placed where they come in contact with the passenger and render to him services due by the carrier, though the act complained of was not done in pursuance of the duties of the servant's employment nor for the master's service.[98] The carrier's contract duty to carry the passenger safely to his destination and so conduct the operation of its cars as not to injure him, protects him only against the negli-

94. Liability for manner of execution of trust.—Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

A carrier is liable for the acts of the servant in charge of or having control over the passengers, amounting to a breach of the duty of transporting them safely. Louisville R. Co. *v.* Kupper (Ky. App.), 118 S. W. 266.

A carrier must protect passengers from the negligent or wilful misconduct of its servants while engaged in transporting such passengers. Connell *v.* New York, etc., R. Co., 118 N. Y. S. 944, 134 App. Div. 231.

The obligation of a carrier is to carry passengers safely, and protect them from insult and injury at the hands of its own officers and employees. Alexander *v.* New Orleans R., etc., Co., 57 So. 283, 129 La. 959.

95. Extent of contract.—International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op., citing Texas Mid. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943, reversing 82 S. W. 524.

One who has been accepted as a passenger is lawfully on the train, and the carrier must provide reasonable facilities for his transportation in safety, and protect him from violence and annoyance from employees. Hull *v.* Boston, etc., Railroad, 96 N. E. 58, 210 Mass. 159, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147.

96. Test as to liability.—Texas, etc., R. Co. *v.* Lyons (Tex. Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.

The fact that an employee is angry and acts maliciously will not relieve the railroad company from the consequences of the act if it was in the line of his duty. Texas, etc., R. Co. *v.* Lyons (Tex. Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.; Houston, etc., R. Co. *v.* Washington (Tex. Civ. App.), 30 S. W. 719.

The fact that a motorman did not have time to read the rules of the company, where he had been in its service nearly two weeks after having been instructed for twelve days, is no excuse. Foley *v.* Boston, etc., St. R. Co., 84 N. E. 846, 198 Mass. 532.

97. International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000, affirmed in 102 Tex. 585, no op., citing Texas Mid. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943, reversing 82 S. W. 524.

A carrier is liable for all damages to passengers from acts of an agent in the course of his employment, though the act was not ordered or ratified by the carrier. Baltimore, etc., R. Co. *v.* Davis, 44 Ind. App. 375, 89 N. E. 403.

98. Texas Mid. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943, reversing 82 S. W. 524.

In an action for the death of a passenger, a requested charge to find for the carrier, if the injurious act, which was incident to the particular transaction in which the employee was engaged, was not within the scope of his duty was properly rejected. Layne *v.* Chesapeake, etc., R. Co., 67 S. E. 1103, 66 W. Va. 607.

"In the case of Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311, the doctrine is thus stated: 'As a general rule, the master is liable for what his servant does in the course of his employment, but in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do.'" Texas Mid. R. Co. *v.* Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943, reversing 82 S. W. 524.

gence or willful act on the part of the employees.[99] And the failure of railroad employees to discharge a legal duty owed by them to a passenger is negligence.[1]

Mistake of Judgment.—It seems to be a pretty well-settled principle that an act of an employee on a car, resulting in an injury to the passenger, if done when the passenger is in apparent danger, even though a mistake of judgment, will not render the carrier liable.[2]

§ 2568. Negligence of Servants.—Although a carrier of passengers has exercised due care in the selection of his servants and has no knowledge of their incompetency,[3] he is liable to passengers who are damaged as a proximate result of their negligence,[4] when acting within the scope of their employment.[5]

99. Liable only for negligence or willful act.—Prospert *v.* Rhode Island Suburban R. Co., 28 R. I. 367, 67 Atl. 522, 11 L. R. A., N. S., 1142.

1. Failure to discharge legal duty.—Texas Cent. R. Co. *v.* Cameron (Tex. Civ. App.), 149 S. W. 709.

No legal duty existing.—Plaintiff was a passenger on one of defendant's suburban electric cars, which became stalled in a snowstorm, so that plaintiff was obliged with her infant child to remain in the car for 11½ hours, during which she suffered from cold, at the end of which time the conductor obtained shelter for plaintiff and her child in a nearby house. Held, that defendant's contract duty to carry plaintiff safely to her destination and so conduct the operation of its cars as not to injure her, protected plaintiff only against any wilful act or negligence on the part of defendant's employees, and that the conductor was under no legal obligation to take steps before he did to find comfortable shelter for plaintiff outside the car. Prospert *v.* Rhode Island Suburban R. Co., 67 Atl. 522, 28 R. I. 367, 11 L. R. A., N. S., 1142.

2. Where a female passenger on a street car, after the conductor gave one bell and the car slowed up, got on the running board, ready to alight, but made no other move to alight, and the conductor then seeing her gave three bells to stop the car, for fear she would step down, whereupon it was stopped with a jerk throwing her off, the carrier is not absolved from liability for the conductor's negligence, on the ground that he acted when the passenger was in apparent danger, and for her safety, and that, if he made a mistake in judgment, it was not responsible therefor. Sheppard *v.* New York City R. Co., 107 N. Y. S. 553, 56 Misc. Rep. 639.

3. Bishop *v.* Stockton, Fed. Cas. No. 1,440, affirmed in 4 How. 155, 11 L. Ed. 918; Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135, 39 Am. & Eng. R. Cas. 480; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

4. *United States.*—Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502; Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264; Peck *v.* Neil, 3 McLean 22, Fed. Cas. No. 10,892.

Alabama.—Alabama, etc., R. Co. *v.* Siniard, 123 Ala. 557, 26 So. 689.

Louisiana.—Black *v.* Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586.

New York.—Koetter *v.* Manhattan R. Co., 59 Hun 623, 13 N. Y. S. 458, 36 N. Y. St. Rep. 611, affirmed without opinion, in 129 N. Y. 668, 30 N. E. 65.

Though the obligation of a carrier is not that of an insurer, it must exercise the highest degree of care, and is bound to protect its passengers from the negligence of its employees. Louisville, etc., R. Co. *v.* Mulder, 149 Ala. 676, 42 So. 742.

Injury not caused by servants' negligence.—Where a conductor requested a boy, who claimed that his father had paid his fare, to show him his father, and thereby implied that he would ask the person pointed out whether the boy's statement was true, but did not by his threatening manner require the boy to go on the running board, and there was nothing to show that the conductor anticipated that the boy would do so, the injury sustained by the boy by stepping onto the running board and falling from the car was not occasioned by the negligence of the conductor. Goodfellow *v.* Detroit United Railway, 119 N. W. 900, 155 Mich. 578, 20 L. R. A., N. S., 1123.

5. Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423; Lakin *v.* Oregon Pac. R. Co., 15 Ore. 220, 15 Pac. 641; Missouri, etc., R. Co. *v.* Perry, 8 Tex. Civ. App. 78, 27 S. W. 496; International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

The owner of a passenger elevator is liable for injury to a passenger which results from the negligent act of a servant while acting as such, and within the scope of his employment. Sweeden *v.* Atkinson Improv. Co., 93 Ark. 397, 125 S. W. 439, 27 L. R. A., N. S., 124.

Where a passenger elevator operator invites a minor into the elevator as his guest for the purpose of taking her for for a ride, she having no business in the building, it is an act without the scope of the servant's employment, and the mas-

And he is not relieved of liability because the particular act was not authorized or ratified by him,[6] or because the servant may have exceeded his detailed instructions.[7] The carrier is liable even though the particular act causing the injury was done in disregard of the general orders or special command of the carrier.[8] The result of the authorities, then, is that the liability of the carrier for the negligence of his servants depends, not upon whether the particular act was authorized, nor even upon whether it was forbidden, but upon whether the servant was, when he caused the injury, acting within the line of his duties or the scope of his employment. A carrier becomes responsible for all damages resulting from the negligent acts of such employees as were within the legal contemplation of the carrier at the time of contracting with a passenger for transportation.[9] The negligence of the agent, of whatsoever grade, of a carrier is, as to matters within the scope of the employment, with reference to passengers, the negligence of the carrier itself, and fixes a liability which the carrier can not avoid or limit by contract.[10] Thus, it is said that it is immaterial what position in the railroad company's employ a servant may hold to whom a passenger reports the condition of the door of a car which subsequently injures the passenger, where such servant is superintending the movement of the cars, as the railroad company is liable for his negligence no matter what position he holds in its employ.[11]

Negligent Ignorance All That Is Required.—In a suit to recover damages for injuries received as a result of the negligence of a servant of a railway company, the right to recover does not depend upon actual knowledge, or willful or intentional conduct on the part of the servant. It may be based on actual knowledge or willful conduct, but negligent ignorance on the part of the servant of that which the law makes it his duty to know is all that is required. In safe-

ter is not liable for injuries to the child from the operator's negligence. Sweeden *v.* Atkinson Improv. Co., 93 Ark. 397, 125 S. W. 439, 27 L. R. A., N. S., 124.

Carriers are liable for injury to passengers caused by negligence or unskillfulness of servants, unless such acts are shown to be without scope of employment or to be wilful. Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573, 581.

Where a railroad employee intrusted with a switch key leaves the switch lock insecurely fastened, his act is one within the ordinary scope of his employment, and the railroad company is liable for resulting damages. Texas, etc., R. Co. *v.* Boren (Tex. Civ. App.), 149 S. W. 295.

6. Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149; Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19, 6 Am. & Eng. R. Cas. 178; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339, 61 Am. Dec. 101.

7. Gray *v.* Boston, etc., Railroad, 168 Mass. 20, 46 N. E. 397.

8. *United States.*—Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502; Heenrich *v.* Pullman Palace Car Co., 20 Fed. 100, 18 Am. & Eng. R. Cas. 379.

Illinois.—Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 178, 14 N. E. 197, 5 Am. St. Rep. 510.

Michigan. — Fitzsimmons *v.* Milwaukee, etc., R. Co., 98 Mich. 257, 57 N. W. 127.

Pennsylvania. — Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. 382, 91 Am. Dec. 168.

South Carolina.—Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

9. St. Louis, etc., R. Co. *v.* McAnellia (Tex. Civ. App.), 110 S. W. 936, citing International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; International, etc., R. Co. *v.* Welch, 86 Tex. 203, 206, 24 S. W. 390, 40 Am. St. Rep. 829; Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, affirmed in 93 Tex. 685, no op.; Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407.

10. Gulf, etc., R. Co. *v.* McGown, 65 Tex. 640.

A carrier is liable to a passenger for injury inflicted on him by its servant, in whatever capacity the servant may be employed. St. Louis, etc., R. Co. *v.* Franklin (Tex. Civ. App.), 44 S. W. 701.

Liability for negligence of ticket agent.—The negligence of a ticket agent of a railroad company is not selling ticket to an intending passenger and in failing to signal the train for said passenger is the negligence of the railroad company, and the latter is liable for any damages resulting, or which might reasonably be expected to result from the passenger being left under the circumstances. Houston, etc., R. Co. *v.* Rand, 1 Texas App. Civ. Cas., § 255.

11. Servant's position immaterial.—International, etc., R. Co. *v.* Lane (Tex. Civ. App.), 127 S. W. 1066.

guarding a passenger the law makes it the duty of the servant of the railway company to know every fact which by the exercise of extreme diligence he could discover.[12]

§§ 2569-2601. Wilful Acts of Servants—§ 2569. In General.—The earlier doctrine of the common law, both in England and the United States, was that the master is not liable for the wilful wrong or trespass of his servant, unless done by his express direction, or with his assent. But, in the modern law of master and servant, the distinction between the master's liability for the negligence and the wilful acts of his servants is generally discarded, and the master is liable not only for the negligence of his servants, but also for their wilful acts, when done within the scope of their employment. Since then, as is now generally agreed, the wilfullness of a servant's act does not relieve the master from liability even to persons toward whom he sustains only the ordinary relations of life, it is clear that the wilfullness of the wrong can not relieve him from liability to persons whom he owes some special duty. "The principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty."[13] It is, therefore, well settled that a carrier is liable to his passengers for even the wilful and malicious acts of his servants.[14] A common carrier un-

12. Negligent ignorance.—Bennett *v.* Central, etc., R. Co., 6 Ga. App. 185, 188, 64 S. E. 700.

Thus, in a suit to recover damages for personal injuries received by a passenger from the sudden slamming of a car door by a servant of a railway company, in order to show a cause of action it is not necessary to allege that the servant had actual knowledge of the dangerous position of the passenger at the time the injuries were received, or that the act of the servant was intentional. Bennett *v.* Central, etc., R. Co., 6 Ga. App. 185, 64 S. E. 700.

13. Ryan, C. J., in Croaker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

14. *California.*—Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695.

Louisiana.—Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197.

New York.—Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224, reversing 45 Hun 139.

Ohio.—Passenger Railway *v.* Young, 21 O. St. 518, 8 Am. Rep. 78.

Oregon.—Lakin *v.* Oregon Pac. R. Co., 15 Ore. 220, 15 Pac. 641, 34 Am. & Eng. R. Cas. 500.

South Carolina.—Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

Tennessee. — Knoxville Tract. Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; Springer Transp. Co. *v.* Smith, 84 Tenn. (16 Lea) 498, 501, 1 S. W. 280; Cincinnati, etc., R. Co. *v.* Harris, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A., N. S., 779.

West Virginia.—Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 29 Am. St. Rep. 827, 14 L. R. A. 798.

Wisconsin.—Croaker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504. But see Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460.

In Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474, affirming 12 N. Y. Super. Ct. 133, a railroad company was held liable to a passenger for the consequences of an unreasonable delay in the transportation, caused by the wilful act of the conductor in detaining the train, knowing it to be a violation of his duty.

The liability of the carrier for torts committed by its servants in the prosecution and within the scope of its business is not limited to the negligent torts of the servant but includes also the voluntary or wanton torts. Brunswick, etc., R. Co. *v.* Moore, 101 Ga. 684, 28 S. E. 1000; Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842; Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216; Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281.

In Western, etc., Railroad *v.* Turner, 72 Ga. 292, 294, 53 Am. Rep. 842, it is held that railroad companies are liable for torts committed by their servants in the transaction of the business and within the scope of the duties entrusted to them, whether the same be negligent or volun-

dertakes absolutely,[15] or as said in some cases, must exercise a very high degree of care,[16] to protect its passengers from the misconduct of its own servants while engaged in performing a duty which it owes to the passenger, and if the servant inflicts injury upon one of its passengers during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural consequences, no matter what may have been the motive which actuated the servant, and although the act was contrary to the express orders of the carrier,[17] hence, if this duty to the passenger is not performed, and a passenger is assaulted and insulted through the negligence or willful misconduct of the carrier's servants, the carrier is liable.[18] So it may be laid down as the general rule that when a contract of carriage is entered into between a passenger and a carrier there arises out of the relation thus created not only a duty to safely transport the passenger to the destination fixed in the contract, but also to protect him from injury, violence, insult and ill-treatment at the hands of the servants of the carrier who are in charge of or connected in any way with the carriage in which the passenger is being transported.[19] And it is held that a carrier is liable to a pas-

tary. Savannah Elect. Co. *v.* Hodges, 6 Ga. App. 470, 472, 65 S. E. 322.

In an action by a passenger for an assault by the conductor Ga. Code (1882), § 2202, which provides that the principal is not liable for the wilful trespass of his agent, unless done by his command or assented to by him, and § 2961 which makes every person liable for torts committed by his servant by his command or in the prosecution and within the scope of his business whether the same be by negligence or voluntary, must be so construed as that they will be harmonized and both remain of force in cases to which they apply. Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

A passenger may recover from a carrier for the misconduct and insulting language of its conductor without proof that such misconduct and insulting language were "negligently done." San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

15. Absolute undertaking.—A carrier of passengers is under an absolute contractual duty to protect them from wilful and unlawful injury at the hands of its servants. Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

A carrier is liable as an insurer for the protection of passengers against assaults and insults at the hands of its servants, unless the passenger alone is the cause of the trouble. Rohrback *v.* Pullman's Palace Car Co., 166 Fed. 797.

16. A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants. Missouri, etc., R. Co. *v.* Gerren, 57 Tex. Civ. App. 34, 121 S. W. 905.

17. Motive.—Blake *v.* Kansas, etc., R. Co., 38 Tex. Civ. App. 337, 85 S. W. 430; Dallas, etc., St. R. Co. *v.* Gilmore (Tex. Civ. App.), 138 S. W. 1134; Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

Passengers do not contract with carriers merely for ship room and transportation from one place to another, but for good treatment and against personal rudeness and want of interference with their persons, either by the carrier or his agents employed in the management of the conveyance; and whatever may be the motive which incites a carrier's servant to commit an unlawful or improper act towards a passenger during the existence of the relation of carrier and passenger, and regardless of whether the wrong is committed in the execution of the servant's employment, the carrier is liable for the act and its natural and legitimate consequences. Pelot *v.* Atlantic, etc., R. Co., 60 Fla. 159, 53 So. 937.

Whether the act of the servant be one of omission or commission whether negligent or fraudulent, "if," as was adjudged in Philadelphia, etc., R. Co. *v.* Derby (U. S.), 14 How. 468, 14 L. Ed. 502, "it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment." New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

What will be misconduct on the part of its servants towards a passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

18. Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

19. Brewster *v.* Interborough Rapid Transit Co., 123 N. Y. S. 992, 68 Misc. Rep. 348; Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842, 28 Am. & Eng. R. Cas. 455; Atlanta, etc.,

senger, waiting at a depot for a train, for injuries proximately resulting from the improper acts of the servant in charge of the depot, done in the discharge of the duties of the employment.[20] In at least two states statutes were enacted, at an early date, by which owners of every carriage or vehicle conveying passengers for hire were made liable for injuries done by the driver, whenever the driver was liable therefor, whether caused by negligence or willful acts.[21] In view of a section in the New York statute defining the term "carriage" the driver of a street car has been held not to be a driver of a carriage within the meaning of the act.[22]

As Dependent upon Authorization, Ratification and Repudiation of Act.—That a common carrier did not authorize or ratify, but promptly repudiated the violent act or insulting language of its employee that caused injury to the person or feelings of its passenger will not excuse it from liability to the passenger for the damages thus resulting from the breach of its contract or of its liability for exemplary damages. The obligation of its contract is absolute. If it selects agents to perform its contract the carrier and not the passenger must take the risk and assume responsibility for the acts and conduct of their agents.[23] Yet it has been said that if the carrier discharge such servant, it would show disapproval of his conduct and may mitigate damages; if it retains or promotes him, it may go to aggravate the wrong by ratifying the conduct of the wrongdoer.[24]

Acts without Scope of Employment.—But, while the liability of the carrier to passengers for the wilful acts of his servants is undoubted, there exists much confusion of authority as to whether the servant's act must be within the scope of his employment or the line of his duty in order to charge the carrier with liability. As will appear later, in connection with discussions of the carrier's liability for specific wilful acts of his servants, the state of the authorities upon this question is as follows: The preponderance of authority is to the effect that he is responsible for assaults upon a passenger by a servant if the servant is, at the time, engaged in executing the contract of transportation,

Railroad *v.* Condor, 75 Ga. 51; East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474, 31 S. E. 107, 12 Am. & Eng. R. Cas., N. S., 14; Savannah, etc., R. Co. *v.* Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85; Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216; Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281; Turner *v.* Western, etc., Railroad, 69 Ga. 827; Savannah St., etc., R Co. *v.* Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464; Brunswick, etc., R Co. *v.* Moore, 101 Ga. 684, 28 S. E. 1000; Georgia R., etc., Co. *v.* Richmond, 98 Ga. 495, 25 S. E. 565; Central, etc., R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

A carrier must carry passengers safely and conserve by every reasonable means their safety throughout the journey and protect them from insult or personal violence from its employees, and such duty continues until the passenger is safely landed at his destination. Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142.

A carrier is liable to a passenger thereof for injury inflicted on him by its servant, in whatever capacity the servant may be employed. St. Louis, etc., R. Co. *v.* Franklin (Tex. Civ. App.), 44 S. W. 701.

Respectful treatment.—One of the duties which a carrier owes its passengers is that of respectful treatment, and a breach of this duty will give rise to a cause of action. Louisville, etc., R. Co. *v.* Forrest, 6 Ga. App. 766, 65 S. E. 808.

20. Passenger at station.—Gulf, etc., R. Co. *v.* Luther, 90 S. W. 44, 40 Tex. Civ. App. 517. See post, "Application of the Rule," § 2576.

21. 1 N. Y. Rev. Stat., p. 696, § 6; Saub. & B. Wis. Ann. Stat., § 1595.

22. Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418.

23. Effect of repudiation by carrier.—Knoxville Tract. Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

The fact that a railroad conductor has not been instructed by the company to use insulting language toward a passenger, and that the company has so ratified his act in using it, will not relieve it from liability for the mental anguish caused the passenger. Bleecker *v.* Colorado, etc., R. Co., 50 Colo. 140, 114 Pac. 481, 33 L. R. A., N. S., 386.

24. Mitigation or aggravation of wrong.—Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

although the act may not be strictly within the servant's "scope of employment" or "line of duty" [25] there seems to be no reference to the question in the cases which involve the carrier's liability to passengers for insults by servants [26] and there are a number of dicta and a few decisions to the effect that the carrier is liable for the false arrest and imprisonment of a passenger by a servant only when the servant, in effecting the wrongful arrest, is acting within the scope of his employment.[27] Why the carrier's liability to passengers for assaults by servants and his liability for the false imprisonment of passengers should be governed by different rules is certainly not obvious. It is apprehended that the same rule is to be applied to determine the liability of the carrier to passengers for the wilful acts of his servants, whether the particular act be an assault, insult, or false arrest and imprisonment. What that rule should be is sufficiently indicated in the discussion of the carrier's liability for assaults by servants.

Female Passengers.—The duty owed by the carrier to protect its passengers against violence and insult on the part of its servants is especially owed to female passengers.[28]

Nature of Liability.—The company's liability for a failure to protect its passengers from insult and abuse arises out of its breach of a public duty, not because the wrongdoer's act is, in law, imputable to it.[29]

§§ 2570-2592. Assaults upon Passengers—§ 2570. In General.—The earlier doctrine of the common law affirmed the rule that "in general a master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass." [30] But in the modern law of master and servant this distinction is generally discarded and the master is liable, not only for the negligence of his servants, but also for their wilful acts, when done within the scope of their employment.[31] It is obvious that there is much greater reason for holding a principal liable for an assault committed by his servant when the person assaulted sustains the relation of a passenger to the principal than when the injury is to a mere stranger.[32] A carrier, it is said, is an absolute guarantor of the safety of

25. See the authorities collected under §§ 2570-2592.

26. See the authorities collected under § 2593.

27. See the authorities collected under §§ 2594-2600.

28. Female passengers.—Savannah, etc., R. Co. *v.* Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85.

29. Nature of liability.—Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474, 31 S. E. 107, 12 Am. & Eng. R. Cas., N. S., 14; Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

30. 2 Hilliard on Torts, 524; McManus *v.* Crickett, 1 East 106.

31. Mott *v.* Consumers' Ice Co., 73 N. Y. 543.

32. In the much-cited case of Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39, an action of trespass by a passenger for an assault upon him by the defendant's brakeman, it being contended by the defendant that it was not liable because the brakeman's assault upon the plaintiff was wilful and malicious, and was neither directly nor impliedly authorized by the defendant, Walton, J., in delivering the opinion of the court, said: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precaution as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary,

its passengers against the assaults of its employees while it is performing its contract of carriage,[33] except such assaults as are justified by reason of some acts or conduct upon the part of the passenger.[34] Accordingly, it is uniformly held that, subject to limitations which will be pointed out later, carriers of passengers are liable, not only for the negligence of their servants, but for wilful and wanton assaults committed upon passengers by their servants,[35] without regard to negligence.[36] So it is said that a carrier is liable for the acts of its conductor in assaulting a passenger while engaged in the performance of his duty as such, precisely as the conductor himself would be.[37] And in view of this rule, where the assault is a joint act of the conductor and a person not a servant of the company, the company and such person are joint trespassers.[38]

What Constitutes Assault.—Where an intoxicated passenger, on being requested by a brakeman to deliver up a pistol which he is brandishing, gives it to his wife who places it under her, whereupon the brakeman reaches under her for it, it does not constitute an assault upon her, but is the reasonable and proper thing for him to do, in pursuance of his duty to protect the fellow passenger from an apprehended danger.[39]

the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible."

33. Guarantor against assaults.—Zeccardi *v.* Yonkers R. Co., 190 N. Y. 389, 83 N. E. 31, 17 L. R. A., N. S., 770; Baumstein *v.* New York City R. Co., 107 N. Y. S. 23, 56 Misc. Rep. 498; Miller *v.* Brooklyn Heights R. Co., 108 N. Y. S. 960, 124 App. Div. 537.

34. Where a brakeman without justification assaulted and injured a disorderly passenger after the latter had been removed to another car, the carrier is liable for the assault. Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018. See post, "Justifiable Assaults," §§ 2585-2590.

35. *Arkansas.*—St. Louis, etc., R. Co. *v.* Dowgiallo, 82 Ark. 289, 101 S. W. 412.

Georgia.—Central, etc., R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Wolfe *v.* Georgia, R., etc., Co., 2 Ga. App. 499, 58 S. E. 899; Savannah Elect. Co. *v.* Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A., N. S., 1176.

Illinois.—Chicago, etc., R. Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33, affirming 9 Ill. App. 250.

Indiana.—Citizens' St. R. Co. *v.* Willoeby, 15 Ind. App. 312, 43 N. E. 1058, 58 Am. & Eng. R. Cas. 485.

Iowa.—McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kentucky.—Winnegar *v.* Central, etc., R. Co., 85 Ky. 547, 4 S. W. 237, 34 Am. & Eng. R. Cas. 462, 9 Ky. L. Rep. 156; Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 33 Am. & Eng. R. Cas. 414, 8 Am. St. Rep. 538.

Maine.—Goddard *v.* Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

Missouri.—Keen *v.* St. Louis, etc., R. Co., 129 Mo. App. 301, 108 S. W. 1125.

New York.—Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127, 43 Am. Rep. 185.

Tennessee.—Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

Texas.—Dillingham *v.* Anthony, 73 Tex. 47, 11 S. W. 139, 37 Am. & Eng. R. Cas. 1, 15 Am. St. Rep. 753, 3 L. R. A. 634; International, etc., R. Co. *v.* Kentle, 2 Texas App. Civ. Cas., § 303; Galveston, etc., R. Co. *v.* McMonigal (Tex. Civ. App.), 25 S. W. 341; Texas, etc., R. Co. *v.* Edmond (Tex. Civ. App.), 29 S. W. 518; St. Louis, etc., R. Co. *v.* Johnson, 29 Tex. Civ. App. 184, 68 S. W. 58.

West Virginia.—Smith *v.* Norfolk, etc., R. Co., 48 W. Va. 69, 35 S. E. 834.

Wisconsin.—Croaker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

Assault by conductor.—A railroad company is liable as a trespasser to a passenger for an unjustifiable assault made upon him by the conductor of the train, the conductor being engaged in the company's business and in the conduct thereof making such assault. Savannah Elect. Co. *v.* Wheeler, 128 Ga. 550, 554, 58 S. E. 38, 10 L. R. A., N. S., 1176.

In Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842, it was held that when a conductor maliciously assaulted one who was treating with him for passage, he was acting in the prosecution and scope of the company's business, and it was liable. Savannah Elect. Co. *v.* Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A., N. S., 1176.

36. Negligence immaterial.—St. Louis, etc., R. Co. *v.* Johnson, 68 S. W. 58, 29 Tex. Civ. App. 184.

37. Neuer *v.* Metropolitan St. R. Co., 143 Mo. App. 402, 127 S. W. 669.

38. Carrier and third persons joint trespassers.—Central, etc., R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

39. What constitutes assault.—Friar *v.* Orange, etc., R. Co., 45 Tex. Civ. App. 564, 101 S. W. 274.

§ 2571. Assaults within the Scope of the Employment.—In consequence of the duties which carriers owe to passengers, the liability of the carrier to a passenger for assaults by servants must be at least as extensive as would be its liability to third persons to whom it owes no contractual duties, so that there can be no question but that the carrier is liable for a wrongful assault committed by the servant in the line of his duty or which is within the scope of his employment.[40]

§§ 2572-2584. Assaults Outside the Scope of the Employment—§ 2572. In General.—But there is considerable conflict of opinion as to whether the carrier is liable where the act is not within the servant's "scope of employment" or "line of duty."

§ 2573. Minority Rule.—In some cases the rule which obtains in the law of master and servant to limit the master's liability to third persons is applied as between carriers and passengers and it is held that, to charge the carrier with liability, the assault must be within the scope of the servant's employment or, as the rule is sometimes expressed, in the line of his duty.[42] Then, too, in a number of cases where the particular assault complained of was clearly within the scope of the servant's employment, the courts have favored this view in dicta.[43] But it is doubtful whether any support is afforded this view by the many cases in which, while it is apparently favored, the terms "scope of employment" and "line of duty" are used in a loose sense so that possibly nothing more is meant, and certainly nothing more is really held, than that the carrier is not liable for the acts of the servant when he is off from the duties of his employment, and is not engaged in executing the carrier's contract of transportation, in other words when the act is not done in the course of the servant's employment.[44]

40. *Alabama.*—Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448, 2 Am. & Eng. R. Cas., N. S., 425.

Georgia.—Western, etc., Railroad *v.* Turner, 72 Ga. 292, 28 Am. & Eng. R. Cas. 455, 53 Am. Rep. 842.

Iowa.—McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Kansas.—Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas., N. S., 418, 29 L. R. A. 465.

Kentucky.—Winnegar *v.* Central, etc., R. Co., 85 Ky. 547, 9 Ky. L. Rep. 156, 4 S. W. 237, 34 Am. & Eng. R. Cas. 462.

Massachusetts.—Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

A carrier is liable for a wrongful assault upon a passenger by a brakeman, at least while such brakeman is acting within the line of his employment. Morey *v.* Chicago, etc., R. Co., 119 Pac. 544, 86 Kan. 73.

A conductor is in charge of a street car and authorized to do such things and use such means as will facilitate and promote the business for which he is employed, the character of which will vary according to the nature of the duty to be performed and the attending circumstances; and the company employing him is liable for his wrongful act while so engaged. Holland *v.* Columbus R. Co., 12 O. D. N. P. 690.

42. McGilvray *v.* West End St. R. Co., 164 Mass. 122, 41 N. E. 116; Little Miami R. Co. *v.* Wetmore, 19 O. St. 110, 2 Am. Rep. 373. And see Central R. Co. *v.* Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425.

A carrier is not ordinarily responsible for the tortious acts of its servants when not engaged in their assigned and appropriate duties. Marks *v.* Alaska Steamship Co. (Wash.), 127 Pac. 1101.

43. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039; Texas, etc., R. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463; Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448, 2 Am. & Eng. R. Cas., N. S., 425; Fick *v* Chicago, etc., R. Co., 68 Wis. 469, 32 N. W. 527, 34 Am. & Eng. R. Cas. 378, 60 Am. Rep. 878.

44. The liability of a carrier for injuries to a passenger from an assault committed by an inspector depended on whether the inspector at the time of the assault was acting within the scope of his employment. Goodwin *v.* Cincinnati Tract. Co., 175 Fed. 61, 99 C. C. A. 661.

A carrier is not liable for an assault on a passenger by an agent or employee, unless the assault was committed while the agent or employee was acting within the scope of his employment. Philadel-

Thus, in one case,[45] the court, after declaring the general rule that "when the employee committing the injury is not at the time executing the employer's business, or not acting within the scope of his employment, the employer is not responsible," illustrates the meaning of this by saying: "If one driving the cars for the corporation should leave the car, and beat or abuse one on the sidewalk, the company would not be responsible." And when the terms "scope of employment" or "line of duty" are not used at all, but it is merely required that the assault should have been committed by the servant in the "course of his employment" it can hardly be contended that the view under discussion is favored; for the expression "course of employment," instead of being equivalent to "line of duty" or "scope of employment," may be used in expressing nothing more than the idea that the carrier is not liable when the servant, at the time of the assault, is not engaged in executing the contract of transportation.[46] It should be noted, too, that some of the cases in which the scope of employment limitation of the carrier's liability to passengers is favored, the distinction between the duties which a master owes third persons and the duties of a carrier to passengers is ignored and the decision is rested upon cases involving the right of a third person, to whom the master owed no contractual or other special duty to recover for the wilful act of a servant.[47] On the whole, when the cases are carefully analyzed, it will be found that the authority in favor of the scope of employment limitation of the carrier's liability to passengers for assaults by a servant is very slight in comparison with the authority by which it is rejected.

§§ 2574-2576. Prevailing Rule—§ 2574. In General.—According to the best considered and larger number of cases the liability of carriers to their passengers is not to be determined by the principles which control in defining their liability to third persons to whom they owe no contractual obligations, as passenger carriers. In the latter case the liability of the carrier is merely that of a master or principal for the acts of his servants or agents, but, since carriers and their passengers are not strangers who bear no other relation to each other than one citizen, merely as such, bears to another, the principles of law which are applicable in litigations growing out of the relations of principal and agent and master and servant do not fully define the rights, duties and liabilities of

phia, etc., R. Co. *v.* Crawford, 77 Atl. 278, 112 Md. 508.

A carrier must protect a passenger, and, if he is unjustifiably assaulted, arrested, or imprisoned by the carrier's servants or agents while acting within the scope of their duty, the carrier is liable. Tolchester Beach Imp. Co. *v.* Scharnagl, 65 Atl. 916, 105 Md. 199.

The liability of a carrier for injuries to passengers by the torts of employees are no exception to the general rule that a master is not responsible for the wrongful act of his servant, unless that act be done in execution of the authority, express or implied, given by the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged can not be regarded as the act of the master. Little Miami R. Co. *v.* Wetmore, 19 O. St. 110, 2 Am. Rep. 373; O'Neil *v.* Baltimore, etc., R. Co., 2 O. C. C. 504, 1 O. C. D. 610.

The contract of a carrier is to safely carry its passengers and to compensate them for all tortious injuries inflicted by the servant within the scope of the employment. Blomsness *v.* Puget Sound Elect. Railway, 92 Pac. 414, 47 Wash. 620, 17 L. R. A., N. S., 763.

45. Winnegar *v.* Central, etc., R. Co., 85 Ky. 547, 9 Ky. L. Rep. 156, 4 S. W. 237, 34 Am. & Eng. R. Cas. 462.

46. See the case of Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108, wherein it was held that a street railway company is liable for an assault on a passenger committed by its conductor while executing the contract of transportation.

47. Thus, in Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781, it was held that a railroad company is liable to a passenger for an assault by one of its servants only when the assault is committed while the servant is in the discharge of the services which he owes to the company and in the line of his employment, and the only authority cited in support of the proposition is the case of Cobb *v.* Columbia, etc., R. Co., 37 S. C. 194, 15 S. E. 878, which was an action by a person to whom the defendant owed no duty as a carrier of passengers.

common carriers and their passengers. The application of these principles in actions by passengers against carriers for the torts of their servants ignores the high degree of care imposed upon common carriers in the transportation of persons.[48] To give full scope and effect to the obligations assumed by carriers towards passengers and to the rights and duties which the relation of carrier and passenger creates and implies, the tendency of the later authorities is to hold the carrier liable for the assault of a servant upon a passenger even though the act was not within the servant's "scope of employment" or "line of duty," in the sense in which these terms are used in the law of master and servant to limit the master's liability to third persons for the torts of his servants.[49] In effect, these cases hold the carrier liable for every act of violence upon a passenger by the carrier's servant while the servant is engaged in executing the contract of transportation,[50] though the assault is made wilfully and maliciously, and in no man-

48. The rule that the master is not liable for the torts of the servant, unless the act itself pertains to the service for which the servant is employed, does not apply to an assault on a passenger by a carrier's servant, in which case the carrier's liability arises, not out of the relation of master and servant, but out of that of carrier and passenger; the carrier being bound to protect the passenger against assaults, not only of its servants, but of third persons. Shelby *v.* Metropolitan St. R. Co., 125 S. W. 1189, 141 Mo. App. 514.

49. The rule that a master is not responsible for acts of a servant outside the line of his duty, and not in the service of the master, does not apply where a railroad passenger conductor inflicts an injury on a passenger, as the extreme duty of the conductor, who is the master in such case, is to protect passengers from injury. St. Louis, etc., R. Co. *v.* Sanderson, 99 Miss. 148, 54 So. 885.

50. Acts of servants or employees outside scope of employment.—New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109, 52 Am. & Eng. R. Cas. 447; New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039; New York, etc., R. Co. *v.* Lockwood, 17 Wall. 357, 21 L. Ed. 627; Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468, 14 L. Ed. 502.

United States.—Pendleton *v.* Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922.

Alabama.—While the earlier Alabama cases distinctly favor the scope of employment limitation Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448, 2 Am. & Eng. R. Cas., N. S., 425; Goodloe *v.* Memphis etc., R. Co., 107 Ala. 233, 18 So. 166, 2, 9 L. R. 729, 2 Am. & Eng. R. Cas., N. S., 444, 54 Am. St. Rep. 67, the principal case places the supreme court of Alabama in line with the cases in which the limitation is rejected.

Georgia.—East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Brunswick, etc., R. Co. *v.* Moore, 101 Ga. 684, 28 S. E. 1000; Bennett *v.* Central, etc., R. Co., 6 Ga. App. 185, 64 S. E. 700; Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216; Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281; Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842, 28 Am. & Eng. R. Cas. 455; Central, etc., R. Co. *v.* Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250; Central R. Co. *v.* Gleason, 69 Ga. 200; Georgia R. Co. *v.* Newsome, 60 Ga. 493; Savannah Elect. Co. *v.* Hodges, 6 Ga. App. 470, 65 S. E. 322.

Indiana.—Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85; Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202, 33 N. E. 219.

Massachusetts.—A carrier, being bound to carry its passenger safely and properly, and to treat him respectfully, is liable for an unjustifiable assault committed on the passenger, either by strangers or by the carrier's servant, though the assault by the servant is not within the scope of his duty. Jackson *v.* Old Colony St. R. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A., N. S., 1046, 19 Am. & Eng. Ann. Cas. 615.

New Jersey.—Haver *v.* Central R. Co., 62 N. J. L. 282, 41 Atl. 916, 12 Am. & Eng. R. Cas., N. S., 261, 72 Am. St. Rep. 647, 43 L. R. A. 84.

New York.—Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 44 Am. & Eng. R. Cas. 384, 17 Am. St. Rep. 611, 8 L. R. A. 224; Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127, 43 Am. Rep. 185, substantially overruling Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418.

North Carolina.—In the case of White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489, it was held that a carrier is liable for the assault of a servant upon a passenger although the wrongful act was done while the servant was not acting within the scope of his employment.

And in Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327, 4 L. R. A., N. S., 485, this proposition is distinctly favored by Avery, J., who, in a concurring opinion, said: "The correctness of the ruling in the court below depends, not upon the general principles governing the liability of the master for the torts of his servant, but upon the nature,

ner connected with the discharge of the servants' duties,[51] but merely from personal motives of resentment or desire for mischief.[52] Where other servants of the carrier are present it is the carrier's duty, through them, to protect the passenger from assault, and it is responsible for their failure to do so.[53]

§ 2575. Limitation of the Rule.—The general rule which has been stated above is to be understood with the limitations that, in order to charge the car-

extent, and duration of the duty of protection which is implied in contracts for the carriage of passengers. From the inception of the relation between them, until it ends, the law imposes upon the carrier the duty of protecting his passenger absolutely against his own servants, and qualifiedly against all other persons. Though the conduct of the employee or officer in doing violence to the passenger may be wholly unauthorized, beyond the scope of his authority, and even wilful and malicious, the obligation to respond in damages for any injury done still rests upon the principal just as fully as it would had the master commanded or encouraged the commission of the act."

And again in Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879, Montgomery, J., in delivering the opinion of the court, said: "Where the relation of carrier and passenger exists, the conduct of an employee of the carrier in inflicting violence on the passenger, though the act be outside of the scope of his authority, or even wilful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act." But in the separate opinion delivered in this case by Faircloth, C. J., it is pointed out that this is merely a dictum. It is questionable, however, whether the further contention by the learned chief justice that the proposition was rejected in Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327, 4 L. R. A., N. S., 485, is sustainable; for, according to the opinion of the court, delivered by the learned chief justice himself, the plaintiff in that case had ceased to be a passenger at the time when he was assaulted.

It is, therefore, submitted that not only the weight of dicta but actual authority in North Carolina supports the view that a carrier is liable for the assaults of a servant upon a passenger without regard to whether the act of the servant is, in the proper sense of the term, within the scope of his employment. And it seems that some additional support for this proposition may be found in the cases which hold that a carrier is liable for a wrongful ejection by an employee who has nothing to do with ejecting passengers. See Savannah, etc., R. Co. *v.* Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187.

Tennessee.—In Springer Transp. Co. *v.* Smith, 84 Tenn. (16 Lea) 498, 1 S. W. 280, the court apparently favors the view that the carrier is liable although the assault is not within the scope of the servant's employment. But perhaps these expressions should be regarded merely as dicta for the reason that, in view of the facts of the case, it seems that the court might properly have held that the act of the servant was within the scope of his employment.

Texas.—Dillingham *v.* Anthony, 73 Tex. 47, 11 S. W. 139, 37 Am. & Eng. R. Cas. 1, 15 Am. St. Rep. 753, 3 L. R. A. 634; Houston, etc., R. Co. *v.* Washington (Tex. Civ. App.), 30 S. W. 719; Galveston, etc., R. Co. *v.* McMonigal (Tex. Civ. App.), 25 S. W. 341.

51. Dillingham *v.* Anthony, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753, 37 Am. & Eng. R. Cas. 1.

Where an employee of a carrier warned plaintiff, waiting on a station platform, not to push or he would smash his head, and plaintiff told him to go ahead and do it, whereupon the employee knocked plaintiff down, the carrier is liable for the employee's acts, and can not avoid liability on the plea that they were not within the scope of his employment. Brewster *v.* Interborough Rapid Transit Co., 123 N. Y. S. 992, 68 Misc. Rep. 348.

The duty of a carrier to carry passengers safely and expeditiously, and to conserve, by every reasonable means, the convenience, comfort, and peace of the passengers, rests on its agents, who must protect each passenger from bodily discomfort, insult, indignities, and personal violence, and though the act of an agent breaching such duty is one which bears no relation to the duty of the carrier, and is not connected as an incident to the discharge of any duty, the carrier is liable because of a violation of the duty it owes to passengers. Baltimore, etc., R. Co. *v.* Davis, 44 Ind. App. 375, 89 N. E. 403.

52. Galveston, etc., R. Co. *v.* Bean, 45 Tex. Civ. App. 52, 99 S. W. 721.

53. Duty of other servant.—Houston, etc., R. Co. *v.* Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902.

Carriers are not liable for assaults committed by their servants outside of the servants' scope of employment, unless the assaults could have been anticipated and prevented by due care. Houston, etc., R. Co. *v.* Bush, 104 Tex. 26, 133 S. W. 245, 32 L. R. A., N. S., 1201, reversing judgment (Tex. Civ. App.), 123 S. W. 201.

rier with liability, the servant must, at the time of the assault, be acting in the course of his employment.[54] Of course, if the servant at the time of the assault is not employed in executing the contract of transportation the carrier will not be liable. And the question of whether he was in the performance of duty as an agent of the carrier at that time is for the jury.[55]

§ 2576. Application of the Rule.—The application of this rule is well illustrated by cases involving the liability of carriers for assaults by servants upon female passengers. For example, a railroad company has been held responsible for an unlawful assault by its conductor in forcibly kissing a woman passenger.[56] A railroad company has been held liable for an assault by its baggage master, with intent to commit rape, upon a woman, while she was being carried as a passenger upon one of its trains,[57] and for a similar assault by its station agent upon a woman passenger while she was waiting in the station for a train.[58] It has been very properly said that the carrier's duty to protect female passengers from indecent assaults by its servants should not be frittered away by nice questions as to whether the servants were acting within the scope of their authority.[59]

Forcible Expulsion of Passenger by Brakeman without Authority to Expel.—A railroad company has been held liable for an assault by a brakeman in ejecting a passenger even though the brakeman had no authority to eject passengers.[60] And if a passenger is forcibly expelled and removed from a train by the brakeman, the liability of the carrier could rest on the proposition that the forcible expulsion embraces an assault from which the carrier rests under the duty of protecting the passenger.[61]

Assault by Servant Engaged in Collecting Fares.—Where the clerk of a steamboat refused a tender of an amount larger than the fare, and, in consequence of a refusal of the passenger to pay the exact amount, assaulted him, it was held that the act of the clerk was done in the course of his employment and that the carrier was liable.[62]

Assault Commenced on Car.—Where a conductor attacks a passenger before he alights from the car and continues the assault after the passenger has left the car, the carrier is liable not only for the initial assault but for the consequences following therefrom in natural sequence and as a part of one continuous transaction.[63] Thus, a street railway company has been held liable for the assault of its conductor upon a passenger on a car and afterwards repeated at the office of the company when the passenger went there to make complaint.[64]

Assault While Alighting.—A street railway company owes to a passenger the duty of protecting him, while the relation exists, from assault by its employees and strangers. This duty continues during the passage and also while the passenger is alighting, and until the act of alighting has been entirely accomplished. So if a passenger, while in the act of alighting, is assaulted by a conductor, who follows him off the car, and kills him in an altercation on the street, the company is liable.[65]

54. Pendleton *v.* Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922.

55. Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 44 Am. & Eng. R. Cas. 384, 17 Am. St. Rep. 611, 8 L. R. A. 224.

56. Croaker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

57. Savannah, etc., R. Co. *v.* Quo, 103 Ga. 125, 39 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483.

58. St Louis, etc., R. Co. *v.* Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741.

59. Birmingham R. etc., Co. *v.* Parker, 161 Ala. 248, 50 So. 55.

60. Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85.

61. Expulsion embracing assault.—International, etc., R. Co. *v.* Anderson, 15 Tex. Civ. App. 180, 53 S. W. 606.

62. Pendleton *v.* Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922.

63. Assault commenced on car.—Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142.

64. Savannah St., etc., R. Co. *v.* Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464.

65. Assault while alighting.—Savannah Elect. Co. *v.* McCants, 130 Ga. 741, 746, 61 S. E. 713.

The court did not err in overruling a general demurrer to the petition, it appearing that the petitioner's cause of ac-

§§ 2577-2583. Acts Which Are or Are Not within Scope of Employment—§ 2577. In General.—Since the "scope of employment" or "line of duty" limitation of the carrier's liability to passengers for the torts of servants has not been wholly abandoned, some consideration of what acts are and what are not within the scope of the servants' employment is still necessary. It may, generally speaking, be said that, from the moment the contract between the carrier and passenger begins until it ends, the official actions of the servants of the carrier touching the payment of fares, or the manner in which passengers shall conduct themselves, or the enforcement of the regulations prescribed for the conduct of the transportation—in short all intercourse between the servants and passengers, naturally and legitimately growing out of the relationship exising between them—may properly be said to come within the scope of their employment,[66] and it is not necessary to allege that the particular act was authorized by the carrier.[67] But when the employee goes clear out of the scope and range of his employment, as where he pursues a passenger who has alighted and is proceeding along the platform leaving the station and wantonly and maliciously assaults him, the passenger can not recover damages from the railroad company for the injuries sustained.[68]

§ 2578. Acts Done in Connection with Collection of Tickets and Fares.—It has been decided in a number of cases that where the servant is, at the time of the assault, engaged in taking up tickets or collecting fares he is acting within the line of his duty and the carrier is liable.[69] The court said in effect that while a conductor is engaged in collecting fares, or attempting to do so, or in meeting any exigency or emergency naturally and necessarily growing out of his duty to collect fares, his conduct, or the course he pursues in performing that duty, is within the scope of his employment. In this case a conductor, becoming involved in an altercation with the plaintiff, an employee of the company who was riding on one of its passenger trains, while attempting to collect the fare, and becoming enraged in consequence of an insulting remark by the plaintiff, which was provoked by the conductor's own language, assaulted him. It was held that the assault was committed while the conductor was acting within the scope of his employment. And it has been held that where a conductor attempts to seize articles in the possession of a passenger to enforce the payment of a fare the

tion arose from an assault upon him by the conductor and the motorman of the defendant company's street car, upon which he was a passenger, made under such circumstances that the jury would be authorized to find, should the allegations in the petition be supported by evidence, that the assault, though it occurred in the street, was a continuation of an alteration that took place while he was a passenger on the car, and that, upon leaving the car, he was immediately pursued by the conductor and motorman, who assailed him and inflicted upon him severe personal injuries. Savannah Elect. Co. *v.* McCants, 130 Ga. 741, 61 S. E. 713.

66. Sherley *v.* Billings (Ky.), 8 Bush 147, 8 Am. Rep. 451; Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200. See Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518. See post, "Scope of Employment," §§ 2602-2616.

Where a railway brakeman, while looking after the train, assaulted a passenger whom he found in a freight car instead of in the passenger coach where he should have been, the assault was committed within the scope of the brakeman's employment, and the carrier was liable for his act. Keen *v.* St. Louis, etc., R. Co., 108 S. W. 1125, 129 Mo. App. 301.

A railroad was liable for an assault on a passenger in a car standing at a depot committed by an employee of the railroad whose duties as baggage master or porter required him to get freight and baggage on and off cars, to check the same, and to do anything that might come up about the depot. Houston, etc., R. Co. *v.* Bush (Tex. Civ. App.), 123 S. W. 201.

67. Need not be authorized.—Holland *v.* Columbus R. Co., 12 O. D. N. P. 690.

68. Outside range of employment pursuing passenger.—Greb *v.* Pennsylvania R. Co., 41 Pa. Super. Ct. 61, 72.

69. In Texas, etc., R. Co. *v.* Williams, 62 Fed. 440, 10 C. C. A. 463.

railroad company is liable for the assault and battery.[70] Where a clerk of a boat while engaged in the duty of collecting fares charged one of the passengers with attempting to evade payment and, an altercation ensuing, finally assaulted him, it was held that the act of the clerk was within the scope of his employment and that the carrier was liable.[71]

§ 2579. Assault by Steward and Waiters on Steamboat.—Where a passenger on a steamboat interfered, by a proper remark, with the rude treatment of another passenger, who was his relative, by the steward and the table waiters and was assaulted by them, it was held that the act of the servants was done in the course of their employment and that the master was liable.[72]

§ 2580. Assault by Baggage Master.—Where a passenger, while having his baggage checked, abused the baggage master for his delay and thereby provoked an assault, it was held in an Ohio case that the act of the baggage master was not done in the execution or performance of the service for which he was engaged and that the railroad company was not liable.[73] But in a very similar case in North Carolina the question as to whether the act of the baggage master was "in the line of his duty to his employer" was left to the jury and a finding in the affirmative sustained.[74] It seems, however, that, as has been shown above, the supreme court of North Carolina is rather committed to the view which rejects the scope of employment limitation.

§ 2581. Assaults Committed after the Relation of Carrier and Passenger Is Terminated.—An assault by a servant upon a person who has ceased to be a passenger is clearly outside of the scope of the servant's employment.[75] And it has been held that a street-railway company was not liable for an assault by a driver of one of its cars upon a person who had left the car and was walking along the sidewalk towards the office of the company with the intention of reporting the driver.[76] It has, however, been held that if the driver of a street car should abuse a passenger, and, upon the passenger leaving the car in consequence of the abuse, the driver should pursue him and continue the abuse and assault him, the carrier can not escape liability on the ground that the servant, in committing the assault after the passenger had left the car, was not acting within

70. Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

71. Sherley *v.* Billings (Ky.), 8 Bush 147, 8 Am. Rep. 451.

72. Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311.

73. Little Miami R. Co. *v.* Wetmore, 19 O. St. 110, 2 Am. Rep. 373.

74. Daniel *v.* Petersburg R. Co., 117 N. C. 592, 23 S. E. 327, 4 L. R. A., N. S., 485.

75. If, after a passenger has reached the point of his destination, he is assaulted by an employee of the company not acting within the scope of his duties, the company is not liable. Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281.

A carrier is not liable for an assault committed on a passenger, after he had left the car at his destination, by the carrier's conductor, standing on the street, inflicted out of a spirit of vindictiveness arising out of a prior altercation between them on the car. Jackson *v.* Old Colony St. R. Co., 92 N. E. 725, 206 Mass. 477, 30 L. R. A., N. S., 1046, 9 Am. & Eng. Ann. Cas. 615.

Relation not terminated.—In an action against a street railway company for assault by its employees upon a passenger, who alighted from the front platform of a crowded car at a transfer point and walked to the rear platform to procure a transfer, the company may not defeat recovery because the passenger fails to show that the company operated the car to which he desired a transfer, on the theory that he ceased to be a passenger when he alighted, since he was entitled to be carried to the end of the line, or so far in that direction as he saw fit to remain on the car, and the company became an absolute guarantor of his safety against unjustifiable assault by its employees while the contract of carriage was in force, and since, if the conductor had refused a transfer, the passenger could have remained on the car and continued his ride to the end of the line. Miller *v.* Brooklyn Heights R. Co., 108 N. Y. S. 960, 124 App. Div. 537.

76. Central R. Co. *v.* Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425.

the scope of his employment.[77] But these cases are not reconcilable with the case cited above in which the court refused to hold a railroad company liable for an assault by its baggage master. And their value as authorities, defining scope of employment, is weakened by the fact that, notwithstanding the language of the court in speaking of the servant's scope of employment, they seem to be more in line with the authorities which reject the scope of employment limitation and hold carriers liable to passengers for assault by employees while engaged in executing the contract of transportation.

Passenger Carried by Destination.—Though a passenger's ticket may only entitle him to be carried to a certain station, yet if he be afforded no opportunity to alight at that point, but is carried beyond, and there put off, and in doing so the conductor uses abusive language and personal violence, causing injury to the passenger, he may recover.[78] Where a passenger on a street car falls asleep, and is carried several blocks beyond his destination, the carrier is not liable for an assault upon him by servants on another car in preventing him from riding on such car without fare back to his destination, having fully performed its contract when it carried him to his destination, after which it was under no obligation to furnish him a return passage free of charge.[79]

§ 2582. Assault by Conductor upon Passenger Who Has Alighted from Street Car.—One who had been a passenger on a car which had just been switched into the car house was standing in the street close by the car house waiting for another car and, while so doing, complained to the conductor of the car which he had just left for not informing him that it was not going through. After some altercation the conductor assaulted him. It was held that the assault was not within the scope of the conductor's employment and that the company was not liable.[80]

§ 2583. Accidental Blow by Servants Engaged in Playful Scuffle.—Where a passenger was injured by being accidentally pushed off a station platform by servants of the company who were engaged in a playful scuffle, it was held that the actions of the servants were not in the line of their duty and that the company was not liable.[81] But in connection with this case it is to be remembered that the supreme court of Alabama has, in the principal case, rejected the scope of employment limitation.

§ 2584. Presumption as to Scope of Duty.—In the absence of proof that a servant, in making an assault upon a passenger, was acting within the line of his duty, no presumptions will be entertained to supply the absence of such proof.[82]

§§ 2585-2590. Justifiable Assaults—§ 2585. In General.—It is not every assault by a servant that gives to a passenger a right of action against the carrier. In order to charge the carrier with liability the servant's act must be unlawful. "It may be generally affirmed that, if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."[83]

77. Wise *v.* Covington, etc., St. R. Co., 91 Ky. 537, 13 Ky. L. Rep. 110, 16 S. W. 351; Wise *v.* South Covington, etc., R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894.

78. **Passenger carried by destination.**—King *v.* Southern R. Co., 128 Ga. 285, 57 S. E. 507.

79. **Passenger asleep—Failure to alight at destination.**—Brown *v.* Interborough Rapid Transit Co., 107 N. Y. S. 629, 56 Misc. Rep. 637.

80. McGilvray *v.* West End. St. R. Co., 164 Mass. 122, 41 N. E. 116.

81. Goodloe *v.* Memphis, etc., R. Co., 107 Ala. 233, 18 So. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67.

82. **Presumption.**— Chicago City R. Co. *v.* Cooper, 128 Ill. App. 528.

83. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919, 52 Am. & Eng. R. Cas. 447.

Passenger own act.—Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

Special offer.—Where the servant of a carrier, acting as a special police officer, under St. 1898, c. 282, is not liable to one

But showing that plaintiff was guilty of provoking conduct which falls short of justifying a conductor in inflicting the injuries complained of is insufficient to defeat plaintiff's entire cause of action.[84] The fact that a passenger on a railroad train has been drinking and is boisterous, though it may warrant his expulsion from the train, if his conduct is calculated to disturb other passengers, does not authorize an assault on the passenger by the conductor,[85] even though the statute makes such an act a misdemeanor,[86] and that the assault grew out of a mistake made by the conductor as to the character of the passenger assaulted, in an effort to protect another passenger from being robbed, is no excuse.[87] Nor does the fact that certain passengers had been pointed out to the conductor as suspicious characters by the depot watchman excuse the railroad from liability for a wrongful assault upon them by such conductor.[88] But where the passenger assaulted voluntarily intervened in a quarrel, as to which the carrier owed him no duty, the carrier is not liable to him.[89]

§§ 2586-2589. Acts Done in Self-Defense—§ 2586. In General.—If the act of the servant is done in the just exercise of the right of self-defense, no liability attaches either to the servant or the carrier.[90] Where a passenger is

for assault and battery, the carrier is exonerated from liability. Horgan *v.* Boston Elevated R. Co., 94 N. E. 386, 208 Mass. 287.

84. Galveston, etc., R. Co. *v.* La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488. See post, "Assaults Provoked by the Passenger," § 2591.

A conductor in charge of a passenger train has a right to defend himself from an attack by a passenger, but he has no right to strike a passenger with a pistol for the use of abusive language toward him. Coleman *v.* Yazoo, etc., R. Co. (Miss.), 43 So. 473.

85. Assault not justifiable.—St. Louis, etc., R. Co. *v.* Johnson, 68 S. W. 58, 29 Tex. Civ. App. 184.

86. Under Acts 33d Gen. Assem. 1909, c. 141, § 1, providing that any person who shall drink intoxicating liquor on railway cars or use profane language thereon shall be guilty of a misdemeanor, the commission of such misdemeanor by a passenger does not justify or excuse the railroad for the act of its conductor in assaulting or mistreating the passenger. Heggen *v.* Fort Dodge, etc., R. Co., 150 Iowa 313, 130 N. W. 148.

87. Assault growing out of mistake.—Plaintiff was rightfully on defendant's train as a passenger. The conductor in charge of the train mistook plaintiff for a suspicious character, and in the discharge of what he considered his duty in preventing plaintiff, as he thought, from robbing another passenger, he pulled him from his seat, and, on a show of resistance, struck him over the head with a pistol. Held, that the mistake of the conductor did not exempt the company from liability for the actual damage resulting to plaintiff from the wrongful acts of the conductor. Texas, etc., R. Co. *v.* Graves (Tex.), 2 Posey 306.

88. Texas, etc., R. Co. *v.* Graves (Tex.), 2 Posey 306, 307.

89. Plaintiff was a passenger on defendant's car. The conductor quarreled with another passenger, plaintiff's friend, over the payment of fare, and the latter was ejected from the car, whereupon he and the conductor engaged in a fight upon the ground; the car being stopped at the time. Plaintiff knew not what the fight was about, but stepped out to separate the men, when the motorman took hold of him and knocked him down and punched him. Subsequently the conductor charged plaintiff in a police court with having assaulted him, and plaintiff was acquitted. Held, that defendant was not liable for the motorman's assault on and the false charge against plaintiff; his injuries having been occasioned during his voluntary intervention in a quarrel, as to which defendant owed him no duty. Order 99 N. Y. S. 936, reversed. Zeccardi *v.* Yonkers R. Co., 83 N. E. 31, 190 N. Y. 389, 17 L. R. A., N. S., 770.

90. Acts done by servant in self-defense.—New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109.

Alabama.—Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

South Carolina.—Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Texas.—Dallas, etc., St. R. Co. *v.* Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42.

A carrier is not liable for an assault upon a passenger by one of its employees acting in self-defense. Reed *v.* New York, etc., R. Co., 102 N. Y. S. 19, 116 App. Div. 709.

The employment in which a street car conductor was engaged at the time he was charged to have assaulted a passenger did not deprive him of the right of self-defense; he being entitled if assaulted to repel the assault and prevent injury to himself, provided his defense did not become offensive and exceed the bounds of prevention. Dallas, etc., St. R. Co. *v.* Pettit, 105 S. W. 42, 47 Tex. Civ. App. 354.

assaulted by a trainman in self-defense, the high degree of care which applies to carriers in other cases where passengers are injured does not apply.[91] But the servant's act must be considered in the light of his duty to exercise that high degree of care to avoid injury to passengers which very cautious and prudent persons would have exercised under the same circumstances.[92]

§§ 2587-2589. What Constitutes Self-Defense—§ 2587. In General.—And, according to what is deemed to be the better authority, the rules which determine what is self-defense are the same when a carrier's liability for the acts of its servants is sought to be enforced as in criminal prosecutions.[93]

§ 2588. Circumstances Justifying the Act.—Applying the rule which obtains in criminal prosecutions, if the servant honestly believes that he is in imminent danger and has reasonable ground for such belief no liability attaches to the carrier, and it is immaterial that there was no actual necessity for his act.[94] But the evidence must at least show a present injury reasonably to be apprehended, in order that the company may escape liability for an assault and battery upon a passenger by one of those in charge of the train, however abusive may have been the language or reprehensible the conduct of the passenger.[95]

§ 2589. Degree of Force Permissible.—In criminal prosecutions it is a well-settled general rule that a defendant can not justify an assault on the ground that it was made in self-defense if more force than necessary was used. An analogous rule has been applied, by some courts in actions by passengers against carriers for the assaults of their servants and it has been held that, while a jury will not be required to nicely weigh the evidence to see whether greater force than necessary was used,[96] in order to relieve the carrier from liability on the ground that the servant acted in self-defense, such force only must have been used as the exigencies of the occasion required.[97] In other words, his defense must not become offensive and exceed the bounds of prevention.[98] Accordingly, although a servant has been assaulted or resisted in the performance of a duty by a passenger, if the servant attacks the passenger after the assault or resistance is at an end and apparently will not be renewed, the carrier will be liable for the battery.[99] But some courts have refused to apply the rule which obtains in crim-

91. Where passenger assaulted in self-defense.—International, etc., R. Co. *v.* Washington, 54 Tex. Civ. App. 166, 117 S. W. 992.

92. How act considered.—Dallas, etc., St. R. Co. *v.* Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42.

93. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919, 52 Am. & Eng. R. Cas. 447.

94. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919, 52 Am. & Eng. R. Cas. 447.

95. Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

Reasonable appearance of danger.—Houston Elect. Co. *v.* Park (Tex. Civ. App.), 135 S. W. 229.

96. Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

97. St. Louis, etc., R. Co. *v.* Berger, 64 Ark. 613, 44 S. W. 809, 10 Am. & Eng. R. Cas., N. S., 235, 39 L. R. A. 784, Bunn, Ch. J., dissenting.

If a street car passenger assaulted the conductor, the company was not liable for an assault committed by the conductor in repelling such assault, if he only acted upon reasonable appearance of danger, and used no more violence than was reasonably necessary to protect himself. Houston Elect. Co. *v.* Park (Tex. Civ. App.), 135 S. W. 229.

In an action against a carrier for an assault on a passenger, evidence held sufficient to show that the force exercised upon plaintiff was justified by actual or apparent danger of defendant's brakeman from an unjustified assault on him by plaintiff. Friar *v.* Orange, etc., R. Co., 101 S. W. 274, 45 Tex. Civ. App. 564.

98. Defense must not become offensive.—Dallas, etc., St. R. Co. *v.* Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42.

99. Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

A difference of opinion having arisen between plaintiff and a conductor of defendant railroad, the former struck the latter. The conductor did not then resent the assault, but went into another car, procured a pistol, returned, and, without further provocation, assaulted plaintiff. Held, that the jury were warranted in finding that the carrier had not

inal prosecutions. On the ground that where the passenger so acts as to disqualify the servant from properly performing his duty to his master and to the public by assaulting him and causing him to resort to whatever present means of defense he may have, ought not to be heard to complain of the consequences, these courts have held that where the servant acted in self-defense the passenger can not recover of the carrier even although excessive force was used.[1] But whether the circumstances warrant the force and violence used in an assault upon a passenger by the carrier's servant, on the ground of real or apparent danger of death or great bodily harm, is a question for the ultimate determination of the jury, viewing the situation from the standpoint of the servant at the time, though he must decide it in the first instance at the peril of himself and his master.[2]

§ 2590. Forcible Expulsion of Passengers.—Another case where the carrier will not be charged with liability is where the assault was committed while ejecting the passenger. If a passenger has subjected himself to expulsion and only such force as is necessary to remove him is used, he has no cause of action against the carrier.[3] Although in the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force, the law will not protect the carrier if the servant uses excessive or unnecessary force.[4] This subject will, however, be discussed in a subsequent note.

exercised that high degree of care for the protection of plaintiff which the law imposes. Galveston, etc., R. Co. *v.* La Prelle, 65 S. W. 488, 27 Tex. Civ. App. 496.

The conductor was the agent and representative of the railroad company, and his act in assaulting plaintiff was the act of such company. Galveston, etc., R. Co. *v.* La Prelle, 65 S. W. 488, 27 Tex. Civ. App. 496.

1. City Elect. R. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508; Wise *v.* South Covington, etc., R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894.

Mr. Justice Lumpkin in delivering the opinion of the court in City Elect. R. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508, said: "It could not be seriously contended that a person who willfully or capriciously tampered with important mechanical appliances provided by the company for use in the running of its cars, thereby getting the same so out of order that they became incapable of properly performing their office, would be heard to assert that the company failed in its duty to guard him against danger, if, in consequence of his own wrongful act in thus placing it beyond the power of the company so to do, there followed a catastrophe from which he received injury. This being true, still less has a passenger or any one else the right to 'tamper with,' or get out of proper working condition, a fellow creature, whose brain and muscle and heart are most essential agencies in his employer's service. Under such circumstances as are detailed in the first headnote, it could not reasonably be expected that the average conductor would remain in nicely-adjusted, well-regulated, and passive functionary; and it follows that the company would not be legally responsible for the consequences if its conductor, thus goaded into a state of excitement, exasperation, and resentment, should himself do wrong, by resorting to great and unnecessary violence; provided, of course, that the insult and abuse to which he was subjected were of such a nature as naturally to excite his passions, and render him unfit to perform in a proper and lawful manner the duty he owed his master and the latter's patrons. One who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him, surely can not complain of an omission so to do. Especially is this true where he practically invites the master's servant to disregard and abandon his official duties, and enter into a personal encounter on his own account and upon his individual responsibility."

In a dissenting opinion by Bunn, C. J., in St. Louis, etc., R. Co. *v.* Berger, 64 Ark. 613, 44 S. W. 809, 10 Am. & Eng. R. Cas., N. S., 235, 39 L. R. A. 784, the view that the use of excessive force by a servant in repelling an assault by a passenger entails no liability upon the carrier is favored, chiefly on the ground that the servant, in defending himself, does not act within the line of his employment.

2. Question for jury.—Teel *v.* Coal, etc., R. Co., 66 W. Va. 315, 66 S. E. 470.

3. See the dictum by Brewer, J., in New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919, 52 Am. & Eng. R. Cas. 447.

4. Enforcing regulations of carriers.—New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 646, 30 L. Ed. 1049, 7 S. Ct. 1039; New Orleans, etc., R. Co. *v.*

§ 2591. Assaults Provoked by the Passenger.—For wilful injury, inflicted upon a passenger of a common carrier by a servant of the latter, under provocation, by the exercise of force or violence, not justified under the principles of the law of self-defense, the carrier is liable.[5] Thus, it is held that abusive language,[6] provoking language,[7] insulting language or conduct,[8] threats,[9] indefinite as to time and place,[10] or interference with the employees in the exercise of their functions,[11] although justifying expulsion from the train, do not bar recovery for injury by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other injury,[12] and are not justification for an assault, while some cases seem to hold the assault justified when the passenger used language with intent to bring about the assault.[13]

Jopes, 142 U. S. 18, 25, 35 L. Ed. 919, 12 S. Ct. 109. See also, Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, 608, 30 L. Ed. 1146, 7 S. Ct. 1286; New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 73, 36 L. Ed. 71, 12 S. Ct. 356; Carpenter *v.* Washington, etc., R. Co., 121 U. S. 474, 30 L. Ed. 1015, 7 S. Ct. 1002.

Where a passenger was assaulted by defendant's conductor as he was leaving a street car, either at his destination or in response to the conductor's order, without resistance and in an orderly manner, the carrier was liable, under the rule that it is only where a passenger refuses to comply with a lawful order to leave the car that reasonable force may be used to eject him. Jackson *v.* Old Colony St. R. Co., 92 N. E. 725, 206 Mass. 477, 30 L. R. A., N. S., 1046, 9 Am. & Eng. Ann. Cas. 615.

Ejection of passengers on street cars.—Carpenter *v.* Washington, etc., R. Co., 121 U. S. 474, 30 L. Ed. 1015, 7 S. Ct. 1002.

5. Assualt provoked—General rule.—Teel *v.* Coal, etc., R. Co., 66 W. Va. 315, 66 S. E. 470. McDade *v.* Norfolk, etc., R. Co., 67 W. Va. 582, 68 S. E. 378.

A carrier is liable to passengers for assault or injury by its servants, though the passenger provokes the assault by insulting language. White *v.* South Covington, etc., R. Co., 150 S. W. 837, 150 Ky. 681.

That a passenger brought on the altercation in which he was shot and killed by the conductor in charge of defendant's street car will not preclude a recovery against the carrier under Rev. St. 1899, § 2864, for the passenger's death. O'Brien *v.* St. Louis Transit Co., 110 S. W. 705, 212 Mo. 59, 15 Am. & Eng. Ann. Cas. 86.

The carrier is liable when a brakeman, without justification, makes an assault upon a disorderly passenger. Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

6. Abusive language, used by a passenger to a street car conductor, was no justification for a subsequent assault by the conductor on the passenger as he was leaving the car. Jackson *v.* Old Colony St. R. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A., N. S., 1046, 19 Am. & Eng. Ann. Cas. 615.

Mere abusive words by a passenger to a conductor do not justify the commission by the conductor of an assault and battery. Baltimore, etc., R. Co. *v.* Davis, 89 N. E. 403, 44 Ind. App. 375.

7. Provoking language.—A carrier is liable for damages from insult to and assault on a passenger by a guard of the carrier on the car, notwithstanding the use of provoking language by the passenger. Danziger *v.* Interborough Rapid Transit Co. (App. Term), 104 N. Y. S. 845.

8. Though one person may instigate a combat by insulting language or conduct, still the law does not justify his adversary on the plea of self-defense in the use of unnecessary force, and this rule applies to assaults made by street car conductors on passengers. Neur *v.* Metropolitan St. R. Co., 127 S. W. 669, 143 Mo. App. 402.

Offensive language by a street car passenger will not justify the conductor in assaulting him, however insulting or opprobrious, though evidence thereof may be given in mitigation of damages. Mitchell *v.* United R. Co., 102 S. W. 661, 125 Mo. App. 1.

9. Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

10. The movement by a disorderly passenger, who had been removed from the car, of his hand along side to his hip pocket, did not justify the trainman in assaulting him, where such movement was accompanied by the statement, "I'll see you later." Norfolk, etc., R. Co. *v.* Brame, 63 S. E. 1018, 109 Va. 422.

11. Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

12. Layne *v.* Chesapeake etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

13. Though a passenger applied a vile and insulting epithet to a servant of a carrier, it does not excuse the carrier from liability for an assault by the servant, unless the passenger used the language with intent to bring about the assault. Baker *v.* Brooklyn Union Elevated R. Co., 130 N. Y. S. 690, 146 App. Div. 304.

Provocation in Mitigation.—According to some courts, while the fact that the assault was provoked by the use of insulting language by the passenger, may be taken into consideration in mitigation of damages,[14] it is not a justification and will not relieve the carrier from liability.[15] Thus, it is said that where a passenger insults a servant of his carrier in the discharge of his duties in such manner that an assault may reasonably be expected to follow, and the servant, under immediate influence of passion excited by such insults, assaults the passenger, such insult may be considered, not in justification, but in mitigation, of damages;[16] but the provocation must be so recent as to induce the belief that the violence was committed under the immediate influence of passion.[17] But the insulting language used by the passenger, if provoked by the insulting words of the conductor, ought not to be considered in mitigation of damages in a suit by the passenger against the company for an assault by the conductor.[18] According to the rule so laid down it was held that where a brakeman who was charged by a passenger with having stolen his watch assaulted him, it was held that the company was liable.[19] This is believed to be the better view. It is a general rule of law that abusive or insulting language does not justify an assault. And it seems that this rule should be applied in the law of carriers to determine the liability of a carrier to passengers for assaults by servants; for, as has been said, "an employee of a common carrier, on duty * * *, ought to be the last to make an assault for insulting language used to him; for he stands, in relation to a passenger, as a protector and a guard."[20] But the courts which deny the liability of the carrier for the use of excessive force by a servant when assaulted by a passenger, also hold that where a passenger brings upon himself an assault by the use of insulting and abusive language of such a character as naturally excites the passions of the servant and renders him unfit to perform in a proper manner the duty he owes his master and the master's patrons, there can be no recovery against the carrier,[21] even though the battery may have been dispropor-

14. Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; Galveston, etc., R. Co. *v.* La Prelle, 65 S. W. 488, 27 Tex. Civ. App. 496.

If a battery upon a passenger committed by a carrier's conductor was not justified but mitigated by provocative words or conduct of the passenger, such mitigation would inure to the benefit of the carrier, but if the conductor committed an assault and battery upon the passenger, and the words and conduct of the passenger aroused the conductor's anger and tended to provoke a difficulty, but did not justify the conductor's act, the carrier would not be relieved from liability. Mason *v.* Nashville, etc., R. Co., 70 S. E. 225, 135 Ga. 741, 33 L. R. A., N. S., 280.

15. Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; Haman *v.* Omaha Horse R. Co., 35 Neb. 74, 52 N. W. 830; Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

16. Houston, etc., R. Co. *v.* Batchler, 83 S. W. 902, 37 Tex. Civ. App. 116.

17. Where a passenger had used insulting language to the conductor, who assaulted the passenger after leaving the car, the jury should be permitted to consider such conduct in assessing his damages. Houston, etc., R. Co. *v.* Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981.

In an action for injuries sustained by a conductor's assault, where the issue was whether the assault was committed under the influence of passion aroused by insulting words, an instruction was proper which required the jury to find that sufficient time elapsed between the use of insulting words by plaintiff and the time of the assault for cool reflection, and that the assault was the result of cool deliberation of the conductor, before they could ignore the mitigating effect of the insulting words by plaintiff to the conductor. Houston, etc., R. Co. *v.* Batchler, 83 S. W. 902, 37 Tex. Civ. App. 116.

18. Houston, etc., R. Co. *v.* Batchler, 83 S. W. 902, 37 Tex. Civ. App. 116.

19. Chicago, etc., R. Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33, affirming 9 Ill. App. 250.

20. Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

21. *United States.*—Harrison *v.* Fink, 42 Fed. 787.

Georgia.—Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 37 Am. & Eng. R. Cas. 114, 12 Am. St. Rep. 334; East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Georgia R., etc., Co. *v.*

tionate to the provocation.[22]

§ 2592. Failure of Agent to Comply with Law as to Uniform.—It can hardly be contended that the carrier can take advantage of the neglect of its own agent to comply with the state law, to relieve it from liability for the act of such agent in committing an assault upon a passenger.[23] Thus, in Indiana it has been held that the failure of a servant to comply with the law relative to trainmen wearing on their hats or caps a badge of their office, etc., does not relieve the carrier from liability in case of assault.[24]

§ 2593. Insult to Passenger.—A carrier of passengers is bound to exercise care, not only to carry his passengers safely, but to see that they are accorded respectful and courteous treatment. Hence, the liability of the carrier to passengers for the wilful wrongs of his servants is not limited to actual violence, but extends to insulting and abusive language and conduct,[25] which need not

Hopkins, 108 Ga. 234, 33 S. E. 965, 75 Am. St. Rep. 39.

Kentucky.—Wise *v.* South Covington, etc., R. Co., 17 Ky. L. Rep. 1359, 34 S. W. 894.

It has been held error to charge, without qualification, that "sneers, looks or contemptuous gestures will not justify an assault by an agent of a railroad company upon one who has a ticket and has become entitled under the contract to courteous treatment, until the contract was fully carried out by the railroad company or its agents." A similar charge was held not to be erroneous in East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778, but in that case the plaintiff below was a passenger actually riding upon the defendant's train, and entitled to protection at the hands of the conductor who assaulted him; and the facts were in other respects wholly different. Georgia R., etc., Co. *v.* Richmond, 98 Ga. 495, 25 S. E. 565.

22. Georgia R., etc., Co. *v.* Hopkins, 108 Ga. 324, 33 S. E. 965, 75 Am. St. Rep. 39.

23. Failure of agent to comply with law as to uniform.—Southern R. Co. *v.* Crone (Ind. App.), 99 N. E. 762.

24. Failure to wear badge of office.—Southern R. Co. *v.* Crone (Ind. App.), 99 N. E. 762.

Section 5177, Burns' Ann. St. 1908, requires that trainmen shall wear on their hats or caps a badge of their office, etc. Southern R. Co. *v.* Crone (Ind. App.), 99 N. E. 762.

25. *Georgia.*—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899.

Louisiana.—Laffitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. 701, 47 Am. & Eng. R. Cas. 645, 12 L. R. A. 337; Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197.

Mississippi.—Jackson Elect. R., etc., Co. *v.* Lowry, 79 Miss. 431, 30 So. 634, 23 Am. & Eng. R. Cas., N. S., 103.

New York.—Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 53 Am. & Eng. R. Cas. 56, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming 60 Hun 579, 39 N. Y. St. Rep. 23, 14 N. Y. S. 468.

Tennessee.—Knoxville Tract. Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

Texas.—Texas, etc., R. Co. *v.* Tarkington, 27 Tex. Civ. App. 353, 66 S. W. 137; San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

A street railroad company, while not an insurer against injury on its cars, must protect passengers from the violence and insults not only of strangers, but also of its own employees. McMahon *v.* Chicago City R. Co., 88 N. E. 223, 239 Ill. 334, affirming judgment 143 Ill. App. 608.

Insulting conduct or offensive language—A passenger on a street car may recover damages where she is carried past her destination against her will, and thereafter the motorman addresses her in an insulting manner, and shakes his fingers and an iron bar in her face. San Antonio Tract. Co. *v.* Crawford (Tex. Civ. App.), 71 S. W. 306.

Injury to feeling.—A common carrier—e. g., an electric street railway company—is liable in damages to a passenger not only for injury to his person by the violence of its employee, but likewise for injury to his feelings by the indecent and insulting language of its employee, upon ground, not of tort or negligence, but of breach of its contract, that obligates the carrier not only to transport the passenger, but to guarantee him respectful and courteous treatment, and to protect him from both violence and insult from strangers, and, a fortiori, from its own employees. Knoxville Tract. Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; Cincinnati, etc., R. Co. *v.* Harris, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A., N. S., 779.

be "negligently done." [26] Thus, it is very properly held that the obligation on a carrier to use due diligence through its servants to protect its passengers from injury and abuse is equivalent to a guaranty that such injury and abuse shall not come from its servants themselves.[27] It is immaterial whether an insult offered by a conductor to a passenger is caused by malice or is the result of negligence on the part of the carrier's servant. Injury caused by omission to protect is none the less actionable than that caused by commission.[28] Thus, the unprovoked use by a railroad conductor to a passenger of opprobrious words and abusive language, tending to cause a breach of the peace, or to humiliate the passenger, subjects the company to liability,[29] and the intention of the servant in regard to charges made by him implying dishonesty, is immaterial.[30] And it is held that a passenger is not only entitled to civil treatment at the hands of all the employees, but to their protection, and that the carrier will be held liable for any acts of rudeness and oppression by its employees resulting in an injury to a passenger while on the train, since the safety and proper treatment of the passengers are within the scope of the employment and range of duties of every employee.[31] But the carrier can not be held responsible to passengers for merely indecorous, or rude, conduct on the part of his servants.[32]

26. A passenger may recover from a carrier for the misconduct and insulting language of its conductor without proof that such misconduct and insulting language were "negligently done." San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

The gist of an action against a street car company for insults offered by a conductor to a female passenger is the wrongful act of the conductor independent of negligence. San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

27. McMahon *v.* Chicago City R. Co., 143 Ill. App. 608 judgment affirmed in 239 Ill. 334, 88 N. E. 223.

28. Injury by omission to protect.—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899.

The liability of a carrier for mental anguish suffered by a passenger in consequence of insults offered by its servants does not depend on its negligence in employing the servants or the scope of their authority, where the insults were offered while employed about the carrier's business. Gulf, etc., R. Co. *v.* Luther, 90 S. W. 44, 40 Tex. Civ. App. 517.

29. Cole *v.* Atlanta, etc., R. Co., 102 Ga. 474, 31 S. E. 107, 12 Am. & Eng. R. Cas., N. S., 14; St. Louis, etc., R. Co. *v.* Fussell (Tex. Civ. App.), 97 S. W. 332.

The carrier is liable even though there was no loss of time and no hindrance to the passenger in the pursuit of his business and he was occasioned no considerable amount of physical suffering by the assault and abuse, as the fact that he was subjected to indignity, was degraded in the eyes of his fellow passenger by being assailed with coarse and vituperative language and blows, and his feelings were outraged by the acts of the servant afford a ground of recovery. Atlanta, etc., Railroad *v.* Condor, 75 Ga. 51.

When plaintiff was about to board a train the conductor asked her if she had a ticket for her son, eight years of age, and, on being informed that she had not, told her to get one, which she did. Later, when taking up the tickets, the conductor, in the hearing of her children and other passengers, said to her: "The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again." It was held that the conductor's language was actionable, for the reason that it justified an inference that plaintiff was charged with dishonesty, and even if it were conceded that the language did not imply dishonesty, when taken in connection with the manner in which it was used and the circumstances under which it was used, it was insulting and calculated to humiliate and mortify. Texas, etc., R. Co. *v.* Tarkington, 27 Tex. Civ. App. 353, 66 S. W. 137.

30. Texas, etc., R. Co. *v.* Tarkington, 27 Tex. Civ. App. 353, 66 S. W. 137.

31. Rudeness and oppression resulting in injury.—Railroad *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554; West Memphis Packet Co. *v.* White, 99 Tenn. (15 Pickle) 256, 41 S. W. 583, 38 L. R. A. 427.

32. Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 3 S. W. 530, 9 Ky. L. Rep. 7, 7 Am. St. Rep. 600; Rose *v.* Wilmington, etc., R. Co., 106 N. C. 168, 11 S. E. 526; Daniels *v.* Florida, etc., R. Co., 62 S. C. 1, 39 S. E. 762, 23 Am. & Eng. R. Cas., N. S., 107.

Discourteous conduct of agent held not to impose liability on company.—A carrier is not liable because the agent at a depot, at which a passenger was awaiting for train was cross, and refused to tell her the name of the town or where she could find a hotel, and, on her asking for water, merely pointed to a tank some

What Constitutes Abusive Language or Insult.—In an action by a passenger to recover for an insult given by the conductor, his acts must have been such as did not only humiliate and insult plaintiff, but such as would reasonably tend to humiliate any person in similar circumstances.[33] To apply the term "negro" to a white person is humiliating and insulting.[34] Thus, it has been held that a suggestive question, addressed to a white passenger by a conductor of a street car, who points to the seats reserved for negroes, is but little less than calling him a "negro," and in either case, whether the language used is heard by others or not, the carrier is liable therefore in damages.[35] A statement of a conductor in ejecting a passenger that the pass on which he was attempting to ride was "bogus" and had "been scratched," but that he regarded the passenger as a gentleman, does not constitute abusive language or insults to the passenger's person or character.[36] Vulgar and offensive language by the carrier's servants in the presence of a female passenger is actionable.[37] But a proposal, made by the conductor, to take a female passenger to the end of the division and see that she returned home the next day, at a time when she had been carried past her station, was not insulting.[38] Nor do the remarks of a conductor to a female passenger that, if other conductors had carried her child without pay, he, if in her place, would not give them away, and would not tell it on them, charge her with undue intimacy with them.[39]

Good Faith No Excuse.—Good faith unaccompanied by freedom from fault is no excuse for an insult offered by a servant of the carrier to a passenger who suffers injury; the good faith of the transaction can only be considered in mitigation of the damages.[40] A conductor is bound to examine carefully the tickets, and can not justify an offensive refusal of a book of tickets, by the rule that a ticket is conclusive evidence as between conductor and passenger.[41]

Provocation, etc.—And, in line with the authorities which hold that when a passenger brings upon himself an assault by the use of insulting and abusive language of such a character as naturally excites the passions of the servant, and renders him unfit to perform in a proper manner the duty he owes his master and the master's patrons, there can be no recovery against the master,[42] it has been held that a passenger can not recover damages on account of being insulted by the conductor of a train, if the insulting language was provoked by the conduct of the passenger.[43] But it is believed that the true rule is that, while the fact that the passenger's own conduct brought about his ill treatment may be considered in mitigation of damages, it is not a justification and does not relieve the carrier from liability. This rule is analogous to the one which has been favored in discussing the liability of the carrier for servant's assaults which

distance away, or because men and boys around the station jeered and laughed at her. Missouri, etc., R. Co. *v.* Kendrick (Tex. Civ. App.), 32 S. W. 42.

33. What constitutes an insult.—Georgia R., etc., Co. *v.* Baker, 1 Ga. App. 832, 58 S. E. 88.

34. Term "negro" applied to white person.—May *v.* Shreveport Tract. Co., 127 La. 420, 53 So. 671, 32 L. R. A., N. S., 206.

35. Suggestive question.—May *v.* Shreveport Tract. Co., 127 La. 420, 53 So. 671, 32 L. R. A., N. S., 206.

It is an insult for a conductor of a carrier to call a white man a negro, or to intimate that a white man is of African descent, and, dependent on the circumstances, is actionable. Wolfe *v.* Georgia R., etc., Co., 58 S. E. 899, 2 Ga. App. 499.

36. What constitutes.—Kansas, etc., R. Co. *v.* Scott, 1 Tex. Civ. App. 1, 20 S. W. 725.

37. Vulgar and offensive language.—Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

38. Proposal not amounting to insult.—Missouri, etc., R. Co. *v.* Pope (Tex. Civ. App.), 149 S. W. 1185.

39. Remarks not charging undue intimacy.—Carpenter *v.* Trinity, etc., R. Co., 55 Tex. Civ. App. 627, 119 S. W. 335.

40. Good faith no excuse.—Wolfe *v.* Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899.

41. Offensive refusal of ticket book.—Humphrey *v.* Michigan United R. Co., 166 Mich. 645, 132 N. W. 447.

42. See § V. of note to Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, 22 Am. & Eng. R. Cas., N. S., 909.

43. Harrison *v.* Fink, 42 Fed. 787.

are provoked by the passenger[44] and is supported by respectable authority.[45] Thus, it has been held that while the fact that an insulting proposal by the conductor of a train to a woman passenger was provoked by an immodest or improper remark on her part, might be considered in fixing the damages, it could not be held to justify the conductor's conduct.[46] But the servant's insults, rude conduct, and language must be responsive to insulting language or other provocation by the passenger, and offered under the influence of sudden passion.[47]

§§ 2594-2600. False Imprisonment and Arrest—§ 2594. General Rule.—A carrier of passengers is liable for the false imprisonment and arrest of a passenger which is made, or caused to be made, by a servant when acting in the line of his duties or scope of his employment.[48] And, while there are few decisions to that effect, it seems that, in the absence of ratification by the carrier, he is liable only when the servant, in effecting the wrongful arrest, is acting within the scope of his employment.[49] If the arrest of the passenger is within the scope of the servant's employment the carrier is liable, although the servant

44. See § V. of note to Birmingham R., etc., Co. *v.* Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, 22 Am. & Eng. R. Cas., N. S., 909.

45. See San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

46. Strother *v.* Aberdeen, etc., R. Co., 123 N. C. 197, 31 S. E. 386.

47. Must be responsive—Sudden passion.—San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

Instructions as to mitigation of damages.—In an action for insults to a female passenger on a street car by the conductor of the car, an instruction that if plaintiff and her companions willfully insulted the conductor, and such insults provoked the acts and language of the conductor, such fact might be considered in mitigation of damages, was properly refused for failure to confine the matter to language or conduct of the conductor which arose from insults first given to him by the passengers which was in immediate response to such insults. San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

48. *California.*—Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695.

Kansas.—Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas., N. S., 418, 29 L. R. A. 465.

New York.—Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 53 Am. & Eng. R. Cas. 56, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming 60 Hun 579, 39 N. Y. St. Rep. 23, 14 N. Y. S. 468; Shea *v.* Manhattan R. Co., 29 N. Y. St. Rep. 313, 8 N. Y. S. 332, 15 Daly 528; Hamel *v.* Brooklyn, etc., Ferry Co., 25 N. Y. St. Rep. 153, 53 Hun 634, 6 N. Y. S. 102, 1 Silvernail 584, affirmed, without opinion, in 125 N. Y. 707, 26 N. E. 753.

Texas.—Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162, 9 Am. & Eng. R. Cas. 287.

Virginia.—Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935.

And the mayor of a city is not authorized by law to appoint a special policeman for a railroad company. Thus, a night watchman, in the employ and pay of the company was sworn in by the mayor, at the company's request. He arrested and imprisoned the plaintiff, though possessed of no authority to make arrests as an officer In so doing, however, he acted within the scope of his employment, and the arrest of the plaintiff was authorized and ratified by the company. The plaintiff in an action against the company for false imprisonment was held entitled to recover. Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935.

A common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

49. Lezinsky *v.* Metropolitan St. R. Co., 31 C. C. A. 573, 88 Fed. 437, 12 Am. & Eng. R. Cas., N. S., 55; Laffitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. 701, 47 Am. & Eng. R. Cas. 645, 12 L. R. A. 337; Cunningham *v.* Seattle Elect. R., etc., Co., 3 Wash. 471, 28 Pac. 745, 52 Am. & Eng. R. Cas. 588.

But see St. Louis, etc., R. Co. *v.* Franklin (Tex. Civ. App.), 44 S. W. 701, an action by a passenger for damages for false imprisonment, in which the court, answering defendant's proposition that a master is not responsible for the wrongful act of his servant not done in the scope of his employment, said: "The principle is sound, but without any application in cases like this. To one who is a passenger of a carrier, the latter is liable for injury inflicted upon him by its servant, in whatever capacity the servant may be employed."

may have exceeded his authority,[50] in which it was held that where a railroad company employs a person to act for it as a detective officer, and his authority includes, expressly or by general usage or consent, the power to make an arrest in the company's behalf, it will be liable if he wrongfully makes an arrest without a warrant, although he has not been authorized to make arrest without warrants,[51] or even though he may have acted directly contrary to his instructions. Thus, where the conductor of a train caused the arrest of one of the passengers, whom he erroneously believed to be the person who had previously committed an assault upon him, it was held that the company was liable, although, when the occurrence of the assault upon the conductor had been reported to the management of the road, he had been instructed not to make any arrest for the assault.[52] According to the present state of the authorities, the rule governing the carrier's liability for the wrongful arrest or imprisonment of passengers by his servants, is, then, the same as that which governs the carrier's liability for the negligence of servants[53]—the liability of the carrier depends, not upon whether the arrest was authorized, nor even upon whether it was forbidden, by the carrier, but upon whether the servant was, at the time, acting within the line of his duties or the scope of his employment. And it has been held that, where a passenger on a street car was knocked from the car by the conductor, the assault being continued in the street, and on the approach of an officer the conductor directed him to arrest plaintiff, which he did, that the whole affair was but a single transaction, and that defendant was liable for both the assault and the arrest if unlawful, and in the same case the court held that it was not error not to instruct on whether or not the conductor was acting within the scope of his employment at the time he directed the arrest.[54]

§§ 2595-2600. What Constitutes False Imprisonment—§ 2595. In General.—The constituent elements of false imprisonment are, first, the detention or restraint, and, secondly, the unlawfulness of the detention or restraint.

§ 2596. The Detention or Restraint.—In order to charge a carrier of passengers with liability to a passenger for a false imprisonment, there must be a detention against the will of the passenger[55] and the detention must be by, or at the instance of, the carrier or his servants. If the arrest of the passenger is not made by the carrier, or his servants, but by the police authorities, the carrier can not, of course, be liable in an action for false imprisonment.[56] Thus if the police authorities, having information that a passenger on a railroad train is violating the law, enter the train and arrest him, the carrier is not liable.[57] The conductor of a train is not required to enter into a contest with officers of the law, by inquiring into their authority and asserting his own in opposition,[58] and,

50. Duggan *v.* Baltimore, etc., R. Co., 159 Pa. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672.

51. Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 54 Am. St. Rep. 883, 31 L. R. A. 702.

52. Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

53. See note to Louisville, etc., R. Co. *v.* Steenberger, 24 Ky. L. Rep. 761, 69 S. W. 1094, 5 R. R. R. 384, 28 Am. & Eng. R. Cas., N. S., 384.

54. Assault and arrest.—Louisville R. Co. *v.* Kupper (Ky. App.), 118 S. W. 266.

55. Sullivan *v.* Old Colony R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513.

56. Oppenheimer *v.* Manhattan R. Co., 63 Hun 633, 18 N. Y. S. 411, 45 N. Y. St. Rep. 134. See Cunningham *v.* Seattle Elect. R., etc., Co., 3 Wash. 471, 28 Pac. 745, 52 Am. & Eng. R. Cas. 588.

"A railroad company is bound to use extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons; but where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest." Baldwin *v.* Seaboard, etc., Railway, 128 Ga. 567, 572, 58 S. E. 35, 13 L. R. A., N. S., 360.

57. Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262, 14 Am. & Eng. R. Cas., N. S., 217.

58. Duggan *v.* Baltimore, etc., R. Co., 159 Pa. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672.

therefore, that the arrest of a passenger upon his train is made without authority or probable cause does not make the railroad company liable for the false imprisonment.[59] Nor is the carrier liable for the wrongful arrest of a passenger merely because the conductor points him out to an officer who is in search of him.[60] But the carrier may be liable if the conductor takes part in the unlawful arrest. Thus, if the conductor of a train, who has received telegraphic orders from one of the company's detectives to arrest one of the passengers, participates in the unlawful arrest of the passenger by officers who have been called for the purpose, the company is liable.[61] And the carrier may be liable if his agent procures the arrest of a passenger, or sets in motion the machinery by which the arrest is made, although it is not expressly ordered or directed. Thus, where a detective employed by a railroad company, who was present when plaintiff tendered a counterfeit bill to pay for a ticket, telegraphed ahead to another station, relating the occurrence, and directing the operator to tell the police authorities to be at the station, then boarded the same train with plaintiff, and, upon reaching the station, pointed plaintiff out to the officers, as did also the conductor, it was held that his arrest by the officers was procured by an agent of the company.[62] So where the baggage master at a station, who was charged with the duty of checking baggage and attending to the waiting room, assisted an officer in unlawfully arresting a passenger while she was about to take a train, the carrier was liable, although the baggage master was not at the time actively doing anything in furtherance of the carrier's business.[63]

§§ 2597-2600. The Unlawfulness of the Detention or Restraint—§ 2597. In General.—In order to charge a carrier of passengers with liability to a passenger for false imprisonment, there must not only be a detention of the passenger, but the detention must be unlawful. Conversely, if the detention is wrongful, it is no defense to an action for false imprisonment against the carrier that servant acts in good faith in making the arrest[64] or that the arrest resulted from the passenger's own absolute and unreasonable conduct. The fact that a passenger's arrest, on a false charge of fraudulently evading the payment of fare, is induced by the passenger's conduct in refusing to identify himself as the person to whom the ticket which he presents was issued, is not a justification and does not relieve the carrier of liability for the false arrest.[65] A railroad company is, of course, liable in damages in an action for false imprisonment brought by a passenger whom it causes to be arrested for alighting from a moving train, under a statute which denounces a penalty for getting on or off a moving train, but especially excepts passengers and train employees from its operation.[66]

§ 2598. Detention to Enforce Payment of Fare.—The right to arrest a passenger for evading payment of fare or attempting to steal a ride is in some instances given by law.[67] But in the absence of legislation upon the subject,

59. Owens *v.* Wilmington, etc., R. Co., 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642.

60. Owens *v.* Wilmington, etc., R. Co., 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642; Baldwin *v.* Seaboard, etc., Railway, 128 Ga. 567, 573, 58 S. E. 35, 13 L. R. A., N. S., 360.

61. Duggan *v.* Baltimore, etc., R. Co., 159 Pa. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672.

62. Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 54 Am. St. Rep. 833, 31 L. R. A. 702.

63. Baggage master assisting officer.—Texas Mid. R. Co. *v.* Dean, 85 S. W. 1135, 98 Tex. 517, 70 L. R. A. 943.

64. Jacobs *v.* Third Ave. R. Co., 71 App. Div. 199, 75 N. Y. S. 679, 10 N. Y. Ann. Cas. 462, reversing 34 Misc. Rep. 512, 69 N. Y. S. 981.

65. Palmer *v.* Maine, etc., R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673.

66. Alabama, etc., R. Co. *v.* Kuhn, 78 Miss. 114, 28 So. 797, 19 Am. & Eng. R. Cas., N. S., 466.

67. Mass. Pub. Stat., c. 103, §§ 18, 19; c. 112, § 197.

An attempt to steal a ride by conceal-

the detention of a passenger to enforce the payment of fare constitutes a false imprisonment.[68] Where a passenger upon an elevated railroad train, who had lost his ticket before reaching his destination, was not permitted by the gatekeeper to pass from the station platform to the street without producing his ticket or paying his fare, although he explained that he had lost his ticket, and, on his insisting upon his right to pass, was arrested by a police officer at the instance of the gatekeeper, it was held that the carrier was liable for false imprisonment.[69] But a passenger who fails to present a ticket or pay fare may be detained a reasonable time for the purpose of enquiring into the circumstances. Thus, where a passenger on a steamboat who knew, or has reason to know, that he would be required to present and surrender his ticket upon disembarking, failed either to do so or to pay his fare, it was held that his detention for a reasonable time for the purpose of investigating the circumstances of the case, did not subject the carrier to liability for false imprisonment.[70]

§ 2599. Arrest without Warrant.—While it has been said that if there is probable cause for concluding that a passenger has either committed a felony, or is about to do so, his arrest by a servant of the carrier is excusable, even though the suspicion was unfounded,[71] there is no authority to that effect. That may be the rule by which to determine the lawfulness of an arrest which is made by a servant who is invested, by statute or special appointment, with the authority of a peace officer, and who acts as a peace officer in making the arrest. But there can be little doubt that the legality of arrests by servants who are not clothed with the authority of a police officer must be governed by the rules which determine the legality of arrests by any private individuals. In that case, to justify the arrest of a passenger by the carrier's servant, without a warrant, for an offense which was not committed in his presence, it must appear, in some jurisdictions, that a felony had been committed, and that there were reasonable grounds for believing that the passenger was guilty, in other jurisdiction, that a felony had been committed, and that the passenger was actually guilty. The arrest of a passenger for a misdemeanor, which amounts to a breach of the peace, by the carrier's servant, without a warrant, does not constitute false imprisonment. Where the conductor of a train, who was unable to control disorderly passengers or to suppress the disorder which they created, and felt powerless to eject them because of their threatened resistance, telegraphed to a station

ing one's self on a moving train of cars is a misdemeanor, and the conductor is by law authorized to cause a person guilty thereof to be arrested. Where in a given case the conduct of the passenger is such as to afford reasonable ground and probable cause for believing that one is violating this law, his arrest by the conductor does not render the railroad company liable, although it be shown that the person was not, as a matter of fact, violating or attempting to violate the statute. Southern R. Co. *v.* Gresham, 114 Ga. 183, 39 S. E. 883.

68. Chilton *v.* London, etc., R. Co., 16 M. & W. 212; Smith *v.* State, 26 Tenn. (7 Humph.) 43.

69. In the opinion of the court it was said that defendant had no right to detain and imprison plaintiff until he should produce a ticket or pay his fare. "At most the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it can not be to compel payment of fare. The detention here was not to enable the gate-keeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare." Lynch *v.* Metropolitan, etc., R. Co., 90 N. Y. 77, 12 Am. & Eng. R. Cas. 119, 43 Am. Rep. 141.

70. Standish *v.* Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66.

71. Newman *v.* New York, etc., R. Co., 54 Hun 335, 7 N. Y. S. 560, 27 N. Y. St. Rep. 135.

ahead for a policeman, and when the train reached the station pointed them out to the officer and had them arrested, it was held that the arrest was lawful, although made without a warrant, and that the company was not liable in an action for false imprisonment brought by one of the passengers arrested. The decision was upon the theory that the disorderly conduct amounted to a breach of the peace, for which the conductor, as a private individual, would have been authorized to arrest had he been physically able to do so, and that "the act of the conductor in telegraphing for a policeman, and in a short space of time thereafter turning the plaintiff over to the officer, was in no respect different from a formal arrest by the conductor in the midst of the riot and disorder."[72] Where the common-law rule that a private person can not lawfully arrest another for a misdemeanor, which does not amount to a breach of the peace, without a warrant, obtains, a carrier is liable for the arrest of a passenger, without a warrant, for a misdemeanor, which does not amount to a breach of the peace, by a peace officer, who was not present when the offense was committed, at the instance of a servant who acts in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. Thus, a railroad company is liable for the arrest of a passenger, at the instance of a conductor, by an officer, without a warrant, for the statutory offense of fraudulently evading the payment of fare.[73]

§ 2600. What Constitutes Probable Cause.—It can not be said that there is probable cause when the servant causing the arrest of a passenger does not believe that the offense with which a passenger is charged has been committed.[74] Where a passenger on a street car deposited a counterfeit coin in the fare box, and refused to redeem it unless it should be returned to him, although he was told by the driver that he could not open the box, but that the coin could be had by calling at the office of the company, it was held that there was probable cause for his arrest upon a charge of passing counterfeit money.[75] It appearing that plaintiff, when arrested by a detective in the employ of defendant carrier, while awaiting a train for which he had a ticket, had on a rubber suit, and a hood, part of which came down over his face, with holes for eyes, wore a false beard, and had in his possession a paper box which contained bottles of liquid substances, rags in an oily condition, and eight or ten wax tapers, it was held that the question as to whether there was probable cause for his arrest was for the jury.[76]

§ 2601. Communication of Disease by Employee to Passenger.—A carrier is liable in damages for the communication of smallpox by a ticket agent to a passenger buying tickets from him, where the agent knows he is infected.[77] And it is held that the act of a railway ticket agent, infected with smallpox, in exposing himself to plaintiff, who purchases tickets from him, is the proximate cause of plaintiff's wife contracting the disease, where plaintiff contracts it and communicates it to her.[78]

72. Baltimore, etc., R. Co. *v.* Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.

73. Palmer *v.* Maine, etc., R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500, 26 Am. & Eng. R. Cas. 118; S. C., 143 Mass. 228, 9 N. E. 613, wherein it was held that the arrest was illegal, although the conductor was empowered by statute to make the arrest himself, if the conductor, in turning the passenger over to an officer, did not act in the capacity of an officer, but in that of conductor.

74. Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500, 26 Am. & Eng. R. Cas. 118; S. C., 143 Mass. 228, 9 N. E. 613, 28 Am. & Eng. R. Cas. 138.

75. Central R. Co. *v.* Brewer, 78 Md. 394, 28 Atl. 615, 59 Am. & Eng. R. Cas. 639, 27 L. R. A. 63.

76. Newman *v.* New York, etc., R. Co., 54 Hun 335, 7 N. Y. S. 560, 27 N. Y. St. Rep. 135.

77. Communication of disease.—Missouri, etc., R. Co. *v.* Raney, 99 S. W. 589, 44 Tex. Civ. App. 517.

Evidence held sufficient to show that the agent had smallpox and knew it when the passenger bought tickets from him. Missouri, etc., R. Co. *v.* Raney, 99 S. W. 589, 44 Tex. Civ. App. 517

78. Proximate cause.—Missouri, etc., R. Co. *v.* Raney, 44 Tex. Civ. App. 517, 99 S. W. 589.

Evidence held sufficient to show that

§§ 2602-2616. Scope of Employment—§ 2602. In General.—Since it is well settled that the carrier is liable for the negligence of his servants only when acting within the line of their duties or the scope of their employment, and since the "line of duty" and "scope of employment" limitation of the carrier's liability to passengers for the wilful wrongs of his servants has not been wholly abandoned, it becomes important to determine what acts are and what are not within the scope of the servants' employment. It may, generally speaking, be said that, from the moment the contract between the carrier and passenger begins until it ends, the official actions of the servants of the carrier touching the payment of fares, or the manner in which passengers shall conduct themselves, or the enforcement of the regulations prescribed for the conduct of the transportation—in short all intercourse between the servants and passengers, naturally and legitimately growing out of the relationship existing between them—may properly be said to come within the scope of their employment.[79] Thus, it is said that the liability of the carrier extends to tortious acts of its servants done about its business, in checking the baggage of passengers at the several stations on its line of road, and to the platform or area along the cars necessary to be used or traversed by the passengers in attending to procuring seats and checking baggage, and other lawful and peaceful acts in connection with their travel.[80] But an act of the carrier's servant after the passenger has reached the destination, and the relationship terminated, is not within the scope or cause of his employment rendering the carrier liable.[81]

A conductor of a passenger train in the performance of those duties the railroad company owes its passenger, or those rightfully aboard the train, is the representative of the company.[82] In dealing with persons as passengers, whether in admitting or excluding them from the cars, or in assigning them places after they have entered, the conductor in charge is acting in the course or within the scope of his employment. When this is the character of the act, the master is responsible for it civilly, even if it be an act of positive malfeasance or misconduct.[83] And where a carrier places on a train two conductors, or two persons intrusted with the usual functions of a conductor, as between a passenger dealing with one

a passenger contracted smallpox from a railway ticket agent. Missouri, etc., R. Co. *v.* Raney, 99 S. W. 589, 44 Tex. Civ. App. 517.

79. Sherley *v.* Billings (Ky.), 8 Bush 147, 8 Am. Rep. 451; Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117, 6 Am. Rep. 200.

80. Tortious acts at station, etc.—Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

81. The acts of the conductor, after the train had reached the end of the division, in taking plaintiff to a house, which bore an ill repute, were not done while engaged in the company's business; and hence the company was not liable. Missouri, etc., R. Co. *v.* Pope (Tex. Civ. App.), 149 S. W. 1185.

82 Conductor.—Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228; Galveston, etc., R. Co. *v.* La Prelle, 27 Tex. Civ. App. 496, 65 S. W. 488; Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951, affirmed in 93 Tex. 685 no op.; Missouri, etc., R. Co. *v.* Price, 48 Tex. Civ. App. 210, 106 S. W. 700.

In the observance of those duties he must refrain from conduct which exposes a passenger, or one rightfully aboard the train to peril. Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228.

It is within the scope of the authority of the conductor of a railroad train to announce to a passenger, at his request, the name of the station at which the train is then stopped, to state to him the length of time the train will remain there, and t hold the train, in accordance with the answer, for the time so designated. Missouri, etc., R. Co. *v.* Price, 48 Tex. Civ. App. 210, 106 S. W. 700.

A conductor acts within the scope of his powers if, while stopping at a place at which it is not customary to receive passengers, he grants permission to a passenger to temporarily leave the train. Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434.

83. Passenger Railway *v.* Young, 21 O. St. 518, 8 Am. Rep. 78, quoted in Holland *v.* Columbus R. Co., 12 O. D. N. P. 690.

The act of the conductor in requesting a passenger to go on the platform of a coach because of the crowded condition of the coach is an act done in managing the train. Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

of them and the carrier, he stands in the place of a conductor, whether he is such permanently or not.[84]

Power as to Enforcement of Rules of Carrier.—Where a person on a train is violating rules of the railroad, the conductor is justified in using only sufficient force to make him desist.[85]

§ 2603. Inviting or Directing Passenger to Alight at Dangerous Place.—Since the performance of the duty of exercising care to provide passengers with safe alighting places is necessarily reposed in the conductor, a railroad is liable for the act of a conductor in negligently inviting, directing, or otherwise inducing a passenger to get off a train at a dangerous place.[86]

§ 2604. Assisting Passenger on or Off Train or Car.—It is well settled that a railroad or street railway company is liable for the negligence of servants in charge of a train or car while assisting passenger to get on or off.[87] Whenever it is the duty of the carrier to assist passengers to get on or off the vehicle, the carrier is, of course, liable for the negligence of a servant who is charged with the duty of rendering the necessary assistance.[88] And it has been held that the duty to afford "safe means" for alighting includes and refers to any negligence of the carrier's servants in assisting passengers to alight.[89] And, even though the carrier is under no obligation to afford passengers personal assistance in getting on or off the vehicle, if he does, through his servants, undertake to assist passengers, he is still liable for negligence involved in the character of the personal assistance furnished.[90] Thus, whether a railroad company is or is not bound to

84. Two conductors or persons in charge of same train.—Atlanta, etc., R. Co. *v.* Haralson, 65 S. E. 437, 133 Ga. 231.

85. Enforcement of rules.—Texas, etc., R. Co. *v.* Pearl, 3 Texas App. Civ. Cas., § 4.

86. *Missouri.*—McDonald *v.* Kansas City, etc., R. Co., 127 Mo. 38, 29 S. W. 848; Adams *v.* Missouri, etc., R. Co., 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105; Griffith *v.* Missouri, etc., R. Co., 98 Mo. 168, 11 S. W. 559.

New York.—Lewis *v.* Delaware, etc., Canal Co., 145 N. Y. 508, 40 N. E. 248, affirming 80 Hun 192, 30 N. Y. S. 28.

Texas.—International, etc., R. Co. *v.* Smith (Tex.), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324.

87. *United States.*—Pennsylvania R. Co. *v.* Reed, 60 Fed. 694, 9 C. C. A. 219, 58 Am. & Eng. R. Cas. 422.

Michigan.—McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724, 52 Am. & Eng. R. Cas. 290.

New York.—Drew *v.* Sixth Ave. R. Co., 26 N. Y. 49.

Texas.—Texas, etc., R. Co. *v.* Humphries, 20 Tex. Civ. App. 28, 48 S. W. 201; International, etc., R. Co. *v.* Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152.

Wisconsin.—Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416.

If a servant of a carrier of passengers, while assisting a passenger to board a train, is acting within the scope of his duty, the company is liable for injuries received by the passenger from a fall caused by the servant's negligence in rendering the assistance. Western, etc., Railroad *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655.

Where a train is stopped at a flag station, and, after an employee thereon had assisted some passengers to alight, started to move on, and the plaintiff then informed this employee of her desire to get aboard, and he thereupon signaled the engineer to stop the train, which was done, the train stopping at a low place where it was difficult to mount the platform steps, and the employee then undertook to assist the plaintiff to get upon the train, it was, under these circumstances, a question for the jury whether or not the employee in so doing was acting within the scope of his duty. Western, etc., Railroad *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655.

In Drew *v.* Sixth Ave. R. Co., 42 N. Y. (3 Keyes) 429, 1 Abb. Dec. 556, it was held that the driver was acting in the line of his duty in helping a child or infirm person on and off the car, and that the company is liable for the negligence of a driver in this respect.

88. Western, etc., Railroad *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; Pittsburgh, etc., R. Co. *v.* Gray, 28 Ind. App. 588, 64 N. E. 39, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120; International, etc., R. Co. *v.* Gilmer, 18 Tex. Civ. App. 680, 45 S. W. 1028.

89. "Means to alight" as including acts of porter in assisting passenger.—Texas, etc., R. Co. *v.* Beezley, 46 Tex. Civ. App. 108, 101 S. W. 1051.

90. Missouri, etc., R. Co. *v.* White, 22 Tex. Civ. App. 424, 55 S. W. 593; Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573.

A carrier need not assist a passenger

render assistance in taking passengers aboard its cars, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering.[91] A complaint alleging that the conductor of defendant's street car, after assisting plaintiff to alight from the car, stepped back upon the car step and stood on plaintiff's skirt, which had not been removed from the step, while the car was started, throwing plaintiff down, and injuring her, has been held to state a cause of action.[92] Although a passenger leaves a train at an intermediate station, upon being mistakenly informed by a brakeman, whose duty it is to call stations and to assist passengers on and off the train, that it is necessary to change cars at that station, the railroad company is responsible for the negligence of the brakeman in assisting the passenger off the train.[93]

§ 2605. Pushing or Pulling Passenger Off Train or Car.—On the ground that the act of a trainmen in pushing or pulling a passenger from a train or car is within the scope of his employment, a railroad company is liable to a passenger for injuries sustained in consequence of being negligently or wilfully pulled or pushed from a train by the conductor,[94] by a brakeman,[95] by a porter,[96] and even by one of the servants in charge of a sleeping car.[97] If a passenger has boarded a moving train and got safely on the steps of one of the cars, the railroad company is responsible for the act of one of its servants in pushing them off.[98]

§ 2606. Directing or Permitting Passenger to Alight from Moving Train.—A railroad company is liable to a passenger, who is not chargeable with contributory negligence, for injuries received in consequence of being negligently permitted or directed to alight from a moving train by the conductor[99] or the brakeman,[1] especially at a place known to the employee to be dangerous because

in alighting, but, when a brakeman undertakes to assist a passenger to alight, he must exercise reasonable care, and, where he negligently pulls a passenger from the steps of the car and causes him to fall, the carrier is liable. Louisville, etc., R. Co. *v.* Lee, 130 S. W. 813, 140 Ky. 91.

A conductor in proffering his aid to assist a passenger to alight from the car at her destination is acting within the scope of his employment; so that, though there was no duty to furnish such aid, the conductor having taken her by the arm and negligently withdrawn the support of his hand while she was stepping down, because of which she fell, the carrier is liable. Judgment 96 N. Y. S. 1127, 110 App. Div. 918, affirmed. Hanlon *v.* Central R. Co., 79 N. E. 846, 187 N. Y. 73, 10 L. R. A., N. S., 411.

In an action for injury to plaintiff's wife, evidence that when the train was about to start, the conductor ordered her to get off and go to a rear car where there was no platform, and that a brakeman seized and jerked her aboard, injuring her spine, was sufficient to support a verdict for the plaintiff. International, etc., R. Co. *v.* Mulliken, 10 Tex. Civ. App. 663, 664, 32 S. W. 152, affirmed in 93 Tex. 643, no op.

91. Allender *v.* Chicago, etc., R. Co., 43 Iowa 276.

92. Citizens' St. R. Co. *v.* Shepherd (Ind. App.), 59 N. E. 349.

93. International, etc., R. Co. *v.* Anderson, 15 Tex. Civ. App. 180, 53 S. W. 606.

94. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Texas, etc., R. Co. *v.* Humphries, 20 Tex. Civ. App. 28, 48 S. W. 201.

95. Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 33 Am. & Eng. R. Cas. 524, 6 Am. St. Rep. 39; Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416.

96. Liability for acts of porter.—Where, in an action for injuries to a passenger, it appeared that a porter on a train was on duty and assisting in the operation of the train at the time he pushed plaintiff off the train, the company was liable for the consequences of the act. International, etc., R. Co. *v.* Hugen, 100 S. W. 1000, 45 Tex. Civ. App. 326.

97. Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554, 11 Am. & Eng. R. Cas., N. S., 174.

98. Sharer *v.* Paxon, 171 Pa. 26, 33 Atl. 120, 2 Am. & Eng. R. Cas., N. S., 429.

99. Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469; Bucher *v.* New York, etc., R. Co., 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; Cooper *v.* Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543, 16 Am. & Eng. R. Cas., N. S., 12.

1. Eddy *v.* Wallace, 1 C. C. A. 435, 49 Fed. 801, 52 Am. & Eng. R. Cas. 265; Pittsburgh, etc., R. Co. *v.* Gray, 28 Ind. App. 588, 64 N. E. 39, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327.

of insufficient lighting or any other reason.[2] And it has been held that the facts in a given case was sufficient to justify a finding that it was within the scope of the porter's duty to direct passengers to alight.[3] But it has been held that a declaration which stated in effect that plaintiff was injured while alighting from a moving train in obedience to the negligent order of defendant's flagman, but which did not allege that the flagman had any authority to give the direction, or that the giving of it was within the scope of his duties, or that he gave it by direction of the conductor, failed to state a cause of action.[4]

After Termination of Contract.—The act of a brakeman in telling a passenger, who has been carried by his station while asleep, that the train has just started and that he does not think that there is any danger in getting off, does not charge the carrier with liability for injuries received by the passenger in alighting. The contract of carriage having terminated, and the person being upon the train through his own fault, the company could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon him. The advice of a porter or brakeman to such person that it would not be dangerous to get off a moving train can not be considered as the discharge of a delegated duty, for no such obligation rested upon the carrier.[5]

§ 2607. Giving Information to, or Instructing, Passengers.—A railroad is responsible for the act of its ticket agent in directing a passenger to take the wrong train[6] and for the act of its conductor in negligently intimating to a passenger, who makes inquiries, that she is on the right train, when in fact, she is on a train which will not carry her to her destination.[7] But, since the control and management of a train is ordinarily vested in the conductor, whose authority is exclusive, the unauthorized acts of a brakeman as to matters connected with the movement of a train is usually not within the scope of his employment. Thus the unauthorized act of a brakeman on a freight train, which was in charge of a conductor, in telling a passenger, who was riding on the train for the purpose of caring for stock, to look after his stock, and that the train, which has stopped at a station, would remain there some time, has been held not to be within the scope of the brakeman's authority.[8] A passenger who, having been carried past his station while asleep, was set down at a distance therefrom, at his own request, has been denied a recovery for injuries sustained in walking back, notwithstanding that he might have been mislead by the conductor as to the precise place where

2. Place known to be dangerous.—A railroad was negligent where an employee, who knew that the platform was insufficiently lighted, and of the existence of a space between it and the lower steps of the car, directed and commanded a passenger to leave the train while under motion. Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653; S. C. (Tex. Civ. App.), 70 S. W. 359, affirmed in 72 S. W. 165, 96 Tex. 301.

3. Porter's duty.—Texas, etc., R. Co. *v.* Whiteley, 43 Tex. Civ. App. 346, 96 S. W. 109.

4. Savannah, etc., R. Co. *v.* Wall, 96 Ga. 328, 23 S. E. 197.

5. Missouri, etc., R. Co. *v.* Perry, 8 Tex. Civ. App. 78, 27 S. W. 496.

6. South, etc., R. Co. *v.* Huffman, 76 Ala. 492, 52 Am. Rep. 349.

As to liability of carrier for misrepresentations of its agents to purchasers of tickets, see ante, "Of Ticket Agent," § 2210.

7. Plaintiff had a ticket over a railroad which formed a junction with defendant's road. On arriving at the junction, the train switched off on defendant's road. Plaintiff inquired of the conductor who took charge at that point if she was on the right road, and was told to keep her seat, and a short distance on was ejected by the same conductor. Held, that it was the conductor's duty to examine plaintiff's ticket or inquire as to her destination, and his failure to do so was negligence. International, etc., R. Co. *v.* Gilbert, 64 Tex. 536.

8. Authority of brakeman to make statements as to movements of trains.—Where a train is in charge of a conductor, a brakeman is not authorized to make statements to passengers as to the movements of the train, and a passenger who is injured by relying on such statements can not recover from the company. International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

the train had stopped; the conductor, it was said, was not serving the company, but the passenger, in what occurred.[9]

Station Agent's Information as to Routes, etc.—An agent in an office maintained by a carrier for the purpose, among other things, of giving information to intending passenger in reference to routes of travel, acts within the scope of his authority in representing that a certain route is the best and quickest.[10] And in such a case the carrier is liable for any injury proximately resulting, though the passenger did not purchase her ticket until the next day after receiving the information, where she purchased it in reliance thereon, and though she had the opportunity of consulting the official railroad guide as to routes, from which the carrier got its information.[11] In the absence of a showing to the contrary, it is not within the scope of a station agent's authority to suggest to or invite passengers leaving trains at the station to go to any particular hotel not owned by the carrier, or to follow any particular route in reaching such hotel, unless such route has otherwise received the sanction of the carrier, though it may be within his authority to inform passengers alighting from trains of a safe way of egress from the depot or approaches reasonably near thereto.[12]

§ 2608. Acts Calculated, or Intended, to Alarm Passengers.—The act of a brakeman in calling upon passengers to jump from the train, when no real danger was imminent, has been held to be within the scope of his employment, although the expressed duties required of him were limited, and, under ordinary circumstances, did not include the duty of directing passengers, or of managing the passenger cars.[13] And a railroad company has been held not to be liable for the act of a baggage master in going into the compartment of the car adjoining his own, at the request of the express messenger, for the purpose of joining the latter in having sport with a boy who, through ignorance or mistake, had entered the express compartment, and so frightening the boy by threating words and acts as to cause him to jump from the moving train.[14]

§ 2609. Unintentional Assaults upon Passengers.—The act of an engineer in negligently throwing a jet of water from a water tank upon a passenger has been held to charge the carrier with liability.[15] And where the servants of a carrier on a train were attacked and the flagman, in the performance of his duty, while repelling the attack shot and injured an innocent passenger, the carrier was held liable if the act was wrongful.[16] And a street railway company has been held liable to a passenger upon one of its cars for injuries received through the act of the driver in throwing a stick at boys who

9. Wilson *v.* New Orleans, etc., R. Co., 68 Miss. 9, 8 So. 330.

10. Information as to routes, etc.—Southern R. Co. *v.* Nowlin, 156 Ala. 222, 47 So. 180.

11. Liability for injury.—Southern R. Co. *v.* Nowlin, 156 Ala. 222, 47 So. 180.

12. Information as to hotels.—Alabama, etc., R. Co. *v.* Godfrey, 156 Ala. 202, 47 So. 185.

A statement of a station agent, made to a passenger alighting from a train at night, in going into the depot to deposit his grip, that a hotel man was there with a light, and that if the passenger would hurry he could catch up with him, amounted only to the agent's individual suggestion, for which the carrier was not responsible, unless the route taken to the hotel was within depot grounds or approaches thereto or was a passageway which the carrier had otherwise expressly or impliedly invited the public to use as a means of ingress or egress to or from its depot and platforms. Alabama, etc., R. Co. *v.* Godfrey, 156 Ala. 202, 47 So. 185.

13. Ephland *v.* Missouri, etc., R. Co., 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 7 Am. & Eng. R. Cas., N. S., 579, 59 Am. St. Rep. 498, 35 L. R. A. 107, rehearing denied in 137 Mo. 196, 38 S. W. 926, 59 Am. St. Rep. 502, 35 L. R. A. 109; McPeak *v.* Missouri, etc., R. Co., 128 Mo. 617, 30 S. W. 170, 2 Am. & Eng. R. Cas., N. S., 226.

14. Louisville, etc., R. Co. *v.* Douglass, 69 Miss. 723, 11 So. 933, 30 Am. St. Rep. 582.

15. Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19, 6 Am. & Eng. R. Cas. 178.

16. Shooting innocent passenger.—Illinois Cent. R. Co. *v.* Gunterman (Ky. App.), 122 S. W. 514.

were hanging on the car.[17] Where a railway conductor, while in charge of a car, strikes one passenger and knocks him against another, injuring the latter, it is no defense to an action by the injured passenger that the other passenger had used opprobious language to the conductor.[18]

§ 2610. Falling against, or Jostling, Passengers.—That the negligent or wilful jostling of passengers by employees is within the scope of their employment is illustrated by cases holding a street railway company responsible for the injuries inflicted upon a passenger in consequence of the conductor negligently stumbling against him, while engaged in collecting fares,[19] holding a street railway company responsible for injuries to a passenger, who, while riding on the front platform of one of its street cars, was knocked off by the conductor in attempting to get on,[20] holding a street railway company liable for the negligence of a driver of one of its street cars in knocking a passenger from the platform in leaving the car, after having given the reins to another driver by whom he was relieved,[21] and holding a railroad company liable for the act of a brakeman in wilfully or carelessly jostling a passenger from the train, as he was passing from one car to another to find a seat.[22] A railroad company has been held liable to a passenger who was knocked down and injured, while in the central entrance to defendant's station, in consequence of the violent expulsion of a drunken man by a servant who was employed to care for the men's waiting room.[23] In a case in which the evidence showed that plaintiff, who was a passenger upon defendant's elevated train, riding on the platform of a car which was so crowded that the gate could not be closed, was injured in consequence of the guard striking at a passenger with whom he had become involved in a quarrel, causing the crowd on the platform to surge against plaintiff, who, in order to save himself from being pushed off through the open gate, made a quick involuntary movement with his left hand to catch the railing behind him, thereby getting his arm caught between the railing of the car on which he was riding and the one immediately following, it was held that plaintiff was improperly nonsuited.[24] But in an action by a passenger who was injured, while on the platform at one of defendant's stations, in consequence of the falling against him of one of defendant's servants, who was engaged in a playful scuffle with another employee, it was held that the conduct of the employees was not in the line of, or fairly incidental to, their employment.[25]

§ 2611. Directing Passenger to Render Assistance.—The act of a brakeman on a freight train, who was invested with no control whatever over any person on the train, in directing a boy, who was riding on the train without the consent of the conductor and without paying fare, to adjust some boards which were falling off the car, has been held not to be within the brakeman's scope of employment.[26]

§ 2612. Refusing Passenger Entrance to Car.—The act of the porter on a chair car, whose duty it is to direct passengers which car to enter, and

17. Allen *v.* Galveston, etc., R. Co., 79 Tex. 631, 15 S. W. 498.

18. Striking at one and injuring another.—Georgia R., etc., Co. *v.* Rich, 9 Ga. App. 497, 71 S. E. 759.

19. Whalen *v.* Consolidated Tract. Co., 61 N. J. L. 606, 40 Atl. 645, 11 Am. & Eng. R. Cas., N. S., 207, 68 Am. St. Rep. 723, 41 L. R. A. 836.

20. Gray *v.* Metropolitan, etc., R. Co., 57 N. Y. S. 587, 39 App. Div. 536.

21. Commonwealth *v.* Brockton St. R. Co., 143 Mass. 501, 10 N. E. 506, 30 Am. & Eng. R. Cas. 632.

22. Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 13 Am. & Eng. R. Cas. 1, 47 Am. Rep. 149.

23. Gray *v.* Boston, etc., Railroad, 168 Mass. 20, 46 N. E. 397, 8 Am. & Eng. R. Cas., N. S., 481.

24. Graham *v.* Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917.

25. Goodloe *v.* Memphis, etc., R. Co., 107 Ala. 233, 18 So. 166, 2 Am. & Eng. R. Cas., N. S., 444, 54 Am. St. Rep. 67, 29 L. R. A. 729.

26. Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423.

who carries the keys to the car, in refusing a passenger entrance to the car, is clearly within the scope of his employment.[27]

§ 2613. Causing Unnecessary Delay in Transportation.—The act of a conductor in unnecessarily holding his train at an intermediate station, and thereby causing an unreasonable delay in the transportation, is within the scope of his employment, and charges the carrier with liability for the consequent injuries to a passenger.[28]

§ 2614. Making Overcharge for Ticket.—The act of a ticket agent in making an overcharge for a ticket, being done in the discharge of the duties expressly committed to him by the railroad company employing him, is within the scope of his employment, and the company is liable for the penalty imposed by statute.[29]

§ 2615. Assaults upon Passengers.—As to when assaults committed by servants upon passengers are and when they are not within the scope of the employment of the servants, see ante, "Assaults upon Passengers," §§ 2570-2592.

§ 2616. False Imprisonment of Passengers.—In some cases it has been taken for granted that the act of the conductor of a train in causing the arrest of a passenger on a charge of evading payment of fare is within the scope of the conductor's employment [31] and that is undoubtedly the law. It has been held that a conductor who causes a passenger on his train, with whom he has had trouble in connection with the collection of fare, to be wrongfully arrested, is acting within the line of his employment.[32] A street railway company has been held liable in damages to a passenger who, when he presented a transfer which had, by mistake of the agent of a connecting road, been incorrectly punched, was forcibly ejected by the conductor, and placed under arrest by a policeman at the conductor's instance.[33] The conduct of the gatekeeper of an elevated railroad company in refusing to allow a passenger, who had lost his ticket before reaching his destination, to pass from the station platform to the street, detaining him and causing him to be arrested, has been declared to be within the gate-keeper's scope of employment, on the ground that all these acts were successive steps taken to enforce the payment of fare by the passenger, or to punish him for refusing to do so.[34] And it has been held that a carrier by water is liable for the act of the captain of one of its steamboats, whose duty it is to collect fares from passengers, in handcuffing and chaining a passenger to a post, under the mistaken belief that he has not paid his fare.[35] But in an action for malicious prosecution it has been held that, when a street railway conductor has been authorized only to put delinquent passengers off his car, the act of the conductor in calling a policeman to take a passenger off the car and to arrest him for violating an ordinance against riding on street cars without the payment of fare, does not render the carrier liable.[36] The act of a

27. Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518.

28. Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474, affirming 12 N. Y. Super. Ct. 133.

29. St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245, 19 S. W. 839.

31. Palmer *v.* Maine, etc., R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500, 26 Am. & Eng. R. Cas. 118; S. C., 143 Mass. 228, 9 N. E. 613, 28 Am. & Eng. R. Cas. 138.

32. Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas., N. S., 418, 29 L. R. A. 465.

33. Jacobs *v.* Third Ave. R. Co., 71 App. Div. 199, 75 N. Y. S. 679, 10 N. Y. Ann. Cas. 462, reversing 34 Misc. Rep. 512, 69 N. Y. S. 981.

34. Lynch *v.* Metropolitan, etc., R. Co., 90 N. Y. 77, 12 Am. & Eng. R. Cas. 119, 43 Am. Rep. 141.

35. Trabing *v.* California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695.

36. Little Rock Tract., etc., Co. *v.* Walker, 65 Ark. 144, 45 S. W. 57, 40 L. R. A. 473, Wood, J., dissenting.

street railway conductor, who has ejected a passenger from his car, in causing the passenger's arrest, by an officer, immediately after the expulsion, has been declared to be outside the scope of his employment. It can not be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor.[37] Upon the question as to when the arrest of a passenger by, or at the instance of, a servant of the carrier, on a charge of passing counterfeit money, is to be deemed to be within the scope of the servant's employment, there is much confusion. It has been held that the driver of a street car is not acting within the scope of his employment when he causes a passenger on his car to be arrested on a groundless charge of passing counterfeit money in payment of his fare.[38] And, again, it has been held that a street railway company is not responsible for the act of its superintendent in causing the arrest of a passenger for depositing a counterfeit coin in the fare box on one of its cars, in the absence of a showing that the superintendent was expressly authorized to procure the arrest, or that the act was ratified or adopted by the corporation.[39] But where a special agent or detective employed by a railroad company for the purpose of protecting the property of the company, and of ferreting out and prosecuting persons guilty of crimes against the company, had general instructions not to make arrests without first consulting the local attorneys of the road, but was, however, authorized to make arrests when the proof was strong, and there was not time to consult the local counsel, the act of the agent in causing the arrest, without consulting the company's local counsel, of a passenger who has tendered a counterfeit bill at one of the company's ticket offices, was held to be within the line of his employment.[40] The conduct of a ticket agent in declaring that a coin which a passenger had given him was a counterfeit, and demanding another coin in its place, and, on the refusal of the passenger to do so, calling her a counterfeiter, and a common prostitute, and then detaining her at the station while search was made for an officer, releasing her when an officer could not be found, has been held to be within the scope of his employment, so that the carrier was responsible for the slanderous words and false arrest.[41] But where a ticket agent, who had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills, accepted from a passenger, who applied for a ticket and whom the agent thought was one of the counterfeiters, a bill which he believed at the time to be a counterfeit, but which was genuine, and then sent for a police officer, to whom he pointed out the passenger, who was then on the station platform, it was held (by a divided court) that the carrier was not responsible for the false imprisonment, because the agent was not, in what he did, acting

37. Lezinsky *v.* Metropolitan St. R. Co., 31 C. C. A. 573, 88 Fed. 437, 12 Am. & Eng. R. Cas., N. S., 55.

38. Laffitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. 701, 47 Am. & Eng. R. Cas. 645, 12 L. R. A. 337.

39. Central R. Co. *v.* Brewer, 78 Md. 394, 28 Atl. 615, 59 Am. & Eng. R. Cas. 639, 27 L. R. A. 63.

40. Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 54 Am. St. Rep. 833, 31 L. R. A. 702.

41. In delivering the opinion of the court, Gray, J., said: "Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury." Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 53 Am. & Eng. R. Cas. 56, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming 60 Hun 579, 39 N. Y. St. Rep. 23, 14 N. Y. S. 468.

within the scope and line of his duty.[42] On the ground that the conductor of a train would not be acting within the scope of his employment in going out of the train, and forcing one into a passenger car and carrying him off, if a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive on the cars for transportation, he and not the company, would be liable for his conduct.[43]

§§ 2617-2629. Who Are Servants—§ 2617. In General.—It is sometimes a matter of difficulty to determine who are servants of the carrier within the rule which charges the carrier with liability for the acts or omissions of his servants. In this connection it is to be observed that the carrier is liable not only for the acts and omissions of a servant in the strict sense of those whom he employs to render personal service otherwise than in pursuit of independent callings, and over whom he has the sole power of direction and control, but that he may sometimes be required to respond in damages to passengers who are injured in consequence of the acts and omissions of persons who are not his servants in the strict sense of the term.[44]

§ 2618. Independent Contractors.—Since the rule of respondeat superior rests upon the control which the superior has a right, and is bound, to exercise over the acts of his subordinates, it follows, that as to those undertakings which may properly be devolved upon others the employer is not liable to third persons for the acts of an independent contractor, over whom he never has the necessary control, nor is he liable for the acts of the employees and servants of the independent contractor, including his own servants whom he has placed under the contractor's exclusive control. But, since the duties which a carrier owes to his passengers are positive duties imposed by law, so that the carrier can not relieve himself from liability for a breach thereof, the carrier is liable

42. Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, 29 N. E. 952, 53 Am. & Eng. R. Cas. 47, 26 Am. St. Rep. 539, 14 L. R. A. 791, reversing 60 Hun 579, 14 N. Y. S. 456. In the prevailing opinion, which was delivered by O'Brien, J., it was said: "It is quite clear from the evidence that the agent was first put upon his guard, and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill he knew, or at least believed, it to be a counterfeit; but, notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crimes. This may have been laudable enough on his part as a citizen or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had or supposed he had lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and therefore acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person applying to purchase a ticket what he believes to be a counterfeit five-dollar bill—not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals—and then immediately directs the arrest of the person from whom he took the bill. Such an act on his part is not binding on his principal. If he was in fact acting within the scope and in the line of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what at least he believed to be good money. The defendant, as a citizen, might with perfect propriety render to the police such services as he could in procuring the detection and arrest of persons engaged in passing counterfeit money, but it does not follow that all his acts in that respect are binding on the defendant."

43. Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, 25 Am. & Eng. R. Cas. 327, 56 Am. Rep. 460.

44. A flagman stationed at a railroad crossing used by a street railway company is the agent of the latter, and it is liable for his negligence in signaling a motorman to cross. Augustus *v.* Chicago, etc., R. Co., 153 Mo. App. 572, 134 S. W. 22.

for the acts and omissions of the servants of an independent contractor, who is employed to discharge any of the duties which the carrier owes to his passengers.[45] Accordingly a steamship company is liable for an assault upon a passenger by the servants of an independent contractor who is employed to transport the company's passengers from the shore, by tugs or tenders, and place them on shipboard.[46] And it is no defense to an action by a passenger for injuries caused by the obstruction of the track by work being done thereon, that the obstruction resulted from the negligence of an independent contractor.[47] When the engine of a railroad company is detached from one of its trains before reaching a passenger station, and an engine of a terminal company is attached for the purpose of completing the transportation, the carrier is liable for the negligence of the terminal company and its servants.[48] It has been held that the agent of the owner of a street railway, who is employed to run a car over the road and to employ a driver, is not an independent contractor.[49] And it has been held that, although a railroad company placed the repair of a bridge leading to one of its stations in the hands of an independent contractor, the doctrine of independent contractors did not apply where the company undertook to use the bridge before the repairs were completed.[50] But in a late Pennsylvania case the court said: "Summing up the whole case, briefly, it shows the defendant using what must be treated as its own track, lawfully and without negligence, and having its passenger killed by the act of a third party, over whom it had no control, and for whose action it was in no wise responsible." [51]

§ 2619. Construction Companies.—While a railroad or street railway company may contract for the construction of its road, it can not escape liability for injuries to passengers caused by the negligence of another, whom it permits or allows to use the road for the purposes of traffic. In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. Hence, when a railroad or street railway is operated for the carriage of passengers by a construction company for a limited period after the completion of the road, the owner of the road and franchise is responsible to the passengers for the negligence of the construction company.[52] Even if a construction company engages in the carriage of passengers before the road has been completed and while it is still in full possession of the road, the owner of

45. Barrow Steamship Co. *v.* Kane, 31 C. C. A. 452, 88 Fed. 197; Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. But see Wolf *v.* Third Ave. R. Co., 74 N. Y. S. 336, 67 App. Div. 605.

46. Barrow Steamship Co. *v.* Kane, 31 C. C. A. 452, 88 Fed. 197.

47. Virginia Cent. R. Co. *v.* Sanger, 56 Va. (15 Gratt.) 230; Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

48. Keep *v.* Indianapolis, etc., R. Co., 3 McCrary 302, 10 Fed. 454.

49. Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

50. Gilmore *v.* Philadelphia, etc., R. Co., 154 Pa. 375, 25 Atl. 774, 56 Am. & Eng. R. Cas. 279.

51. Beckman *v* Meadville, etc., St. R. Co., 219 Pa. 26, 67 Atl. 983, 985.

A street railway company may be employed as an independent contractor by another street railroad to clean and repair its cars. Beckman *v.* Meadville, etc., St. R. Co., 67 Atl. 983, 219 Pa. 26.

The tracks of a street railway company at the place of an accident were the property of a traction company, but in joint use by it and defendant street railroad, under a traffic agreement, which provided that the cars of defendant were to be cleaned and repaired by the traction company. Two cars of defendant had been delivered to the traction company, which dismantled one of them, attached it by chains to the other, and started it towards the car barn for repairs. The coupling chains broke, and the dismantled car ran down a grade until it collided with a car of defendant, in which deceased was a passenger. The workmen who were to repair and clean the cars were employed and controlled by the traction company, and defendant paid on the basis of an account kept not coemployees of defendant. Beckman *v.* Meadville, etc., St. R. Co., 67 Atl. 983, 219 Pa. 26.

52. Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

the franchises, who consents to the carrying on of the passenger traffic, is not relieved of liability to the passengers.[53] And it has been held that if a railroad company furnishes a train to a construction company for the purpose of transporting construction material, and the train is run by persons who are employed and paid by the railroad company, which alone has the power of selection and discharge, the company is responsible to a passenger riding on a pass, given him by the contractors, for injury received through the negligence of those operating the train, even though the contractors have the right to determine when, where and to what extent supplies shall be transported, and to that extent have the control of the company's train and employees.[54] But a railroad company which furnishes a train to an independent contractor for the construction of its road to be used in carrying on the work of construction, is not liable to a passenger, whom the construction company undertakes to carry but with whose transportation the railroad company has nothing to do, for the negligence of an engineer in charge of the train, who is neither employed nor paid by the railroad company.[55] And where a passenger is carried on a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company, and against its express prohibition, the railroad company is not liable to the passenger for injuries sustained through the negligence of the construction company.[56]

§ 2620. Persons in Charge of Sleeping, or Palace, Cars.—Although a sleeping or palace car, which is run in connection with a passenger train, is not owned by the railroad company but by a separate company, which has its own servants in charge thereof, the persons in charge of the car are nevertheless to be regarded and treated, in respect to all matters pertaining to the safety of passengers, as servants of the railroad company; for the law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company, whose cars are used by the railroad and constitute a part of the train, to evade the duties imposed upon it by law. Accordingly, railroad companies are held responsible for the negligence of persons in charge of a palace or sleeping car[57] and for their wilful acts,[58] including assaults upon passengers.[59] And it has been held that a pas-

53. Lakin *v.* Willamette, etc., R. Co., 13 Ore. 436, 11 Pac. 68, 26 Am. & Eng. R. Cas. 611, 57 Am. Rep. 25.

54. Burton *v.* Galveston, etc., R. Co., 61 Tex. 526, 21 Am. & Eng. R. Cas. 218.

55. Scarbrough *v.* Alabama Mid. R. Co., 94 Ala. 497, 10 So. 316.

56. Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

57. Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512, 11 Am. & Eng. R. Cas., N. S., 836.

A passenger, by train of a railroad company, traveling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management; and in such case, where he sustains injury by the negligence of one in the employ of the sleeping-car company, he may maintain an action against the railroad company. What the effect of such notice would be is not determined. Cleveland, etc., R. Co. *v.* Walwrath, 38 O. St. 461, 43 Am. Rep. 433, affirming 6 O. Dec. Reprint 718.

Plaintiff, having purchased a ticket over three railroads to Atlanta, ordered reservation in a sleeping car which she expected would be on the train she boarded. She was informed by the Pullman conductor in the train conductor's presence that that car would be incorporated into the train at a junction point, and was permitted to remain in the sleeper where she was then located until the junction was reached. After the train had left the junction point, she was informed that the Atlanta sleeper had been placed in a prior section of the train, and she was compelled to return to the point from which she started. Held, that the Pullman conductor in failing to transfer plaintiff, and in permitting her to ride in the wrong car, acted as the agent of the railroad company over whose line the train was operated to the junction point, and that it alone was liable for the damages sustained. Cincinnati, etc., R. Co. *v.* Raine (Ky. App.), 113 S. W. 495.

58. Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554, 11 Am. & Eng. R. Cas., N. S., 174.

59. Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 33 Am. & Eng. R. Cas. 414, 8 Am. St. Rep. 538; Thorp *v.* New York, etc., R. Co., 76 N. Y. 402, 32 Am. Rep. 325, affirming 13 Hun 70;

senger may assume that a porter of a palace car may be relied on for assistance.[60]

§ 2621. Servants Invested with Authority of Peace Officers.—The fact that a person who is employed by a carrier has, by statute or special appointment, been invested with the duties and powers of a police officer, does not affect his status as a servant of the carrier, and does not relieve the carrier from liability for his tortious acts done within the scope of his employment.[61] That fact affords no immunity to the carrier for damages resulting from his wrongful or illegal discharge of his duty, either as servant of the company or under color of the police power delegated to him by law.[62] Thus, a railroad company is liable for the false arrest of a passenger by its station agent or conductor, although they are, by statute, made conservators of the peace.[63] And a railroad company is liable for an assault upon a passenger by an employee in its station, whose duty it is to look after passengers, although he may be clothed with the authority of a police officer.[64] If a person occupying the dual position of public officer and servant of a carrier acted in the transaction in which he inflicted injury upon a passenger in the capacity of a servant of the carrier, the question of liability is determined by the legal principles applicable in case of injury to a passenger by ordinary servants of the carrier.[65] Yet it is held that a special officer, appointed and commissioned by the governor, at the instance of a railroad company, under a statute, and paid by such company for his services, is prima facie a public officer for whose wrongful acts such company is not liable.[66]

Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 44 Am. & Eng. R. Cas. 384, 17 Am. St. Rep. 611, 8 L. R. A. 224, reversing 45 Hun 139.

60. Porter.—Gannon *v.* Chicago, etc., R. Co., 141 Iowa 37, 117 N. W. 966, 23 L. R. A., N. S., 1061.

61. Effect of granting conductor police powers.—Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488.

A special officer, appointed at the request of a carrier to maintain order at station platforms, whose shield and cap were paid for by the carrier, and whose wages were paid by it, was its employee, for whose acts towards a passenger the carrier is liable. Brewster *v.* Interborough Rapid Transit Co., 123 N. Y. S. 992, 68 Misc. Rep. 348.

62. Consequently it was not error for the court to refuse the request to charge that the defendant was not liable for its conductor's acts in carrying out the law requiring the separation of white and colored passengers; the request being only a partially correct statement of the law. Georgia R., etc., Co. *v.* Baker, 1 Ga. App. 832, 58 S. E. 88.

A railroad company is liable, as in the case of its regular employees, for the wrongful act of a special policeman appointed by the governor at the instance of the company and paid by it, where engaged in special service for the company such as guarding its property or enforcing obedience to its rules and regulations. McKain *v.* Baltimore, etc., R. Co., 65 W. Va. 233, 64 S. E. 18, 23 L. R. A., N. S., 289, 17 Am. & Eng. Ann. Cas. 634.

63. King *v.* Illinois Cent. R. Co., 69 Miss. 245, 10 So. 42; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 29 Am. St. Rep. 827, 14 L. R. A. 798.

64. A railroad company, which employs a policeman at a depot to look after passengers, is liable to a passenger for loss of an eye, caused by the policeman striking with a billy, the passenger having, after being roused from a drunken sleep, and started to his train, merely attempted to come back into the depot. Texas, etc., R. Co. *v.* Bowlin (Tex. Civ. App.), 32 S. W. 918.

In Texas, etc., R. Co. *v.* Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081, affirmed in 97 Tex. 648, no op., it appeared that plaintiff, while lawfully at a passenger depot, was wrongfully assaulted by a railroad policeman acting as agent of the company and not in his capacity as an officer.

65. When acting in capacity of servant.—Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

Under Acts 33d Gen. Assem. 1909, c. 141, § 2, providing that conductors may refuse to permit persons to enter the cars when intoxicated or may eject such persons at regular stopping places, a conductor who uses violence towards such a passenger while he is in the car is acting solely as agent and servant of the railroad company, and not as a public officer of the state, for whose acts the company is not liable. Heggen *v.* Fort Dodge, etc., R. Co., 150 Iowa 313, 130 N. W. 148.

66. Special officer.—McKain *v.* Baltimore, etc., R. Co., 65 W. Va. 233, 64 S. E. 18, 23 L. R. A., N. S., 289, 17 Am. & Eng. Ann. Cas. 634.

§ 2622. Assistants Engaged by Servants.—It seems to be settled that the master is liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment.[67] But where it is no part of a servant's duty to operate the means of conveyance, or to see that it is operated, it would seem clear that he has no implied power to employ another to do work he is not employed to do, and for the doing of which he is in no way responsible.[68] A railroad company has been held liable for the negligence of a person who was placed on board an engine by a station agent, having no authority to hire men, for the purpose of learning the road, and who was left in charge of the engine by the regular engineer.[69] Where an excursion train stopping at frequent points is composed of so many coaches and is so crowded that the conductor can not attend to his usual duties and authorizes another employee to take charge of a section thereof as conductor, as to a passenger dealing with such employee in connection with the duties so assigned him and in reliance on his being the conductor, he may be treated as such.[70] The proprietors of a stage coach have been held liable for the negligence of a passenger who was permitted, by them or by the regular driver, to drive the coach.[71] The owner of a street railway has been held liable for the negligence of a driver of a street car, who had been employed by an agent, whom the owner had engaged, for a stipulated monthly payment, to run the car over the line, and to furnish a driver.[72] A railroad company has been held liable for an assault upon a passenger by a person who was temporarily left in charge of the ticket office by the regular ticket agent;[73] and where an officer called in to eject some persons not passengers assaults a bona fide passenger, the carrier is liable, although the officer desists as soon as told to do so.[74] If, by custom among street railway employees, known and assented to by the company, those who are on duty are in the habit of calling for and receiving assistance from those who are not at the time on duty, and an employee off duty, thus called upon, undertakes to render the assistance asked, he will be regarded as in the employ of the company for such service; and, if he negligently abandons the work before completing it, whereby injuries to a passenger occur, the company will be liable.[75] And although such a custom does not exist, or, existing, is not

67. Board *v.* Cralle, 109 Va. 246, 63 S. E. 995, 22 L. R. A., N. S., 297, citing Quarman *v.* Burnett, etc., 4 Jurist, 969; Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739.

68. Board *v.* Cralle, 109 Va. 246, 63 S. E. 995, 22 L. R. A., N. S., 297.

Where defendant's hall boy, not charged with any duty of operating an elevator in defendant's office building, or of seeing that it was operated, requested another boy not in defendant's employ to take plaintiff to one of the upper floors, and while doing so plaintiff was injured by the boy's negligent operation of the elevator, the relation of master and servant did not exist between defendant and the boy running the elevator; hence defendant was not liable for his negligence. Board *v.* Cralle, 109 Va. 246, 63 S. E. 995, 22 L. R. A., N. S., 297.

69. Lakin *v.* Oregon Pac. R. Co., 15 Ore. 220, 15 Pac. 641, 34 Am. & Eng. R. Cas. 500.

70. Servant aiding conductor.—Atlanta, etc., R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437.

71. Tuller *v.* Talbot, 23 Ill. 357, 76 Am. Dec. 695.

72. Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

73. Fick *v.* Chicago, etc., R. Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878, 34 Am. & Eng. R. Cas. 378.

74. Where defendant's station agent called a deputy sheriff to eject certain undesirable persons, not passengers, from the station, and, while the agent was requesting those who did not have tickets to leave, the officer began to push plaintiff from the room, and struck him a blow on the neck with his hand or fist, when the agent, seeing the assault, notified the sheriff that plaintiff was a passenger holding a ticket, whereupon no further efforts to eject plaintiff were made, the railroad company was not relieved from liability because the assault was committed by the officer he having acted at the request of the company's agent. Whitlock *v.* Northern Pac. R. Co., 109 Pac. 188, 59 Wash. 15.

75. Leavenworth Elect. R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

known and assented to by the company, but an employee on duty deputes the one off duty to assist him, and he undertakes to do so, but negligently fails to fully perform it, whereby injury to a passenger occurs, the company is likewise liable, because of the negligent abandonment of duty by the employee directly chargeable with its performance.[76] It has been held that where a passenger is carried beyond the point of her destination through the negligence of one of the conductors of defendant railway company, the conductor, in the absence of express authority, can not constitute the proprietor of a hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination, and, therefore, the company is not liable for injuries sustained by the passenger, while at the hotel, in consequence of the negligence of the proprietor.[77]

§ 2623. Servants Employed Jointly by Several Masters.—Applying the rule that when a servant is employed by two or more masters to do work for all in common, any one of them may be liable for a tort of the servant which is within the scope of his employment, it has been held that when a station is used in common by more than one railroad company, each company is liable, at least to its own passengers, for the tortious acts of the station employees done within the scope of their employment,[78] and the same rules, it seems, apply to switching crews and other employees.[79] And when a bridge company employs a railroad company to take trains over its bridge, so that the two companies act together in the transportation of passengers over the bridge, the railroad company is liable for the tortious acts of a servant of the bridge company whom it permits to control the movements of one of its trains.[80] But where the ticket agent at a union station gives a passenger, who applies for transportation over one road, the ticket of a different road, the company whose ticket is issued is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket is desired.[81]

§ 2624. Servants of Lessors or Lessees.—A railroad company which runs its trains over the road of another company, under a contract or license, is liable to its passengers for the negligence of the servants of the licensing company.[82] And, on the other hand, a railroad company which allows its track to be used by another company is liable to its passengers for the negligence of the servants of the latter company while running trains over the road.[83]

76. Leavenworth Elect. R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374.

77. Central, etc., R. Co. *v.* Price, 106 Ga. 176, 32 S. E. 77, 12 Am. & Eng. R. Cas., N. S., 283, 7 Am. St. Rep. 246, 43 L. R. A. 402.

78. Illinois, etc., R. Co. *v.* King, 69 Miss. 852, 13 So. 824; Penfield *v.* Cleveland, etc., R. Co., 26 App. Div. 413, 50 N. Y. S. 79.

A railway company is liable for assault upon a passenger by its operator, though incidentally he worked as operator for an independent telegraph company, and though the passenger called to send a private message. Roberts *v.* Wabash R. Co. (Mo. App.), 134 S. W. 89.

79. Liability for switching crew equally the servants of two railroads.—Where a switching crew, employed to do yard-work for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if it had employed them. Judgment (Tex. Civ. App.), 70 S. W. 359, affirmed. Gulf, etc., R. Co. *v.* Shelton, 72 S. W. 165, 96 Tex. 301.

80. Union R., etc., Co. *v.* Kallaher, 114 Ill. 325, 2 N. E. 77.

81. Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

82. Murray *v.* Lehigh Valley R. Co., 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; Wabash, etc., R. Co. *v.* Peyton, 106 Ill. 534; McElroy *v.* Nashua, etc., R. Corp. (Mass.), 4 Cush. 400, 50 Am. Dec. 794. See Brady *v.* Chicago, etc., R. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712.

83. Central Trust Co. *v.* Denver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143. See

§ 2625. Servants of Receivers.—A railroad company whose business has been in the hands of a receiver, will not, in the absence of a statute imposing liability, be responsible for the tortious acts of the receiver's servants on resuming control of the road. Hence where the ticket agent in the employ of the receiver of a railroad issued the wrong ticket to an intending passenger, who, on attempting to use it after the railroad company had resumed control of the road, was ejected from the train, it was held that the passenger could not recover against the company as for a wrongful expulsion.[84]

§ 2626. Pilots.—A carrier by water is liable for the negligence of his pilot, notwithstanding that the engagement of a pilot is compulsory, and that he must be selected from among those who are licensed by the government; "the doctrine, that the owners are responsible for the acts of their agents and employees, ought not to be discarded because the selection of a pilot by the owner is limited to those who, by the state, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to conduct a vessel through them."[85]

§ 2627. Postal Agents.—Since United States postal agents, who are carried on mail trains, are under the exclusive control of the government, a railroad company is not liable for the consequences of their negligence. It has been so held in actions for injuries to employees and licensees.[86] But in actions by passengers to recover for injuries received, while at railway stations, by being struck by mail pouches thrown from moving trains, it has been held that a railroad company is liable for its own negligence in failing to prevent the practice, even if it has to stop its trains at the stations.[87]

§ 2628. Surgeon Employed by Carrier.—When a carrier by water provides a surgeon to treat passengers who may become sick or meet with accidents, he discharges his duty to his passengers by selecting a reasonably competent man for the office, and is liable only for a failure to do so, and not for the negligence of the surgeon employed. This is the rule whether the carrier employs the surgeon voluntarily,[88] or in compliance with an express statutory requirement.[89] Similarly, it has been held that a railroad company, which assumes to furnish a physician to treat a passenger who has been injured in an accident, is bound to exercise care to select a competent man, but, having done so, is not liable for his negligence in treating the passenger.[90] Of course, a steamship company will not be liable as for an assault committed by its servant, on account of the vaccination of a passenger by the ship's surgeon, where the passenger made no resistance but her behavior indicated consent.[91]

§ 2629. Employees Off Duty.—As affecting a carrier's liability for injury

Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461, 12 Am. & Eng. R. Cas., N. S., 4.

84. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61, 37 Am. & Eng. R. Cas. 8.

85. Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819.

86. Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, 21 N. W. 223, 18 Am. & Eng. R. Cas. 113, 50 Am. Rep. 141.

87. Snow *v.* Fitchburg R. Co., 136 Mass. 552, 18 Am. & Eng. R. Cas. 161, 49 Am. Rep. 40; Carpenter *v.* Boston, etc., R. Co., 97 N. Y. 494, 21 Am. & Eng. R. Cas. 331, 49 Am. Rep. 540.

88. Laubheim *v.* Netherland Steamship Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815, affirming 51 N. Y. Super. Ct. 467.

89. O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Allan *v.* State Steamship Co., 132 N. Y. 91, 30 N. E. 482, 28 Am. St. Rep. 556, 15 L. R. A. 166, reversing 55 Hun (N. Y.), 803, 8 N. Y. S. 803.

90. Liability for malpractice or neglect of physician employed to attend injured passengers.—Galveston, etc., R. Co. *v.* Scott, 44 S. W. 589, 18 Tex. Civ. App. 321; Secord *v.* St. Paul, etc., R. Co., 5 McCrary 515, 18 Fed. 221.

91. O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

to a passenger, an employee traveling on a train off duty must be regarded as a mere passenger.[92]

§§ 2630-2667. Companies and Persons Liable[93]**—§§ 2630-2636. In General—§ 2630. Delegation of Duties by Carrier.**—A carrier's obligation to transport his passengers safely can not be shifted from himself by delegation to an independent contractor, and it extends to all the agencies employed, and includes the duty of protecting the passenger from an injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.[94] So a carrier can not avoid its liability for negligence, resulting in the death of a passenger, by showing that its road and trains were operated by another company.[95] And where a street railway company transfers its property and franchises, without legislative consent, to another company, it is still liable for injuries to a passenger.[96]

Cars in Exclusive Control of Another Carrier.—When the cars of one carrier are in the exclusive control of another carrier, and operated by the latter on its own road, or that of a third carrier, the former is not liable for injuries due to the negligence of the bailee of the cars.[97] But a passenger is not bound by a secret arrangement between the carrier with which he contracts and another carrier under which the other carrier has exclusive control of the car in which the passenger was riding of which arrangement he has no notice.[98]

Delegation to Construction Company.—Where a railroad company permits a construction company to operate the road and receive the earnings thereof for a certain time, the railroad company will still be liable for any injury occurring through the negligence of the construction company in carrying passengers.[99]

92. Employees of duty.—Penny *v.* Atlantic, etc., R. Co., 69 S. E. 238, 153 N. C. 296, 32 L. R. A., N. S., 1209.

93. Passengers on pullman or sleeping cars.—As to the liability of a railroad company for injury to its passengers occupying a pullman or sleeping car, see post, "Palace Cars and Sleeping Car Companies," Chapter 30.

Liability of initial carrier.—See post, "Connecting Carriers," part V.

94. Delegation of duties by carrier.—Barrow Steamship Co. *v.* Kane, 31 C. C. A. 452, 88 Fed. 197.

Where plaintiff, being in a car of the F. Co. standing on a side track, was injured by the negligence of a brakeman of the W. Co., in coupling one of its cars with that in which plaintiff was, in carrying out a contract between the two roads for their mutual benefit, plaintiff may recover from the F. company. White *v.* Fitchburg R. Co., 136 Mass. 321.

95. Palmer *v.* Utah, etc., R. Co., 2 Idaho 350, 16 Pac. 553. See post, "Liability of Lessor," §§ 2652-2658.

96. Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353.

97. Cars in exclusive control of another carrier.—Pell *v.* Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542, affirming 142 Ill. App. 362; Smith *v.* St. Louis, etc., R. Co., 9 Mo. App. 598.

Illustration.—By the terms of a contract between defendant and another railway company defendant's trains were to be drawn over the road of such company between the town of Pacific, defendant's eastern terminus, and the city of St. Louis, which lay east of Pacific, defendant furnishing, at its own expense, all the trainmen for the management of its trains, and such other company using its own locomotive and crew, reserving exclusive control of the trainmen and trains. Held that, under such a contract, a train running between St. Louis and Pacific was not to be regarded as defendant's train, so as to make the latter liable for injuries caused by its negligent operation to a passenger who took passage at St. Louis to go to a point between it and Pacific. Smith *v.* St. Louis, etc., R. Co., 9 Mo. App. 598; S. C., 85 Mo. 418, 55 Am. Rep. 380.

98. Effect of secret agreement.—Pell *v.* Joliet, etc., R. Co., 142 Ill. App. 362, affirmed in 238 Ill. 510, 87 N. E. 542.

99. Delegation to construction company.—Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169.

Though, under the contract for the construction and equipment of an electric railway line, the construction company agrees to operate the road satisfactorily for ten days before payment for the equipment, still, where during that time regular passenger cars, manned with the usual help, and on which the public are invited to take passage at the usual fare, are run, the railway company is responsible for an accident to a passenger occasioned by negligence in the operation

§ 2631. Liability for Negligence in Operation of Trains of Another Carrier.—A railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction, and control, although the train belongs to another company.[1]

§ 2632. Liability of Carrier for Injury to Passengers of Another Carrier.—A carrier is liable when by its negligence a passenger of another carrier is injured, as when, by the negligence of one carrier, there is a collision and a passenger of the other carrier is injured.[2]

§ 2633. Liability of Employee of Carrier.—Servants of a railroad company in charge of a train on which a passenger was injured are not personally liable to such passenger for the injuries sustained unless the injury resulted from the misfeasance and positive wrongs of such servants.[3] Thus a railroad station agent, under no duty to notify a train that another train is preceding it, is not liable for injuries to a passenger in a rear-end collision resulting from failure to give such notice.[4]

§ 2634. Liability of Electric Company Furnishing Power.—A corporation furnishing motive power to a railroad company is not a carrier and need use only ordinary care.[5] Such a corporation, however, is liable, when, through its direct negligence, a passenger of the carrier to which it furnishes motive power is injured.[6]

§ 2635. Carrier Transporting Soldiers for Government.—A railway company, engaged by a government officer in the transportation of prisoners of war, is not an agent of the government in such a sense as to preclude its liability as common carrier to the soldiers in charge of the prisoners.[7]

§ 2636. Liability of Seller of Ticket.—Where a carrier sells a passenger a ticket from one point to another, it contracts to safely transport him to that point. The fact that, through a contract between the seller of the ticket and another carrier, the latter carries the passenger, does not relieve the former of its duty.[8] It has been held, however, that a railroad company, running its

of the cars. Cogswell *v.* West St., etc., R. Co., 31 Pac. 411, 5 Wash. 46, 52 Am. & Eng. R. Cas. 500.

1. Liability for negligence in operation of trains of another carrier.—Fletcher *v.* Boston, etc., Railroad (Mass.), 1 Allen 9, 79 Am. Dec. 695; Schopman *v.* Boston, etc., R. Corp. (Mass.), 9 Cush. 24, 55 Am. Dec. 41.

Where an engine owned by one railroad company, and in charge of its servants, is pulling the cars of another railroad company over the line of a transfer company, the company owning the engine is liable to one who was injured through the negligence of its servants in charge of the engine. Kentucky Cent. R. Co. *v.* Gerreiss, 14 Ky. L. Rep. 397.

2. Liability of carrier for injury to passengers of another carrier.—Beckman *v.* Meadville, etc., St. R. Co., 219 Pa. 26, 67 Atl. 983.

The C. Company and the U. Company jointly used the track of the U. Company under an agreement that all trains should be under the orders of the U. Company's train dispatchers, but that each company should be liable for injuries done by its trains or by the negligence of its employees. Held, that the C. Company was liable for injuries to a passenger on the train of the U. Company resulting from a collision caused by the negligence of the employees of the C. Company. Chicago, etc., R. Co. *v.* Posten, 53 Pac. 465, 59 Kan. 449. See post, "Collision Resulting from Concurrent Negligence of Two Carriers," §§ 2639-2641.

3. Liability of employee of carrier.—Order, 122 Fed. 709, affirmed on rehearing, Bryce *v.* Southern R. Co., 125 Fed. 958; Sutton *v.* Southern Railway, 82 S. C. 345, 64 S. E. 401.

4. Liability of station agent.—Sutton *v.* Southern Railway, 82 S. C. 345, 64 S. E. 401.

5. Liability of electric company furnishing power.—Keep *v.* Indianapolis, etc., R. Co., 3 McCrary 208, 9 Fed. 625.

6. Keep *v.* Indianapolis, etc., R. Co., 3 McCrary 302, 10 Fed. 454.

7. Carrier transporting soldiers for government.—Truex *v.* Erie R. Co. (N. Y.), 4 Lans. 198.

8. Liability of seller of ticket.—Barkman *v.* Pennsylvania R. Co., 89 Fed. 453;

trains over the track of another road, and selling to passengers tickets over both roads, is not liable to such passengers for injuries happening to them while on such other road, through the negligence of the managers of such road or their servants, and without any neglect on the part of itself or its agents.[9] Where there was a traffic agreement between two railroads whereby one could sell a ticket over the line of the other and the evidence tended to show that one railroad owned the other, the seller of the ticket as well as the other carrier was held liable for refusing to honor a through ticket and compelling a passenger to pay fare.[10] But it is held that the fact that the seller of a through ticket owns stock of and finances a connecting carrier does not of itself render it liable to the holder of such a ticket for an injury occurring while being carried over the lines of the latter.[11]

§§ 2637-2641. Injury Due to Concurrent Negligence—§§ 2637-2638. In General—§ 2637. Negligent Carriers Liable.—For a personal injury to a passenger, who is himself without fault, occasioned by the joint and concurring negligence of the carrier and another person, the injured party may seek redress from both or either of the wrongdoers.[12] This is true in spite of

Mullen *v.* Chester Tract. Co., 235 Pa. 516, 84 Atl. 429, 42 L. R. A., N. S., 76.

A railroad company selling a ticket for the carriage of a passenger between two points is liable in tort for an injury resulting to such passenger through the negligence of those operating the train, though such train was owned and operated by a different company, the ticket being receivable for passage thereon through an arrangement between the two companies. Barkman *v.* Pennsylvania R. Co., 89 Fed. 453.

A street railway, issuing tickets in its own name and supplying them to two independent street railway companies, to be good on any of the three railways, held liable to a person injured in a collision on one of the other roads. Mullen *v.* Chester Tract. Co., 84 Atl. 429, 235 Pa. 516, 42 L. R. A., N. S., 76.

9. Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

10. Tolleson *v.* Southern Railway, 88 S. C. 7, 70 S. E. 311.

11. Where one railroad company, owning most of the stock of another railroad company, and being desirous of utilizing it as a connecting line for through business, enters into a through-traffic agreement with it, by the terms of which a division of earnings on such traffic is stipulated for, and matters pertaining to through rates and other like business are intrusted in great part to the management of the first-mentioned company, which upon its part undertakes to guaranty the bonds, and generally to finance the affairs of the last-mentioned company, but the last-mentioned company retains the entire management of its own train service and operating department employs, controls, and discharges its own employees, and pays the expenses of such department, a passenger riding over the latter line upon a through ticket sold by the first-mentioned company, containing a clause limiting responsibility for injuries en route to those occurring on the line of such company, can not recover damages from the selling company for injuries received upon the line of the other one, through the negligence of its employees. Mathews *v.* Atchison, etc., R. Co., 60 Kan. 11, 55 Pac. 282.

12. Injury by concurrent negligence—Negligent companies liable.—Transfer Co. *v.* Kelly, 36 O. St. 86, 38 Am. Rep. 558; Markham *v.* Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131; Missouri, etc., R. Co. *v.* Harrison (Tex. Civ. App.), 77 S. W. 1036, reversed on another point in 97 Tex. 611.

Illustrations.—Where a carrier entered into a contract with a gaslight company to supply the carrier's cars with gas, and while a servant of the light company was filling a gas tank on one of the cars of a train in which plaintiff was a passenger an explosion of gas occurred, by which plaintiff was injured, through the failure of the gas company's employee to shut off the gas, either through his negligence or by reason of the defective condition of the valve of the car, the gas company, and the carrier were both liable for plaintiff's injuries. Chicago, etc., R. Co. *v.* Rhodes, 80 S. W. 869, 35 Tex. Civ. App. 432.

A through passenger train was operated from Chicago to New York, by the Grand Trunk Railway Company to Suspension Bridge and from there eastward by the Lehigh Valley Railroad Company. On reaching Niagara Falls, Ontario, the train was boarded by car cleaners, employed and paid by the Lehigh Company, who, while the train was passing from there to Suspension Bridge, cleaned the cars. The arrangement between the two companies under which this was done did not appear. Plaintiff, who was a customs inspector riding between such two points in the performance of his duties, without

the fact that the carrier owes a higher degree of care to its passenger than need be exercised by the third person.[13] Where the negligence causing the injury consists of separate and independent acts of two companies, neither company having control of the other as to the negligent act, it is held that they are not jointly liable.[14] The general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote. If, however, the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such as its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act.[15]

Determining Respective Liabilities of Defendants.—One having a right to recover against either of two joint wrongdoers or both can not, in an action against both, be involved in litigation to determine the question of the respective rights of the wrongdoers as against each other.[16]

§ 2638. Negligence of Other Carrier No Defense.—The negligence of neither carrier relieves the other from the liability occasioned by its negligence.[17] Thus, where the defendant, a navigation company, negligently left a rope across

negligence on his part, slipped on a banana peel, which had been negligently left with other sweepings in the aisle of one of the cars by the cleaner, and was injured. Held, that both companies were liable for the injury as joint tort-feasors; the Grand Trunk Company for allowing its cars to become dangerous while passing over its own line, and the Lehigh Company because the negligence which created the dangerous condition was that of its servants, for which it was responsible. Grand Trunk R. Co. *v.* Parks, 183 Fed. 750, 106 C. C. A. 186.

Where the track of a city railway company is obstructed through the combined negligence of the company and another corporation employed by it to do certain work, resulting in the derailment of a car and injury to a passenger, both the railway company and the other corporation are liable, in solido, for damages in an action ex quasi delicto. Englert *v.* New Orleans R., etc., Co., 128 La. 473, 54 So. 963.

That the driver of a coach, a passenger in which was injured by a collision between the coach and a turnpike gate, may have been somewhat negligent is not lighting his lamps, furnishes no excuse to the turnpike company for failing to keep the gate securely fastened back. If the injury had resulted wholly from his negligence, the company would not be liable; but, if the injury were occasioned by the negligence of both, both in that case are liable to the party injured. Danville, etc., Road Co. *v.* Stewart (Ky.), 2 Metc. 119.

13. Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117, affirming 77 N. Y. S. 309, 73 App. Div. 494.

14. Where negligent acts are independent and separte.—Where a passenger, injured while alighting from a car by being thrown by a block of wood placed across a trench by a gas company, sued the carrier and gas company jointly, alleging in her statement that the block had been placed by the gas company in a dangerous position, and that she had been negligently directed to alight at such place by the carrier, the sustaining of a demurrer to her complaint was proper, since the alleged negligence consisted of separate and independent acts of both defendants, over which neither had entire control. Howard *v.* Union Tract. Co., 45 Atl. 1076, 195 Pa. 391.

15. Southern R. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

Where by the negligent jerking of defendant's passenger train, a passenger is thrown therefrom to the tracks, where, while stunned, he is afterwards run over by a train belonging to another company, the fact that the train causing the injury was not the defendant's property, but had an independent right to use the track, not derived from defendant, does not affect the defendant's liability, as the defendant was bound to anticipate the presence of the other train. Southern R. Co. *v.* Webb, 42 S. E. 395, 116 Ga. 152, 59 L. R. A. 109.

16. Determining respective liabilities of defendants.—Cordiner *v.* Los Angeles Tract. Co., 5 Cal. App. 400, 91 Pac. 436.

17. Neither relieved from liability by negligence of other.—Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424; Missouri, etc., R. Co. *v.* Harrison (Tex. Civ. App.), 77 S. W. 1036, reversed on another point in 97 Tex. 611, citing Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, 360, 14 S. W. 26, 19 Am. St. Rep. 755.

the path of a boat of another company, whereby a passenger of the latter was injured, the defendant was not relieved from liability by the negligence of those managing the boat.[18]

§§ 2639-2641. Collision Resulting from Concurrent Negligence of Two Carriers—§ 2639. Negligent Carriers Liable.—Where, by the concurrent negligence of two carriers, there is a collision between trains or cars of the respective carriers, both are liable for any injury caused thereby to a passenger of one.[19] The passenger injured in a collision due to the concurrent negligence of two carriers may sue either carrier separately,[20] or, by the better doctrine, he may sue them jointly.[21] One court at least, however, has held that the liability is several, and not joint.[22]

§ 2640. Negligence of Other Carrier No Defense.—Where a passenger is injured in a collision between the conveyances of two concurrently negligent carriers, neither is relieved from liability by the negligence of the other.[23] Hence

18. Markham *v.* Houston Direct Nav. Co., 73 Tex. 247, 11 S. W. 131.

19. Collision resulting from concurrent negligence of two carriers—Both liable.—*California.*—Tompkins *v.* Clay Street R. Co., 66 Cal. 163, 4 Pac. 1165.

Illinois.—Schlander *v.* Chicago, etc., Tract. Co., 253 Ill. 154, 97 N. E. 233, reversing judgment, 160 Ill. App. 309; West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791.

Kentucky.—Louisville R. Co. *v.* Blum, 28 Ky. L. Rep. 253, 89 S. W. 186; Louisville R. Co. *v.* Goodman, 28 Ky. L. Rep. 253, 89 S. W. 186; Danville, etc., Road Co. *v.* Stewart (Ky.), 2 Metc. 119; Big Sandy, etc., R. Co. *v.* Blankenship, 133 Ky. 438, 118 S. W. 316, 23 L. R. A., N. S., 345, 19 Am. & Eng. Ann. Cas. 264.

Louisiana.—McDonald *v.* Louisville, etc., R. Co., 47 La. Ann. 1440, 17 So. 873.

Massachusetts.—White *v.* Fitchburg R. Co., 136 Mass. 321; Chaffe *v.* Consolidated R. Co., 196 Mass. 484, 82 N. E. 497.

Missouri.—Taylor *v.* Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88.

New York.—Schneider *v.* Second Ave. R. Co., 15 N. Y. S. 556, 39 N. Y. St. Rep. 370, 59 N. Y. Super. Ct. 536, judgment modified, 133 N. Y. 583, 30 N. E. 752.

Ohio.—Toledo Consol. St. R. Co. *v.* Fuller, 17 O. C. C. 562, 9 O. C. D. 123.

Texas.—Gulf, etc., R. Co. *v.* Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

20. Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Kimie *v.* San Jose-Los Gatos, etc., R. Co., 156 Cal. 379, 104 Pac. 986; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186; Field *v.* Spokane, etc., R. Co., 64 Wash. 445, 117 Pac. 228.

21. *United States.*—Laughlin *v.* Atlantic City R. Co., 80 Fed. 702.

California.—Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Kimic *v.* San Jose-Los Gatos, etc., R. Co., 156 Cal. 379, 104 Pac. 986.

Indiana.—Baltimore, etc., R. Co. *v.* Kleespies, 39 Ind. App. 151, 76 N. E. 1015, petition for rehearing overruled in 78 N. E. 252.

Kentucky.—Louisville R. Co. *v.* Blum, 89 S. W. 186, 28 Ky. L. Rep. 253; Louisville R. Co. *v.* Goodman, 89 S. W. 186, 28 Ky. L. Rep. 253.

Massachusetts.—Lindenbaum *v.* New York, etc., R. Co., 197 Mass. 314, 84 N. E. 129.

Michigan.—Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178.

Minnesota.—Flaherty *v.* Northern Pac. R. Co., 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654.

Missouri.—McFadden *v.* Metropolitan St. R. Co., 161 Mo. App. 652, 143 S. W. 884.

Washington.—Field *v.* Spokane, etc., R. Co., 64 Wash. 445, 117 Pac. 228.

22. Schmidt *v.* Chicago City R. Co., 239 Ill. 494, 88 N. E. 275, affirming judgment, 144 Ill. App. 512.

23. Negligence of other carrier no defense.—Schlauder *v.* Chicago, etc., Tract. Co., 97 N. E. 233, 253 Ill. 154, reversing 160 Ill. App. 309; Louisville R. Co. *v.* Blum, 89 S. W. 186, 28 Ky. L. Rep. 253; Gulf, etc., R. Co. *v.* Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

Plaintiff, while riding on the front platform of a street car of defendant S. Company was thrown therefrom by the shock of a collision with a car of defendant H. Company, at the point of intersection of the two lines. Held, that the contention of one of the defendants in such case that, if negligence was proved against the other defendant, the first defendant should have had the complaint dismissed as to it, could not be sustained; as the comparative degrees of negligence in the two defendants does not affect the liability of either. Schneider *v.* Second Ave. R. Co., 15 N. Y. S. 556, 39 N. Y. St. Rep. 370, 59 N. Y. Super. Ct. 536. Judgment modified 30 N. E. 752, 133 N. Y. 583.

the doctrine of last clear chance does not apply as between concurrently negligent carriers.[24]

§ 2641. Presumption of Negligence.—Where a collision occurs between the regular trains of two railroad companies at a crossing of their tracks in broad daylight, a presumption arises of negligence on the part of one or both and, in an action for injuries to a passenger, it is proper to refuse a charge that one of the companies was not affected by such presumption.[25]

§§ 2642-2646. Stations and Approaches—§ 2642. In General.—A carrier must own or have to some extent control of the platform where the injury occurred before it can be held liable for injuries thereon.[26]

§§ 2643-2646. Stations Used by Several Carriers—§ 2643. In General.—Where two carriers jointly use and maintain a station, they are jointly responsible for its condition.[27] Where two railroad companies jointly maintain a platform over which passengers would naturally pass in going from the station of one company to that of the other, to take passage on the train of the latter, both companies are liable for injuries to a passenger so doing, resulting from the negligent condition of the platform.[28]

§ 2644. Duties as to Passengers of Other Carrier.—Where two or more carriers jointly use a station, each assumes the duty of so conducting itself as not to harm the passengers of any other carrier. Each is liable for its negligent injury to the passengers of any of the other carriers, to the same extent as it is liable for the negligent injury to its own passengers.[29] This applies,

24. Cordiner *v.* Los Angeles Tract. Co., 5 Cal. App. 400, 91 Pac. 436.

25. Presumption of negligence.—Kansas, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231.

26. A passageway from a station of one railroad company to a station of another company was used interchangeably by the companies, and by persons having business with them. A person while taking his baggage from the depot of one of the companies was injured by an obstruction on the passageway by a truck of the company. The truck was not on the part of the passageway which the company maintained and controlled. It was not shown that the truck had been left there by any employee of such company. Held, that because of the failure to show that the company owned or controlled alone, or with the other company, the place at which the truck was left, there could be no recovery against it. Reynolds *v.* St. Louis, etc., R. Co., 162 Mo. App. 618, 142 S. W. 1097.

A platform was erected by the S. Railroad within the angle of intersection with the I. M. Railroad, on the right of way of both roads. The latter road was built first, and no permission was obtained of the I. M. road to build the platform, though it was built with its knowledge and without objection. Before an accident the latter road gave directions to the S. road to have the platform removed, but the direction was not carried out until after the accident. The platform was within thirty-five feet from the I. M. road's station, and was used by passengers changing from one road to the other. Held, in an action for injuries, that the I. M. Railroad was not liable as a joint tort feasor, on the ground that the platform was a dangerous agency within such close proximity to its station as to become a necessary approach by certain of its patrons. St. Louis, etc., R. Co. *v.* Battle, 63 S. W. 805, 69 Ark. 369.

27. Station used by two carriers.—Lucas *v.* Pennsylvania Co., 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323.

Illustrations.—Where two carriers used a station and one of them controlled the work of moving the station performed by the other, the two were liable as joint tort-feasors for negligence in the performance of the work resulting in injury to a passenger of one of them while attempting to board a train. New York, etc., R. Co. *v.* Reilley, 49 Ind. App. 26, 96 N. E. 623.

Under Code 1906, § 4867, requiring rooms at passenger stations to be kept open and heated an hour before the arrival of trains, held, that where two carriers maintained a union station, and a passenger entering the station by one carrier was injured while waiting for the departure of a train of the other carrier by reason of the cold condition of the room, she might sue both carriers, or either. Williams *v.* Southern R. Co., 102 Miss. 617, 59 So. 850.

28. Lucas *v.* Pennsylvania Co., 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323.

29. Duties as to passengers of other carriers.—Chicago, etc., R. Co. *v.* Stepp, 90 C. C. A. 431, 164 Fed. 785, 22 L. R. A.,

however, only when such passengers are using the station. The liability ceases when the passenger leaves the station in the car of the other carrier.[30]

§ 2645. Duty to Protect Passengers from Negligence of Other Carrier.—Each carrier occupying a station jointly with other carriers, must protect its own passengers from the negligence of all others, at least when its passengers are in the places assigned them in the station.[31] This liability rests upon a carrier even though another carrier occupying the station has the management of the trains of defendant.[32]

§ 2646. Station Owned by Independent Company.—A carrier is not relieved from its duty to its passengers to keep its stations in a safe condition, by using the station of a union depot company. The negligence of the union depot company whereby a passenger is injured is the negligence of the carrier. This is true even when the union depot company is in the hands of a receiver.[33] So, too, a carrier is responsible for the negligence of the employees of the union depot company.[34] Where a union station company which undertakes to direct passengers to their proper trains allowed employees of the railroad company to perform that duty, it can not maintain the claim of nonliability for their acts on the ground that they were not its servants, having availed itself of their services.[35]

§§ 2647-2651. Liabiliy of Carrier Operating Trains Over Another's Lines—§ 2647. In General.—A carrier of passengers owes the same duties to its passengers when it is operating its trains over the tracks of another company as when operating them over its own lines.[36] The operating carrier must exercise care to protect passengers and others having a right upon depot premises by keeping the depots and approaches thereto in a reasonably safe condition.[37]

§ 2648. Liability for Negligence of Owner of Road.—A railroad company, operating its trains over the railroad of another by permission, is liable

N. S., 350; Hannibal, etc., R. Co. *v.* Martin, 11 Ill. App. 386, affirmed in 111 Ill. 219.

A railroad company which occupied a passenger depot with another company was bound to exercise ordinary care to prevent injuring passengers of the other company on the platform. Kansas, etc., R. Co. *v.* Watson, 102 Ark. 499, 144 S. W. 922.

30. Where two connecting railroad companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket for carriage over one of the roads, the other company is not responsible for the negligence of the road over which the ticket carries the passenger. Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, 23 Pac. 151, 19 Am. St. Rep. 129, 7 L. R. A. 414.

31. Duty to protect passengers from negligence of other carriers.—Hannibal, etc., R. Co. *v.* Martin, 11 Ill. App. 386, affirmed in 111 Ill. 219; Central R., etc., Co. *v.* Perry, 58 Ga. 461.

When the passengers are out of their proper places the carrier need not protect them against the negligence of the other carriers. Central R., etc., Co. *v.* Perry, 58 Ga. 461.

32. Hannibal, etc., R. Co. *v.* Martin, 11 Ill. App. 386, affirmed in 111 Ill. 219.

33. Herrman *v.* Great Northern R. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390.

34. Chicago, etc., R. Co. *v.* Gates, 61 Ill. App. 211.

35. Union, etc., R. Co. *v.* Londoner, 50 Colo. 22, 114 Pac. 316, 33 L. R. A., N. S., 433.

36. Liability of carrier operating trains over another's lines.—*United States.*—Chesapeake, etc., R. Co. *v.* Howard, 14 App. D. C. 262; S. C., 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. 880; Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6; Brady *v.* Chicago, etc., R. Co., 53 C. C. A. 48, 114 Fed. 100, 57 L. R. A. 712.

Georgia.—Central R. Co. *v.* Whitehead, 74 Ga. 441.

Indiana.—Louisville, etc., R. Co. *v.* Linton, 43 Ind. App. 709, 88 N. E. 532.

Kansas.—Chicago, etc., R. Co. *v.* Posten, 59 Kan. 449, 53 Pac. 465.

Kentucky.—Chicago, etc., R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950.

Massachusetts.—Frazier *v.* New York, etc., R. Co., 180 Mass. 427, 62 N. E. 731.

37. Duty to maintain depot.—St. Louis, etc., R. Co. *v.* Caldwell, 93 Ark. 286, 124 S. W. 1034.

to its passengers for negligence of the servants of the licensing corporation.[38] And it seems that the rule would be applied in the case of the use of a station of the other railroad company.[39] Where defendant railroad had the right to operate its trains over a bridge, and had charge of a platform thereon, which it invited the public to use, it was bound to exercise a high degree of care to protect passengers on such platform, and the mere fact that the city was in general possession of the bridge and attended to necessary repairs did not absolve defendant from liability for injuries to a passenger through the falling of a window in the wall above the platform.[40]

Operating Trains over Tracks Leased from State.—The owners of passenger cars used upon a railroad belonging to the state are liable as common carriers for an injury sustained by a passenger occasioned by the collision of their trains, though the motive power of the road was furnished by the state and under the control of its agents, through whose negligence the accident happened.[41] It has been held, however, that the operating company is not liable for an injury to its passengers caused by the defective condition of the road owned by the state, no negligence of the operating company being shown.[42]

§ 2649. Liability for Injury to Passengers of Another Lessee of Tracks.—A lessee railroad company is liable for the negligence of its servant in misplacing a switch, causing injury to a passenger on the train of another lessee company using the same tracks.[43]

§ 2650. Effect of Illegality of Contract between Companies.—The illegality of an agreement or arrangement under which a train is run by a railroad company over the track of another company will not relieve the owner of the train from liability for damages to a passenger caused by the negligence of its agents or servants.[44] Thus, a carrier can not show that it had no charter power to operate part of the road, and that the operation was ultra vires.[45]

38. Liability for negligence of owner of road.—Brady *v.* Chicago, etc., R. Co., 53 C. C. A. 48, 114 Fed. 100, 57 L. R. A. 712; Chicago, etc., R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950; Frazier *v.* New York, etc., R. Co., 180 Mass. 427, 62 N. E. 731.

39. Frazier *v.* New York, etc., R. Co., 180 Mass. 427, 62 N. E. 731.

40. Waldman *v.* Brooklyn, etc., R. Co., 120 N. Y. S. 1017, 136 App. Div. 376.

41. Operating trains over tracks leased from state.—Peters *v.* Rylands, 20 Pa. 497, 59 Am. Dec. 746. See, also, Waldman *v.* Brooklyn, etc., R. Co., 120 N. Y. S. 1017, 136 App. Div. 376.

42. Pub. St., c. 112, § 212, provides that if, by reason of the negligence of a railroad company, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, is lost, the company shall be liable in damages assessed with reference to the degree of culpability of the company or of its servants or agent. Defendant was operating a road leased from the state. An accident was caused by water working away the embankment under the track, the ditches having been filled for two months, and persons riding on the train were killed. Held, that defendant was entitled to go to the jury with an instruction that it was not responsible for the defective condition of the road, unless it had notice of the same, or might have had notice by exercise of due care. Littlejohn *v.* Fitchburg R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502.

43. Liability for injury to passengers of another lessee of tracks.—Patterson *v.* Wabash, etc., R. Co., 54 Mich. 91, 19 N. W. 761.

Where the trains of one railroad company were run over tracks leased from a second, and the tracks were jointly used by the lessee and a third company, all three companies are liable as principals to passengers injured by the act of a switchman of the third company in opening a switch under a train of the lessee. Chicago, etc., R. Co. *v.* Rowell, 151 S. W. 950, 151 Ky. 313.

44. Effect of illegality of contract between companies.—Chesapeake, etc., R. Co. *v.* Howard, 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. 880, affirming 14 App. D. C. 262.

A passenger may recover for personal injuries occasioned to him by the negligence of street-railway corporation, who were transporting him on a railway which they had leased unlawfully, but were using and maintaining without objection from its owners or the commonwealth. Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

45. Ultra vires act no defense.—Chesapeake, etc., R. Co. *v.* Howard, 14 App.

§ 2651. As Affected by Compensation Received.—The fact that the owner of the tracks receives the fare of certain passengers and that they are carried by the operating company as consideration for the use of the tracks, does not relieve the latter from the liability of a carrier of passengers as to such passengers.[46] On the other hand it has been held that a street railway company by lending its car and the services of its motorman to a connecting company does not thereby become an operating company over the connecting line, so as to be liable for injuries, due to the negligence of the owner of the tracks, to passengers on the connecting lines; and this is true even when the consideration for the loan is a sum to be ascertained through the number of fares collected by the connecting company for passengers riding in that car while used by it in operating its own line.[47]

§§ 2652-2658. Liability of Lessor—§ 2652. In General.—A railroad company can not escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees, and the operation of the road by the lessees does not change the relations of the original company to the public;[48] and this rule is applicable when the road is operated jointly by a receiver and lessee.[49] So a company permitting another company to use its franchise and run trains over its track is liable for personal injuries to a passenger on one of such trains,[50] or for a wrongful ejection from a train run by the lessee company.[51]

§ 2653. Lessor Liable for Negligence of Lessee.—It is held that a railroad company, which has leased its track and rolling stock to another corporation, is liable for injury to a passenger caused by the negligence of the lessee's servants.[52] The lessor is jointly liable with the lessee for negligent injury to a pas-

D. C. 262, judgment affirmed in 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015.

In an action by a passenger against a railroad company for personal injuries, where there is evidence that defendant operated the road when the injuries were sustained, defendant can not escape liability by showing that its charter did not authorize it to operate such road, and that the ticket held by the passenger provided that defendant assumed no responsibility beyond its own line. Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6.

46. As affected by compensation received.—Louisville, etc., R. Co. *v.* Linton, 43 Ind. App. 709, 88 N. E. 532.

47. Wheeler *v.* Hartford, etc., Tramway Co., 80 Conn. 561, 69 Atl. 535.

48. Liability of lessor in general.—Washington, etc., R. Co. *v.* Brown (U. S.), 17 Wall. 445, 21 L. Ed. 675; Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136; Chesapeake, etc., R. Co. *v.* Howard, 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. 880.

49. Joint operation of receiver and lessee.—Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136; Washington, etc., R. Co. *v.* Brown (U. S.), 17 Wall. 445, 21 L. Ed. 675.

50. Liability for injuries to passenger of lessee.—Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355, 13 Am. Rep. 678; Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 21 S. E. 66; Singleton *v.* Southwestern Railroad, 70 Ga. 464, 48 Am. Rep. 574; Heins *v.* Savannah, etc., R. Co., 114 Ga. 678, 40 S. E. 710.

A street railway company was granted a franchise of a certain street on condition that it operate a line thereon between the public square and a railroad depot. Thereafter it leased its line, and through the lessee's negligent operation thereof between said points a collision occurred. Held, that the street railway company was not relieved of liability for injuries resulting to a passenger of its lessee from a collision by the fact that it occurred on land owned by the railroad company, and not on said street. Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61.

51. East Line, etc., R. Co. *v.* Lee, 71 Tex. 538, 9 S. W. 604.

52. Lessor liable for negligence of lessee.—*Illinois.*—Smith *v.* Chicago, etc., R. Co., 163 Ill. App. 476; Chicago, etc., R. Co. *v.* Newell, 212 Ill. 332, 72 N. E. 416, dismissed in 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

Kentucky.—Chicago, etc., R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950.

North Carolina.—Carleton *v.* Yadkin R. Co., 143 N. C. 43, 55 S. E. 429, 10 Am. & Eng. Ann. Cas. 348.

A railroad company leasing its road under an agreement by which it is to be managed by three men, one to be chosen by the company, is liable for injuries to passengers caused by negligence of an employee of the lessee. Cincinnati, etc., R. Co. *v.* Sleeper, 5 O. Dec. 196.

senger of the lessee.[53] So where a railroad company leases its road to two independent carriers and a passenger of one lessee is injured by the negligence of the other, the three carriers are jointly liable.[54] In Missouri it is held that where by an agreement between two street railroads one of them as lessee took possession of the tracks, cars, plant, and former business of the other, and continued to operate the road, the lessor company was thereby relieved of liability for the negligence of the servants and employees of the lessee resulting in injuries to passengers.[55]

§ 2654. Liability for Indignities of Fellow Passengers.—A domestic railroad company is liable for indignities received by a passenger from a fellow passenger on the cars of such road operated by a lessee.[56]

§ 2655. Lessor's Liability to Its Own Passengers.—The fact that a road is leased to another company in no way releases the owner from its liability to passengers on its own trains operated and controlled by its employees.[57] So a railway company is liable to its own passengers for an injury caused them by the negligence of another carrier also using the tracks of the former.[58] Thus, a railroad company which leases to another company the right to use a portion of its track, over which it also runs its own trains, is liable to one of its passengers for an injury received in a collision due to the negligence of the employees of its lessee.[59]

§ 2656. Lease Illegal or Ultra Vires.—When the lease is without the requisite legislative sanction it is of no effect, and the owner of the tracks still occupies the relation of carrier to those carried over its lines.[60] And a right of action against a railroad corporation for personal injuries in a road operated under an illegal lease will not be affected by a subsequent confirmatory statute.[61]

§ 2657. Leases under Statutory Authority.—It is held that where the operating lessee injures its own passengers by its negligence, the lessor is not liable if the lease was executed with full legislative authority.[62] When the stat-

53. Jointly liable with lessee.—Cincinnati, etc., R. Co. *v.* Sleeper, 5 O. Dec. 196; Calder *v.* Southern Railway, 89 S. C. 287, 71 S. E. 841, Ann. Cas. 1913A, 894. But see Beckman *v.* Meadville, etc., St. R. Co., 219 Pa. 26, 67 Atl. 983.

54. Chicago, etc., R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950.

55. Westervelt *v.* St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114.

56. Liability for indignities of fellow passengers.—Franklin *v.* Atlanta, etc., R. Co., 74 S. C. 332, 54 S. E. 578.

57. Lessor's liability to its own passengers.—Chesapeake, etc., R. Co. *v.* Howard, 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. 880.

58. Liability for negligence of lessee.—Chaffe *v.* Consolidated R. Co., 196 Mass. 484, 82 N. E. 497.

59. Collision.—Denver, etc., R. Co. *v.* Roller, 41 C. C. A. 22, 100 Fed. 738, 49 L. R. A. 77; Maumee Valley R., etc., Co. *v.* Montgomery, 81 O. St. 426, 91 N. E. 181, 26 L. R. A., N. S., 987.

Where defendant leased the right to operate log trains over a part of its railroad to a lumber company, defendant was liable for injuries to a passenger resulting from a collision between its train and a log train, owing to the negligence of the lumber company. Big Sandy, etc., R. Co. *v.* Blankenship, 133 Ky. 438, 118 S. W. 316, 23 L. R. A., N. S., 345, 19 Am. & Eng. Ann. Cas. 264.

60. Lease without requisite legislative sanction.—Howard *v.* Chesapeake, etc., R. Co., 11 App. D. C. 300; Durfee *v.* Johnstown, etc., R. Co., 71 Hun 279, 24 N. Y. S. 1016, 54 N. Y. St. Rep. 526; Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61, affirmed in 93 Tex. 660, no op.; International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216.

In Texas a railroad company can not lease the right to use its road so as to absolve itself from its duties to the public without legislative authority. International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216.

61. Subsequent confirmatory statute.—Chesapeake, etc., R. Co. *v.* Howard, 14 App. D. C. 262, affirmed, in 178 U. S. 153, 44 L. Ed. 1015, 20 S. Ct. 880.

62. Leases under statutory authority.—Moorshead *v.* United R. Co., 119 Mo. App. 541, 96 S. W. 261, affirmed in 203 Mo. 121, 100 S. W. 611, citing Missouri Rev. St. 1899, § 1187. See Graefe *v.* St. Louis Transit Co., 224 Mo. 232, 123 S. W. 835.

ute allowing the lease provides that the lease shall not exempt the owner of the tracks from any liability to which it would otherwise be subject, the owner remains liable for the negligence of the servants of the lessee.[63]

§ 2658. Liability of Lessor of Steamboat.—The lessor of a steamboat, not being a quasi public corporation, having received no special privileges or benefits from the state, is not liable for injury to a passenger from negligence of the lessee.[64]

§§ 2659-2660. Liability When Railroad Operated by Trustee—§ 2659. Liability of Trustee.—A trustee of a railroad, who operates the road for the benefit of bondholders or creditors, is liable in his official capacity for injuries to passengers for the negligent operation of the road.[65]

§ 2660. Liability of Railroad Operated by Trustee.—The fact that a railroad company has turned over the management of its road to trustees does not relieve it from liability for injuries to a passenger caused by its negligence.[66] In order to acquit the company from liability for injuries to passengers, it should appear that the business of management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers, and board of directors, and that this was so notoriously so that the fact may well be presumed to be known to the public, and it also should appear that the trustees were not appointed by the procuration or assent of the railroad company.[67]

§§ 2661-2665. Railroads in Hands of Receiver—§§ 2661-2662. Liability of Receiver—§ 2661. In Official Capacity.—A receiver operating a railroad under order of court, having exclusive control of the road and its agents and employees, is liable in his official capacity to passengers for injuries sustained through the negligent discharge of his duties by himself or his agents, in all cases where the railroad company, if it were operating the road, would also have been liable.[68]

§ 2662. Personal Liability of Receiver.—A receiver is not personally liable for all injuries to passengers of the railway of which he has charge. He is liable only in his official capacity, except in cases of personal negligence.[69]

63. Quested *v.* Newburyport, etc., R. Co., 127 Mass. 204.

64. Liability of lessor of steamboat.—Phelps *v.* Windsor Steamboat Co., 131 N. C. 12, 42 S. E. 335; Gulzoni *v.* Tyler, 64 Cal. 334, 30 Pac. 981.

65. Liability of trustee operating railroad.—Lamphear *v.* Buckingham, 33 Conn. 237.

The holder of the legal title to a street railway, who has executed an agreement acknowledging that he bought it as the agent of, and in trust for, and with the money of a committee, and covenanting to hold it as the agent of and in trust for said committee, and to manage it exactly according to the orders and instructions of the committee, without further compensation than his salary as book-keeper, and to convey it on request of the committee, is not a mere agent, but a trustee for the committee, so that he is responsible for the negligence of a motorman. O'Toole *v.* Faulkner, 70 Pac. 58, 29 Wash. 544.

66. Liability of railroad operated by trustee.—Jones *v.* Pennsylvania, etc., R. Co., 8 Mackey (19 D. C.) 178; reversed as to another point, but affirmed as to this, in Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136.

67. Pennsylvania R. Co. *v.* Jones, 155 U. S. 333, 39 L. Ed. 176, 15 S. Ct. 136.

68. Liability of receiver in official capacity.—*United States.*—In re Winbourn, 30 Fed. 167.

Illinois.—Robinson *v.* Kirkwood, 91 Ill. App. 54.

Missouri.—Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Averill *v.* McCook, 86 Mo. App. 346.

New Jersey.—Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Klein *v.* Jewett, 26 N. J. Eq. 474.

Ohio.—Murphy *v.* Holbrook, 20 O. St. 137, 5 Am. Rep. 633; Potter *v.* Bunnell, 20 O. St. 150.

South Carolina.—Ex parte Brown, 15 S. C. 518.

Vermont.—Newell *v.* Smith, 49 Vt. 255.

69. Personal liability of receiver.—McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631; Vandalia R. Co. *v.* Keys, 46 Ind. App. 353, 91 N. E. 173; Averill *v.* McCook, 86 Mo. App. 346.

The assignee in bankruptcy of a rail-

§§ 2663-2664. Liability of Railroad—§ 2663. In General.—The receiver of a railroad company is the representative of the court, and not of the company, and the company is not liable for his acts or those of his employees.[70] But it has been held that when there is nothing to put the passenger on notice of the change in the management, the railroad can be held liable.[71] That the railroad was in the hands of a receiver need not be specially pleaded as a defense, but may be shown under a general denial of liability.[72]

Duty to Receive or Redeem Ticket Issued by Receiver.—When a ticket is sold by the receiver of a railroad but not presented to the railroad company until after the discharge of the receiver, the railroad is not bound either to receive it as payment of fare or to redeem it.[73]

§ 2664. After Discharge of Receiver.—Where the court orders the receiver of a railroad to restore to the railroad all of its property in his hands on the agreement of the railroad to pay all liabilities and obligations of the receiver, a passenger injured through the negligence of the servants of the receiver may sue the railroad therefor.[74] In such case, an action at law will lie, and it is not necessary to resort to equity.[75]

§ 2665. Liability of Profits and Income.—Though it is true that the relation of master and servant does not exist between a railway company and a receiver, when the company's property is placed in his possession by a proper court, and he is required by its order to discharge with the property of the company the duty of a common carrier, yet the profits or income of the property, while in the hands of the receiver, are responsible for the satisfaction of claims for injuries resulting from the negligence of the receiver or of his employees.[76]

road corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants or that he held himself out as operating the road otherwise than as receiver. Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533.

70. Liability of railroad operated by receiver.—*Georgia.*—Tallulah Falls R. Co. *v.* Ramey, 137 Ga. 568, 73 S. E. 838.

Indiana.—Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61.

New York.—Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

Texas.—Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

71. A railroad corporation run on the joint account of a receiver of part of it and the lessees of the remaining part, held liable for injuries committed, by a servant of the parties working it, upon the person of a passenger whom such servant improperly expelled from a car, into which the passenger had entered; the railroad corporation having allowed tickets to be issued in its own name, in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad corporation was not itself managing the road. Washington, etc., R. Co. *v.* Brown (U. S.), 17 Wall. 445, 21 L. Ed. 675.

72. Necessity of pleading operation by receiver.—Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711.

73. Duty to receive or redeem ticket issued by receiver.—Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61.

74. After discharge of receiver.—*United States.*—Baltimore, etc., R. Co. *v.* Burris, 111 Fed. 882, 50 C. C. A. 48; Texas, etc., R. Co. *v.* Bloom, 164 U. S. 636, 41 L. Ed. 580, 17 S. Ct. 216.

Indiana.—Vandalia R. Co. *v.* Keys, 46 Ind. App. 353, 91 N. E. 173.

Texas.—Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272; Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086 (see 93 Tex. 740, no op.); Texas, etc., R. Co. *v.* Bloom, 85 Tex. 279, 20 S. W. 133, following Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60.

75. Action at law.—Texas, etc., R. Co. *v.* Bloom, 164 U. S. 636, 41 L. Ed. 580, 17 S. Ct. 216.

76. Liability of profits and income of railway while in hands of receiver.—Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; Averill *v.* McCook, 86 Mo. App. 346; Ryan *v.* Hays, 62 Tex. 42; Ex parte Brown, 15 S. C. 518.

A judgment against the receiver of a railroad for injuries sustained through the negligent discharge of his duties by himself or his agents may be satisfied only out of the funds in his hands as receiver as may be directed by the court. Murphy *v.* Holbrook, 20 O. St. 137, 5 Am. Rep. 633.

A judgment against the receiver of a

§ 2666. Who Liable for Injuries Occurring on Chartered Conveyances.—Where a carrier charters a car or train to a third person for the carriage of passengers, but itself operates the train, or car, it remains liable to the passengers as a carrier of passengers.[77] Thus, where a railroad company hires its trains to an association for an excursion, the association selling the tickets to the passengers, the railroad company is liable as a carrier to passengers on the train.[78] And where a passenger is being transported by an express company on a special train, made up expressly for it, and is injured through the negligence of the railroad, he may sue either the express company or the railroad, or both.[79]

§ 2667. Liability for Injuries on Consolidated Lines.—Where several lines are in fact owned by one corporation, the latter is liable to a passenger for injuries received on any of them, although the ticket provides otherwise.[80] And where a railway company injuries a passenger by its negligence, and later consolidates with another railway company, the consolidated company is liable for the injury.[81] Where several railroad corporations, organized in different states, consolidate and operate their respective roads jointly as one line, they are jointly liable for injuries received by a passenger who has paid his fare and rides on one of their cars.[82] This is true, also, where the attempted consolidation is ineffectual.[83]

§§ 2668-2693. Limitation of Liability—§§ 2668-2671. Power to Limit Liability as to Passengers for Hire[84]**—§ 2668. General Rule.**—The obligation of a carrier of passengers to convey passengers over its lines exists as a public duty independent of contract. From considerations of public policy this obligation can not be modified even by contract so as to exempt the carrier from the duty to protect the passenger for hire from the consequences

railroad appointed in foreclosure proceedings, based on a claim for damages resulting from the negligent operation of the road by the receiver's employees, should be regarded as operating expenses, and, the receiver having expended an amount greater than the judgment in betterments of the road, should be ranked above the mortgages as a claim in the fund in court for final distribution. Green *v.* Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. Rep. 379, 33 L. R. A. 806.

The net earnings of a railroad, while in the possession of a receiver appointed by the court, pending the foreclosure of certain mortgages upon the property, can not be applied to the payment of claims for damages which accrued during the operation of the road by the company, although such company was then in default for the nonpayment of interest upon the mortgage bonds. In re Dexterville Mfg., etc., Co., 4 Fed. 873.

77. Who liable for injuries occurring on chartered conveyances.—White *v.* Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; Collins *v.* Texas, etc., R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643; American Exp. Co. *v.* Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023; Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; Texas, etc., R. Co. *v.* Lacey, 107 C. C. A. 331, 185 Fed. 225.

78. Collins *v.* Texas, etc., R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643.

79. American Exp. Co. *v.* Ogles, 81 S. W. 1023, 36 Tex. Civ. App. 407.

Where an express company obtained a train of cars and an engine from a railroad for the purpose of making a particular shipment of stock, no passengers being carried except the owners of the stock and their employees, and the shipment being accompanied by the messenger of the express company, although the train was operated by the servants of the railroad, the railroad was the mere agent of the express company for the transportation and forwarding of the stock, and the express company was liable for the railroad's negligence. American Exp. Co. *v.* Ogles, 81 S. W. 1023, 36 Tex. Civ. App. 407.

80. Liability for injuries on consolidated lines.—Railroad Co. *v.* Harris (U. S.), 12 Wall. 65, 20 L. Ed. 354.

81. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

82. Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258.

83. Latham *v.* Boston, etc., R. Co. (N. Y.), 38 Hun 265.

84. Limitation of liability.—See post, "Drover as Passenger for Hire," § 2678.

As to right of carrier of goods to limit liability, see ante, "Limitation of Liability," chapter 14.

of the negligence of the carrier, its agents or servants.[85] At common law, any contract whereby a carrier attempted to limit its liability for its negligence resulting in injury to passengers for hire, was void as against public policy.[86] This rule has been followed in this country in the vast majority of the cases in which has arisen the question of the power of a carrier to limit its liability for injury by negligence to its passengers for hire.[87] Such a contract, however, is not immoral, and if made in England or any other place where it could be valid, it will be enforced in this country.[88]

As to Extraordinary Care.—The duty of a carrier of passengers to use

85. Power to limit in general.—G. C. & S. F. R. Co. *v.* McGown, 65 Tex. 640; Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862.

86. Common-law rule.—A stipulation by a common carrier, in contracts for interstate carriage, for exemption from liability for injuries to a passenger caused by the negligence of its employees, is void at common law, as against public policy. Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935.

87. Common-law rule followed generally.—*United States.*—Railroad Co. *v.* Lockwood, 17 Wall. 357, 21 L. Ed. 627; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55, 11 S. Ct. 478; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; Northern Pac. R. Co. *v.* Adams, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408; Railway Co. *v.* Stevens, 95 U. S. 655, 24 L. Ed. 535; Baltimore, etc., R. Co. *v.* McLaughlin, 73 Fed. 519, 19 C. C. A. 551.

Delaware.—Flinn *v.* Philadelphia, etc., R. Co. (Del.), 1 Houst. 469.

Georgia.—Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673. See also Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732; Phillips *v.* Georgia R., etc., Co., 93 Ga. 356, 20 S. E. 247; Central, etc., R. Co. *v.* Ricks, 109 Ga. 339, 34 S. E. 570; Southern R. Co. *v.* Decker, 62 S. E. 678, 5 Ga. App. 21.

Illinois.—Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363, affirmed in 50 N. E. 22, 1019, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253; Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

Indiana.—Pittsburgh, etc., R. Co. *v.* Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A., N. S., 1081; Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Cleveland, etc., R. Co. *v.* Henry (Ind. App.), 80 N. E. 636, rehearing denied 81 N. E. 592; reversed in 83 N. E. 710.

Iowa.—Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Kentucky.—Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 38 S. W. 3, 18 Ky. L. Rep. 735.

Massachusetts.—Doyle *v.* Fitchburg R. Co., 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; S. C., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157; Jones *v.* Boston, etc., St. R. Co., 205 Mass. 108, 90 N. E. 1152.

Missouri.—Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292; Jones *v.* St. Louis, etc., R. Co., 125 Mo. 666, 28 S. W. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718.

Nebraska.—Chicago, etc., R. Co. *v.* Hambel, 89 N. W. 643, 2 Neb. 607; Chicago, etc., R. Co. *v.* Collier, 95 N. W. 472, 1 Neb. 278.

New Hampshire.—Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

Ohio.—Cleveland, etc., R. Co. *v.* Curran, 19 O. St. 1, 2 Am. Rep. 362; Knowlton *v.* Erie R. Co., 19 O. St. 260, 2 Am. Rep. 395.

Pennsylvania.—Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. 382, 91 Am. Dec. 168.

Texas.—Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862. G. C. & S. F. R. Co. *v.* McGown, 65 Tex. 640; Sullivan-Sanford Lumber Co. *v.* Watson (Tex. Civ. App.), 135 S. W. 635.

Wisconsin.—Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935.

While it is true that common carriers are not insurers of the safety of passengers, as they are of goods which they undertake to carry, yet the principle of law which forbids them being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods applies with still greater force in the case of passengers. Cleveland, etc., R. Co. *v.* Curran, 19 O. St. 1, 2 Am. Rep. 362.

88. The British rule that a carrier of passengers may stipulate against liability for personal injuries caused by its servants' negligence, though contrary to the policy of Massachusetts law, is not immoral, and will be enforced in that state in the case of a contract made in Ireland. O'Regan *v.* Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

extraordinary diligence to protect the lives and persons of his passengers can not be waived, even by express contract.[89]

§ 2669. Contractual Exemption from Statutory Penalty.—A carrier can not, by a contract made in advance with a passenger for hire, exempt itself from a statutory penalty for its negligence.[90] Thus, when a state statute provides for a penalty to be paid by a carrier to the widow, children, or next of kin of a passenger killed by the negligence of the carrier, no contract, made before the accident, between the carrier and decedent will relieve the carrier from this penalty.[91]

§ 2670. Statutory Power to Limit Liability.—A statute giving a carrier power to limit its liability for injury to or loss of goods does not by implication carry with it the power to limit its liability for negligent injury to passengers. A statute giving a carrier general power to limit its liability by contract will be construed to apply only to the liability for loss of goods, no express mention of carriers of passengers being made.[92]

§ 2671. Passengers Received on Freight Trains.—While a carrier is under no obligation to receive passengers on its freight trains, it is not relieved from the duties of a carrier of passengers as to persons so received. It can not, even by express contract, relieve itself from the consequences of its negligence in respect to such passengers.[93] An express contract entered into by a

89. As to extraordinary care.—*Georgia.*—Central, etc., R. Co. *v.* Lippman, 36 S. E. 202, 110 Ga. 665, 50 L. R. A. 673; Southern R. Co. *v.* Watson, 36 S. E. 209, 110 Ga. 681.

Indiana.—Louisville, etc., R. Co. *v.* Keefer, 44 N. E. 796, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. Rep. 348.

Kentucky.—Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 38 S. W. 3, 18 Ky. L. Rep. 735.

New Hampshire.—Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

Texas.—Ft. Worth, etc., R. Co. *v.* Rogers, 53 S. W. 366, 21 Tex. Civ. App. 605.

A contract exempting a railroad company from liability "for injuries to passengers, except those resulting from the gross carelessness of its employees," is void. Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363, affirmed in 50 N. E. 1019, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253.

The rule that a railroad company may by contract limit its liability for all negligence, except gross negligence, does not apply to a passenger paying fare. Pennsylvania Co. *v.* Greso, 79 Ill. App. 127.

90. Contractual exemption from statutory penalty.—Jones *v.* Boston, etc., St. R. Co., 205 Mass. 108, 90 N. E. 1152; Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157.

91. Doyle *v.* Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157; Jones *v.* Boston, etc., St. R. Co., 90 N. E. 1152, 205 Mass. 108.

92. Chicago, etc., R. Co. *v.* Collier, 1 Neb. 278, 95 N. W. 472.

Civ. Code, § 2276, providing that a carrier may limit his legal liability by an express contract applies only to carriers of goods. Southern R. Co. *v.* Watson, 36 S. E. 209, 110 Ga. 681.

While Ga. Civil Code, § 2276, which denies to a carrier the right to limit his legal liability by a notice or entry on receipts given or tickets sold, but declares that he may do so by express contract, applies only to carriers of goods, yet, under the general law, a carrier of passengers can not limit his legal liability for the consequences of his own negligence by such a notice or even by express contract. Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673, distinguishing Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732; Phillips *v.* Georgia R., etc., Co., 93 Ga. 356, 20 S. E. 247; Central, etc., R. Co. *v.* Ricks, 109 Ga. 339, 34 S. E. 570.

As to the power of a carrier to limit its liability as to passengers on freight trains, under statutory provisions, see post, "Passengers Received on Freight Trains," § 2671.

93. Passengers received on freight trains.—A railroad company which voluntarily designates freight trains to carry passengers, and permits its agents to sell tickets therefor to passengers generally, is a common carrier of passengers by the means so adopted, and its agreement with a passenger, whereby he absolves the company from all liability while riding on such freight trains in

carrier and a passenger, under the terms of which the carrier is released from all liability to the passenger for personal injuries received, while a passenger on a freight train, is, in effect, a contract by which the carrier undertakes to relieve itself from the consequences of its negligence and can not be enforced.[94]

Power to Make Reasonable Regulations.—A carrier may, however, make reasonable regulations as to passengers carried on freight trains. Such regulations, if they do not amount to a limitation of liability for negligence, are valid.[95]

Under Statutes.—Statutes in some states allow carriers to limit their liability for injury to passengers on freight trains. These statutes must be strictly construed. Thus, a statute allowing restriction of liability as to passengers occupying the caboose of a freight train does not apply to passengers occupying a regular passenger car fastened to the rear end of a freight train.[96] So, too, a statutory grant of power to a railroad company to demand a designated form of release from persons accepted on freight trains as passengers does not carry with it a power to demand a release different from that designated.[97]

Consideration for Agreement.—As a railway company, having passenger trains sufficient to accommodate the public, is under no legal obligation to carry a passenger on its freight trains, its undertaking to do so, and the extra coal and expense required in such case, form a sufficient consideration for a contract made with a passenger restricting and limiting its liability.[98]

§§ 2672-2677. Power to Limit Liability as to Persons Carried Free or at Reduced Rates—§§ 2672-2676. Limitation of Liability in Pass Given as Mere Gratuity—§ 2672. In General.—As to the validity of a contract whereby a carrier attempts to limit its liability for the negligent injury of a person traveling upon a free pass, there is considerable conflict. The weight of authority seems to favor the doctrine that such a contract is not against public policy, and will defeat any right of action that the injured person otherwise would have had.[99]

consideration of his securing his ticket at a reduced rate, is against public policy, and void. Richmond *v.* Southern Pac. Co., 67 Pac. 947, 41 Ore. 54, 57 L. R. A. 616, 93 Am. St. Rep. 694.

A carrier can no more avoid the result of his negligence as to a passenger received on one of his freight trains than he can where the passenger is received on a regular passenger train. Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

A railroad company can not, by a release taken from a freight train passenger who pays the usual fare, contract against liability for injury resulting from its own negligence. Ft. Worth, etc., R. Co. *v.* Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61.

94. Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

95. Power to make reasonable regulations.—A railroad company may make reasonable regulation for carrying passengers on its freight trains, from which they are excluded except by special permission, and an agreement by one holding a special permit to assume the risks incident to boarding the caboose of such a train at any place where it may be stopped for conducting the freight business of a company is not a limitation of a carrier's liability for its own negligence. Chicago, etc., R. Co. *v.* Mann, 78 Neb. 541, 111 N. W. 379.

96. Kan. Laws 1907, c. 274; Schwartz *v.* Missouri, etc., R. Co., 109 Pac. 767, 83 Kan. 30.

97. Kan. Laws 1907, p. 44, c. 274; Davis *v.* Atchison, etc., R. Co., 106 Pac. 288, 81 Kan. 505.

98. Consideration for agreement.—Arnold *v.* Illinois Cent. R. Co., 83 Ill. 73, 25 Am. Rep. 383.

99. Limitation of liability in pass given as mere gratuity.—*United States.*—Duncan *v.* Maine Cent. R. Co., 113 Fed. 508; Shelton *v.* Canadian Northern R. Co., 189 Fed. 153; Boering *v.* Chesapeake Beach R. Co., 20 App. D. C. 500, affirmed in 193 U. S. 442, 48 L. Ed. 742, 24 S. Ct. 515; Northern Pac. R. Co. *v.* Adams, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408.

Connecticut.—Griswold *v.* New York, etc., R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115.

Indiana.—Malott *v.* Weston (Ind. App.), 98 N. E. 127; Payne *v.* Terre Haute, etc., R. Co., 62 N. E. 472, 157 Ind. 616, 56 L. R. A. 472. See Indiana Cent. R. Co. *v.* Mundy, 21 Ind. 48, 83 Am. Dec. 339

Maine.—Rogers *v.* Kennebec Steamboat Co., 86 Me. 61, 29 Atl. 1069, 25 L. R. A. 491.

Massachusetts.—Quimby *v.* Boston, etc.,

Contrary View.—There are several cases, however, that hold that, even as to persons carried as a mere gratuity, a carrier can not relieve itself from liability for negligence by contract, entered into prior to the accident.[1] It has been said that a state has an interest in the lives and safety of its citizens, that this interest is paramount to the citizens' right of free contract, and that any contract whereby a citizen, even though the holder of a free pass, attempts to release a carrier from liability for its failure to exercise the high degree of care required of it by law is against public policy and void.[2]

§ 2673. Degrees of Negligence.—There are cases that make a distinction based upon the degrees of negligence. Such cases hold that, even as to persons riding on a free pass, a contractual limitation of liability for gross or willful negligence is against public policy and void.[3] In this class of cases it is held that

R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

New Jersey.—Kinney *v.* Central R. Co., 34 N. J. L. 513, 3 Am. Rep. 265; S. C., 32 N. J. L. 407, 90 Am. Dec. 675.

New York.—Ulrich *v.* New York, etc., R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369; Gill *v.* Erie R. Co., 135 N. Y. S. 355, 151 App. Div. 131, reargument and appeal to Court of Appeals denied 136 N. Y. S. 1135.

Washington.—Muldoon *v.* Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794; S. C., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787.

The law does not prevent a person, in a matter not connected with any public employment, from stipulating for an immunity from the results or ommissions or oversights of his own agents; and hence a railroad company may contract for immunity from liability for any injury to the person of a passenger, on account of the negligence of its agents or employees, in consideration of a free passage over the road. Kinney *v.* Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675.

A contract between a railroad company and a passenger riding on a free ticket, by which the company is exempted from liability under any circumstances of negligence of its agents for any injury to the passenger, is not invalid as against public policy, and will bar a recovery for personal injuries caused by the negligence of the company and its agents. Wells *v.* New York Cent. R. Co., 24 N. Y. 181, affirming 26 Barb. 641; Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 281.

Where a passenger rides by virtue of a free ticket having an indorsement thereon reciting that he assumes all risk of accidents, and that the railroad company shall not be liable "under any circumstances, whether of negligence by their agents, or otherwise," for any injury to the person, such stipulation bars his recovery for injuries caused by a collision between the passenger train and a freight train left standing on the track; such a case of injury being within the contemplation of the parties, and they having a right to stipulate for an exemption from liability under such circumstances. Wells *v.* New York Cent. R. Co., 24 N. Y. 181.

1. *United States.*—Chamberlain *v.* Pierson, 87 Fed. 420, 31 C. C. A. 157; Farmers' Loan, etc., Co. *v.* Baltimore, etc., R. Co., 102 Fed. 17.

Arkansas.—St. Louis, etc., R. Co. *v.* Pitcock, 82 Ark. 441, 101 S. W. 725, 12 Am. & Eng. Ann. Cas. 582.

Illinois.—Pennsylvania Co. *v.* Purvis, 128 Ill. App. 367.

Iowa.—Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Minnesota.—Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, Gill. 110, 18 Am. Rep. 360.

Missouri.—Bryan *v.* Missouri Pac. R. Co., 32 Mo. App. 228.

Pennsylvania.—Buffalo, etc., R. Co. *v.* O'Hara (Pa.), 3 Penny. 190 12 Wkly. Notes Cas. 473.

Texas.—Galveston, etc., R. Co. *v.* Bean, 45 Tex. Civ. App. 52, 99 S. W. 721. Missouri, etc., R. Co. *v.* Flood (Tex. Civ. App.), 70 S. W. 331; G. C. & S. F. R. Co. *v.* McGown, 65 Tex. 640; Missouri, etc., R. Co. *v.* Flood, 79 S. W. 1106, 35 Tex. Civ. App. 197.

Virginia.—Norfolk, etc., R. Co. *v.* Tanner, 100 Va. 379, 41 S. E. 721.

2. Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, Gill 110, 18 Am. Rep. 360.

3. **Degrees of negligence.**—Walther *v.* Southern Pac. Co., 159 Cal. 769, 116 Pac. 51, 37 L. R. A., N. S., 235. Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

A free ticket upon a railroad was indorsed: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, for any injury to the person * * * the passenger using this ticket." Held, that the company was not discharged from liability to a passenger using such a ticket for an injury occasioned by the gross negligence of one of its employees. Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260, approved in Toledo, etc.,

the liability to such passengers for injuries due to slight or ordinary negligence may be limited by contract, entered into prior to the injury.[4] When a railroad company gives gratuitously, and a passenger accepts, a pass, the former waives its rights as a common carrier to exact compensation; and, if the pass contains a condition to that effect, the latter assumes the risks of ordinary negligence of the company's employees; the arrangement is one which the parties may make and no public policy is violated thereby. And if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of willful or wanton negligence.[5] And one case has held that the liability may be limited even as to gross negligence.[6]

§ 2674. Pass Issued in Violation of Law.—When the holder of a pass, issued in violation of law, attempts to release the carrier from liability for negligent injury, there is a conflict as to the validity of the contract stipulating for the release. By the better doctrine, the pass is of no effect as a release.[7] It has been held, however, that the release is valid though the pass be illegal.[8]

§ 2675. Under Statutory Provisions.—Under statutes providing that a carrier can not limit its liability for injuries to passengers due to its negligence, it is held that this applies to passengers carried gratuitously.[9] A provision in a pass exempting a railroad from liability for injuries resulting from the negligence of its agents and servants is of no effect as against a statute giving damages to the widow and next of kin of a passenger whose death results from the negligence of the railroad and its servants.[10]

R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

Plaintiff traveled on defendant's railroad on a free pass, on which was indorsed a statement that "it is agreed that the person accepting this ticket assumes all risk of personal injury." Held, in an action for injuries, that such indorsement or agreement did not cast on plaintiff any risk arising from the gross negligence of defendant's servants in running the train. Indiana Cent. R. Co. *v.* Mundy, 21 Ind. 48, 83 Am. Dec. 339.

A person riding on a pass may recover for personal injuries received through gross negligence of the company, though the pass contains a condition that he shall assume all risks of accident. Illinois Cent. R. Co. *v.* O'Keefe, 63 Ill. App. 102.

4. *Illinois.*—Chicago, etc., R. Co. *v.* Hawk, 36 Ill. App. 327.

Montana.—John *v.* Northern Pac. R. Co., 111 Pac. 632, 42 Mont. 18, 32 L. R. A., N. S., 85.

Wisconsin.—Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848.

5. Northern Pac. R. Co. *v.* Adams, 24 S. Ct. 408, 192 U. S. 440, 48 L. Ed. 513; Walther *v.* Southern Pac. Co., 159 Cal. 769, 116 Pac. 51, 37 L. R. A., N. S., 235.

6. Perkins *v.* New York Cent. R. Co., 24 N. Y. 196, 82 Am. Dec. 281.

7. McNeill *v.* Durham, etc., R. Co., 47 S. E. 765, 135 N. C. 682, 67 L. R. A. 227; John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac 632, 32 L. R. A., N. S., 85.

8. One riding on a pass, given without consideration, and after assent to conditions that he should assume all risk of accident and that the carrier should not be liable, can not recover of it for injuries from negligence of its servants; and it is immaterial that the giving of the pass was a breach of the federal statutes in reference to interstate traffic. Duncan *v.* Maine Cent. R. Co., 113 Fed. 508.

9. Under statutory provisions.—Walther *v.* Southern Pac. Co., 159 Cal. 769, 116 Pac. 51, 37 L. R. A., N. S., 235; Rose *v.* Des Moines Valley R. Co., 39 Iowa 246.

Under Ark. Const., art. 17, § 12, making railroads responsible for damages under such regulations as may be prescribed by the legislature, and Kirby's Dig., § 6773, making railroads responsible for damages to persons caused by the running of trains, a stipulation in a free pass that the passenger accepting it assumes the risk of accidents is contrary to public policy, and the passenger injured through the negligence of the carrier is entitled to recover therefor. St. Louis, etc., R. Co. *v.* Pitcock, 82 Ark. 441, 101 S. W. 725, 12 Am. & Eng. Ann. Cas. 582.

Under Va. Code, § 1296, providing that no agreement by a common carrier for exemption from liability for injury caused by his own negligence or misconduct shall be valid, an agreement with a passenger traveling on a free pass relieving the carrier from the consequences of its negligence or that of its servants is invalid. Norfolk, etc., R. Co. *v.* Tanner, 41 S. E. 721, 100 Va. 379.

10. Tingley *v.* Long Island R. Co., 96 N. Y. S. 865, 109 App. Div. 793, 17 N. Y. Ann. Cas. 440.

§ 2676. Using Nontransferable Pass of Another.—When a person uses a nontransferable pass issued to another person, he is guilty of such fraud and bad faith as to defeat a recovery for injury by the carrier, unless the injury was caused by such gross negligence as to amount to wilful injury.[11]

§ 2677. Reduced Rates or Passes Based upon Some Consideration.—By the weight of authority, where a pass is in fact based upon some consideration, a contract between the carrier and the holder of such pass, releasing the former from liability for any injury that may be received by the latter due to the negligence of the carrier, is void.[12] It has been held, however, that in the absence of statutory restrictions a carrier may for a reduced fare sell a particular form of ticket whereby its liability is restricted and its obligations curtailed.[13]

Effect of Payment of Pullman Fare by Holder of Free Pass.—One court has held that the payment of pullman fare by the holder of a free pass does not make him a passenger for hire so as to render void a contract whereby he attempts to release the carrier from liability.[14]

§§ 2678-2683. Power to Limit Liability in Drover's Pass—§ 2678. Drover as Passenger for Hire.—A drover, while riding on a freight train for the purpose of taking care of his live stock while in the hands of the carrier, even though he use a drover's pass, is, nevertheless, by the better doctrine, a passenger for hire.[15]

11. Using non-transferable pass of another.—Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

12. Reduced rates on passes based on some consideration. — *United States.*— Railway Co. *v.* Stevens, 95 U. S. 655, 24 L. Ed. 535.

Indiana.—Pittsburgh, etc., R. Co. *v.* Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A., N. S., 1081.

Oregon.—Richmond *v.* Southern Pac. Co., 41 Ore. 54, 67 Pac. 947, 57 L. R. A. 616, 93 Am. St. Rep. 694.

Pennsylvania.—Crary *v.* Lehigh Valley R. Co., 203 Pa. 525, 53 Atl. 363, 59 L. R. A. 815, 93 Am. St. Rep. 778.

A contract exempting a common carrier from liability for negligence causing injury to a passenger carried for any compensation is against public policy, though agreed to by the passenger in consideration of special concessions as to rates or otherwise. Walther *v.* Southern Pac. Co., 116 Pac. 51, 159 Cal. 769, 37 L. R. A., N. S., 235.

Although the fact that a pass limiting liability is a mere gratuity is sufficient in New Jersey to defeat an action by the passenger against the carrier for negligence, yet an action will lie if the pass, though not paid for directly, was given in part consideration of a lease, to the employer of the passenger, of land belonging to the carrier. Camden, etc., R. Co. *v.* Bausch (Pa.), 7 Atl. 731, 4 Sad. 518.

In an action for death of plaintiff's intestate, where the evidence showed that her husband agreed to go to a certain point to testify for a railroad company on condition that it furnished transportation for his wife, if the pass was issued for a consideration, the company is not relieved of liability for negligent killing of the wife by the stipulation on the pass to that effect. Nickles *v.* Seaboard, etc., Railway, 54 S. E. 255, 74 S. C. 102.

Where there is a valid consideration for a pass given by a railroad company, conditions printed on such pass, exempting the company from responsibility for the negligence of its servants, do not bind the passenger, and should not be admitted in evidence in an action for damages for injuries caused by negligence. Williams *v.* Oregon Short-Line R. Co., 54 Pac. 991, 18 Utah 210, 72 Am. St. Rep. 777.

As to the validity of a limitation of liability in pass issued to shipper of live stock, see post, "Power to Limit Liability in Drover's Pass," §§ 2678-2683. As to the validity of limitation of liability to express messengers, mail clerks, newsboys, pullman employees and the like, see post, "Power to Limit Liability as to Persons Engaged in Certain Employments," §§ 2684-2689.

13. Miley *v.* Northern Pac. R. Co., 108 Pac. 5, 41 Mont. 51.

14. Holder of pass riding in pullman.—Ulrich *v.* New York, etc., R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369, reversing 13 Daly 129.

15. *United States.*—Kirkendall *v.* Union Pac. R. Co., 200 Fed. 197, 118 C. C. A. 383; Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368.

Illinois.—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210.

Michigan.—Weaver *v.* Ann Arbor R. Co., 139 Mich. 590, 102 N. W. 1037.

Missouri.—Carroll *v.* Missouri R. Co.,

§§ 2679-2681. Carrier Can Not Limit Liability in Drover's Pass—§ 2679. In General.—In nearly every case in which the question has arisen, it has been held that a stipulation in a drover's pass, limiting the liability of the carrier for negligent injury to the drover, is void.[16]

88 Mo. 239, 57 Am. Rep. 382; Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292.

New York.—Smith *v.* New York Cent. R. Co., 24 N. Y. 222.

Ohio.—Cleveland, etc., R. Co. *v.* Curran, 19 O. St. 1, 2 Am. Rep. 362. See, also, L. S. & M. S. R. Co. *v.* Hatchkiss, 14 I. C. D. 431.

Pennsylvania.—Pennsylvania R. Co. *v.* Henderson, 51 Pa. 315.

Texas.—St. Louis, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 44 S. W. 179, affirmed in 93 Tex. 718, no op.

Vermont.—Sprigg *v.* Rutland R. Co., 60 Atl. 143, 77 Vt. 347.

West Virginia.—Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

16. *United States.*—Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Chicago, etc., R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688., 18 S. Ct. 289; Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 44 L. Ed. 1055, 20 S. Ct. 854, affirming 59 Kan. 437, 53 Pac. 461; Delaware, etc., R. Co. *v.* Ashley, 14 C. C. A. 368, 57 Fed. 209; Baltimore, etc., R. Co. *v.* McLaughlin, 19 C. C. A. 551, 73 Fed. 519; Kirkendall *v.* Union Pac. R. Co., 200 Fed. 197, 118 C. C. A. 383; Chicago, etc., R. Co. *v.* Williams, 200 Fed. 207, 118 C. C. A. 393.

Georgia.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Illinois.—Illinois Cent. R. Co. *v.* Anderson, 184 Ill. 294, 56 N. E. 331; Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253.

Indiana.—Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719; Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869; Judgment, 74 N. E. 1014. Lake Shore, etc., R. Co. *v.* Teeters, 77 N. E. 599, 166 Ind. 335, 5 L. R. A., N. S., 425; Pittsburgh, etc., R. Co. *v.* Brown (Ind.), 97 N. E. 145.

Iowa.—Solan *v.* Chicago, etc., R. Co., 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430.

Kansas.—Chicago, etc., R. Co. *v.* Posten, 59 Kan. 449, 53 Pac. 465; Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461, affirmed in 178 U. S. 245, 20 S. Ct. 854, 44 L. Ed. 1055.

Michigan.—Weaver *v.* Ann Arbor R. Co., 102 N. W. 1037, 139 Mich. 590.

Missouri.—Carroll *v.* Missouri R. Co., 88 Mo. 239, 57 Am. Rep. 382; Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292.

Nebraska.—Missouri Pac. R. Co. *v.* Tietken, 49 Neb. 130, 68 N. W. 336, 59 Am. St. Rep. 526.

New York.—Smith *v.* New York Cent. R. Co., 24 N. Y. 222.

Ohio.—Cleveland, etc., R. Co. *v.* Curran, 19 O. St. 1, 2 Am. Rep. 362; Knowlton *v.* Erie R. Co., 19 O. St. 260, 2 Am. Rep. 395.

Pennsylvania.—Pennsylvania R. Co. *v.* Henderson, 51 Pa. 315.

Texas.—Texas, etc., R. Co. *v.* Avery, 46 S. W. 897, 19 Tex. Civ. App. 235; Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; St. Louis, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 44 S. W. 179, affirmed in 93 Tex. 718, no op.

Utah.—Saunders *v.* Southern Pac. Co., 13 Utah 275, 44 Pac. 932.

Vermont.—Sprigg *v.* Rutland R. Co., 77 Vt. 347, 60 Atl. 143.

West Virginia.—Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Wisconsin.—Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; Feldschneider *v.* Chicago, etc., R. Co., 99 N. W. 1034, 122 Wis. 423.

In a contract by a railroad company for the transportation of cattle, a stipulation is void by which, in consideration of a free pass, the person in charge of the cattle releases the company from liability for any injury sustained by him, and the responsibility for negligence, and the presumption thereof from a collision, are the same in such case as in case of an injury to a passenger who pays full fare. Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

Plaintiff was injured by defendant's negligence while in charge of cattle shipped on defendant's train from Iowa to Illinois. The contract of shipment provided that the company should not be liable for such injury in an amount exceeding $500. Held, that such contract was void, under Code, § 1308, providing that a railroad corporation shall not exempt itself by contract from any of its liabilities as a common carrier. Solan *v.* Chicago, etc., R. Co., 95 Iowa 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430.

A provision in a stock pass limiting the common-law liability of the company for injuries to the passenger to $1,000 is invalid, under Gen. St. 1897, c. 69, § 17, prohibiting railroad companies from limiting their common-law liabilities unless by order of the board of commissioners. Chicago, etc., R. Co. *v.* Posten, 53 Pac. 465, 59 Kan. 449.

A stipulation in a stock pass, on which the deceased was riding, in terms limiting the liability of the railway company for injuries to him, does not limit the damages recoverable in an action for the ben-

Consideration for Limitation of Liability in Drover's Pass.—It has been held that such a stipulation is without consideration sufficient to support it.[17]

§ 2680. Drover's Return Pass.—The rule that a carrier can not limit its liability in a drover's pass as to injuries to the drover for negligence, has been held to apply, not only in cases in which the injury occurred while the drover was on the freight train accompanying his live stock, but also in cases in which the injury occurred while the drover was riding on a passenger train using his return pass.[18]

§ 2681. Degrees of Negligence.—A few cases make a distinction based upon the degrees of negligence, holding that a contract exempting a carrier from liability for injury to a drover is binding, save in the case of injuries due to gross or willful negligence.[19] The better doctrine seems, however, to be that the degrees of negligence is not of importance, and that a contract attempting to release the carrier from liability for any negligence is not of importance, and that a contract attempting to release the carrier from liability for any negligence is void.[20]

§ 2682. Stipulation That Drover Is Employee of Carrier.—A common carrier can not limit its liability by stipulating that a person shall occupy a relation which he does not in fact occupy. Thus, it has been held that a carrier can not stipulate with an owner of cattle that an assistant carried on the cattle train was an employee of the carrier, and not a passenger.[21]

§ 2683. Reasonable Regulations Binding.—A carrier, however, may make reasonable contracts with the holder of a drover's pass, for the safety of the latter. Thus, a contract exacted from a cattle shipper, given free transportation to accompany his stock, providing that he would remain in a safe place in the caboose attached to the cars while the train was in motion, would get on and off the caboose only while it was stationary, and would not get on any

efit of the wife and children, brought under Gen. St. 1897, c. 95, § 418. Chicago, etc., R. Co. *v.* Martin, 53 Pac. 461, 59 Kan. 437, affirmed in 20 S. Ct. 854, 178 U. S. 245, 44 L. Ed. 1055.

17. Delaware, etc., R. Co. *v.* Ashley, 14 C. C. A. 368, 67 Fed. 209; Texas, etc., R. Co. *v.* Avery, 46 S. W. 897, 19 Tex. Civ. App. 235.

18. Cleveland, etc., R. Co. *v.* Curran, 19 O. St. 1, 2 Am. Rep. 362.

19. Degrees of negligence.—Meuer *v.* Chicago, etc., R. Co., 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898. See Poucher *v.* New York Cent. R. Co., 49 N. Y. 263, 10 Am. Rep. 364; Smith *v.* New York Cent. R Co., 24 N. Y. 222; Bissell *v.* New York Cent. R. Co. (N. Y.), 29 Barb. 602, reversed in 25 N. Y. 442, 82 Am. Dec. 369.

A special contract for transporting live stock and emigrant movables, made between a railroad company and a shipper, that the shipper may pass upon the same train to care for his stock, and load and unload the same, at his "own risk of personal injury, from whatever cause," is a valid contract, and exonerate the carrier from all liability for any injury to the shipper, while a passenger upon such train, not caused by the gross negligence, fraud, or willful wrong of the company or its servants. Meuer *v.* Chicago, etc., R. Co., 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898.

20. A contract with a carrier providing that stockmen should be entitled to ride in the caboose free of charge, and that the carrier should be liable only for injuries due to gross negligence of the company and its employees, is void, and the company is liable for any negligence causing injury. Judgment 81 Ill. App. 137, affirmed. Illinois Cent. R. Co. *v.* Anderson, 56 N. E. 331, 184 Ill. 294.

Under Code, Iowa 1873, § 1308, providing that no contract shall exempt any railway carrier of persons or property from the liability of a common carrier of passengers, a provision in a drover's contract restricting recovery for personal injury to acts of gross negligence is void. Judgment 69 Ill. App. 363, affirmed. Illinois Cent. R. Co. *v.* Beebe, 50 N. E. 1019, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253.

21. Stipulation that drover is employee of carrier.—Missouri Pac. R. Co. *v.* Tietken, 49 Neb. 130, 68 N. W. 336, 69 Am. St. Rep. 526; Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 9 S. W. 346, 10 Am. St. Rep. 758, 1 L. R. A. 500; St. Louis, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 44 S. W. 179, affirmed in 93 Tex. 718, no op.

freight car, was reasonable, and not against public policy.[22] So too, stipulations that notice of injury shall be given as a condition precedent to an action for damages are reasonable.[23] Where, however, a shipper of household goods and of live stock billed under a live stock bill of lading, which contains a condition that a claim in writing shall be made within five days from the accrual of damages, was killed while accompanying the shipment, it was not a condition precedent to an action by the representative of the shipper that the notice provided by the bill of lading should have been given, since that notice referred only to claims for injuries to live stock or personal property.[24]

§§ 2684-2689. Power to Limit Liability as to Persons Engaged in Certain Employments—§ 2684. Limitation of Liability in Pass Given Employee.—The validity of a limitation of liability in a pass issued to an employee by a carrier, is made to turn upon whether or not the employee is to be considered a passenger for hire. In cases in which the employee is considered a gratuitous passenger, the same rule is applied as in other cases of gratuitous passengers.[25] Where the employee is held to be a passenger for hire, the same rule is applied as to other passenger for hire—the contract is held void as against public policy.[26] Where the pass is issued to the employee as one of the terms of employment, he is not to be considered as a gratuitous passenger.[27] One who makes a journey over a railroad on a free pass, but at the request and for the benefit of the railroad company, is entitled to the rights of a passenger paying fare, in respect to compensation for any personal injury received through negligence of those in charge of the train, and is not necessarily bound by stipulations or conditions printed on the back of the pass to protect the company from claims by those to whom passes may be given as a favor.[28]

§ 2685. Express Messengers.—A railroad company which undertakes by special engagement to carry an express messenger, whom it is not bound to carry, becomes a private carrier as to the messenger so carried.[29] A contract with a railroad company, exempting it from liability for negligence of its employees, resulting in an injury to a messenger of an express company while being carried solely to handle and care for the business of the express company, is not void as against public policy.[30] The privilege accorded by a railroad to an express messenger, holding a passenger's season ticket, of riding in the baggage car, where passengers are not allowed, is a sufficient consideration for an agreement

22. Leslie *v.* Atchison, etc., R. Co., 82 Kan. 152, 107 Pac. 765, 27 L. R. A., N. S., 646.

23. Barber *v.* Chicago, etc., R. Co., 120 Pac. 359, 86 Kan. 277.

24. Pittsburgh, etc., R. Co. *v.* Brown (Ind.), 97 N. E. 145.

25. *United States.*—Smith *v.* Atchison, etc., R. Co., 114 C. C. A. 157, 194 Fed. 76.
Massachusetts.—Dugan *v.* Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748.
Washington.—Judgment, 63 Pac. 539, 23 Wash. 615, 53 L. R. A. 586, affirmed on rehearing. Peterson *v.* Seattle Tract. Co., 63 Pac. 539, 65 Pac. 543, 23 Wash. 615, 53 L. R. A. 586. See ante, "Limitation of Liability in Pass Given as Mere Gratuity," §§ 2672-2676.

26. *United States.*—Grand Trunk R. Co. *v.* Stevens, 95 U. S. 655, 24 L. Ed. 535.
Massachusetts.—Dugan *v.* Blue Hill St. R. Co., 193 Mass. 431, 79 N. E. 748.
New York.—Gill *v.* Erie R. Co., 135 N. Y. S. 355, 151 App. Div. 131.

27. *Massachusetts.*—Dugan *v.* Blue Hill St. R. Co., 193 Mass. 79. N. E. 748.
Michigan.—Eberts *v.* Detroit, etc., Railroad, 151 Mich. 260, 115 N. W. 43.
New York.—Gill *v.* Erie R. Co., 135 N. Y. S. 355, 151 App. Div. 131.
Washington.—Harris *v.* Puget Sound Elect. Railway, 52 Wash. 289, 100 Pac. 838.

28. Grand Trunk R. Co. *v.* Stevens, 95 U. S. 655, 24 L. Ed. 535.

29. Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

30. *Illinois.*—Blank *v.* Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332.
Indiana.—Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 35 L. R. A. 93, 58 Am. St. Rep. 348.
Massachusetts.—Bates *v.* Old Colony R. Co., 147 Mass. 255, 17 N. E. 633.
Wisconsin.—Peterson *v.* Chicago, etc., R. Co., 96 N. W. 532, 119 Wis. 197, 100 Am. St. Rep. 879.

to absolve the railroad from all liability for resulting injury, even if caused by the company's servants.[31] There are a few cases, however, that hold that the contract whereby a carrier attempts to limit its liability for negligence resulting in injury to an express messenger is against public policy and void.[32] State statutes rendering void contracts limiting the liability of a carrier for negligence apply to such contracts between a carrier and an express messenger.[33] Such a stipulation can have no effect no matter where the contract is made, if the injury occurs in such state.[34]

§ 2686. Mail Clerks.—A contract between a railroad company and a mail clerk releasing the former from liability for injury to the latter has been held inoperative.[35] One court, however, has reached the opposite result under a stat-

31. Bates *v.* Old Colony R. Co., 147 Mass. 255, 17 N. E. 633; Hosmer *v.* Old Colony R. Co., 156 Mass. 506, 31 N. E. 652.

32. An express messenger who is injured through the negligence of a railroad company, over whose road he is being hauled, may recover from the railroad company, notwithstanding he has contracted in advance with the express company to release it and the railroad company from all liability for such injury. The contract is contrary to public policy, and void both at common law and by statute. Virginia Code (1904), § 1294C. Shannon *v.* Chesapeake, etc., R. Co., 104 Va. 645, 52 S. E. 376.

A pass issued by a railroad company to an employee of an express company, for a consideration moving from the express company to the railroad company, is not a gratuity; and, if the employee is injured while riding on it, the railroad company is not exempted from liability to him by a provision in the pass to the effect that the person using it assumes all risks of accident and injury. Baltimore, etc., R. Co. *v.* Duke, 38 App. D. C. 164.

33. O'Brien *v.* Chicago, etc., R. Co., 116 Fed. 502; Weir *v.* Rountree, 173 Fed. 776, 97 C. C. A. 500, 19 Am. & Eng. Ann. Cas. 1204.

Under Const., § 196, and Code Va. 1887, § 1296, prohibiting carriers from contracting away their common-law liability, a Virginia contract, whereby an express messenger at the time of his employment released all claims against the express company or against the carrier for injuries he might receive, whether through negligence or otherwise, was void, so as not to affect his right to recover for injuries received in Kentucky. Davis *v.* Chesapeake, etc., R. Co., 122 Ky. 528, 92 S. W. 339, 29 Ky. L. Rep. 53, 5 L. R. A., N. S., 458, 121 Am. St. Rep. 481.

Under Code 1904, p. 668, § 1294C (25), providing that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid," a contract between an express company and its messenger, stipulating that the messenger shall exempt the company from liability for its own negligence, and undertaking to afford similar immunity to railroad companies in whose cars he might travel in the performance of his duties, was void, and afforded no defense in an action against a railroad company for negligence resulting in such messenger's death. Shannon *v.* Chesapeake, etc., R. Co., 52 S. E. 376, 104 Va. 645.

34. Under the provisions of Gen. St. Kan. 1901, §§ 5857, 5858, making railroad companies liable for all damages to persons or property caused by their negligence, and for injuries to employees through their negligence or that of other employees, which, as construed by the supreme court of the state, render void any contract limiting such liability, a contract between an express company and a railroad company that the former shall indemnify and save the latter harmless against any liability on account of the injury or death of any employee of the express company while in the cars or about the platforms of the railroad company, whether resulting from its negligence or otherwise, and a second contract between the express company and an employee by which the employee assumes all risks of accidents or injuries while riding on the cars of any railroad, and expressly ratifies the contract between the express company and railroad company, and agrees to save the express company harmless from any liability thereon, wherever such contracts were made, are not available as a defense to an action against the railroad company by the widow of the employee to recover damages for his death, occurring in Kansas through the alleged negligence of the railroad company. Weir *v.* Rountree, 173 Fed. 776, 97 C. C. A. 500, 19 Am. & Eng. Ann. Cas. 1204.

35. Mail clerks.—Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75, affirming 31 Hun 100; Illinois Cent. R. Co. *v.* Crudup, 63 Miss. 291.

ute declaring mail clerks to have the same rights as the employees of the carrier.[36]

§ 2687. News Agents.—A contract signed by a newsdealer on a train, who is carried free, exempting the railroad company from liability for personal injuries caused by the negligence of its employees, is valid.[37] Such a contract, however, will not release the railroad company from liability for fraudulent, wilful or reckless misconduct of its employees,[38] or for negligence consisting in the violation of a statutory regulation of the operation of trains.[39] Under state statutes forbidding carriers to limit the liability for injuries caused by negligence, such a contract is void.[40]

§ 2688. Circus Employees.—A special contract between a carrier and circus to furnish motive power, etc., to move the circus over the carrier's road at reduced rates, and exempting the carrier from liability for accident or injury occasioned by the carrier's negligence, is not contrary to public policy.[41]

§ 2689. Employees of Pullman Car Companies.—A pullman porter or conductor is not a passenger of the railroad company hauling the pullman car. A contract between the pullman employees and railway company releasing the latter from liability is generally held valid.[42] It has been held that in such case

36. Pennsylvania R. Co. *v.* Price, 96 Pa. 256, 2 Ky. L. Rep. 183.

37. Higgins *v.* New Orleans, etc., R. Co., 28 La. Ann. 133.

A railroad company is not liable for its negligence causing the death of one selling eatables on its train, and riding thereon under a free pass exempting the company from all liability for personal injury. Griswold *v.* New York, etc., R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115.

38. Higgins *v.* New Orleans, etc., R. Co., 28 La. Ann. 133.

39. A contract between a railroad company and a news agent on its train, exempting the company from liability for injuries to the agent caused by its negligence, is void as against public policy, as respects negligence consisting in the violation of a statute requiring trains to be stopped a certain distance from railway crossings. Starr *v.* Great Northern R. Co., 69 N. W. 632, 67 Minn. 18.

40. Under Const., art. 10, § 2, declaring railroads public highways, and railroad companies common carriers, and Sayles' Ann. Civ. St. 1897, arts. 319, 320, imposing on railroads common-law duties and liabilities, and forbidding them to limit or restrict such liability by general or special notice, or any contract whatever, a railroad can not contract away its liability for injuries to a newsboy employed by another corporation to sell its papers, etc., on the trains of the railroad, by an antecedent release, though the execution thereof by the newsboy is imposed as a condition of affording him transportation. Texas, etc., R. Co. *v.* Fenwick, 78 S. W. 548, 34 Tex. Civ. App. 222, affirmed in 98 Tex. 635, no op.

41. Sager *v.* Northern Pac. R. Co., 166 Fed. 526; Kelley *v.* Grand Trunk, etc., R. Co., 46 Ind. App. 697, 93 N. E. 616.

Acts 1901, p. 515, c. 225 (Burns' Ann. St. 1901, § 7082a), makes void all contracts between employer and employee releasing the employer or a third person from liability for his negligence and all contracts between an employee and a third person releasing the employer "from liability for damage of such employee arising out of the negligence of the employer." A show company contracted with a railroad for the transportation of its show cars for a stipulated gross sum, and agreed to assume all responsibility for damages arising out of the contract and "to indemnify and hold said railroad harmless on account of any claim for personal injuries or damage to property." While an employee of the show was in one of the show cars awaiting transportation he was killed by the negligence of the railroad company. Held, in an action against the railroad for the death, that so far as the contract was decedent's contract it was with the railroad relieving it as a private carrier under a special agreement from liability for accidents from all sources affecting him and was not a contract within the inhibitions of the statute. Judgment, 80 N. E. 636, reversed. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710.

42. *United States.* — McDermon *v.* Southern Pac. Co., 122 Fed. 669.

Colorado.—Denver, etc., R. Co. *v.* Whan, 89 Pac. 39, 39 Colo. 230, 11 L. R. A., N. S., 432, 12 Am. & Eng. Ann. Cas. 732.

Illinois.—Chicago, etc., R. Co. *v.* Hamler, 74 N. E. 705, 215 Ill. 525, 1 L. R. A., N. S., 674, 106 Am. St. Rep. 187.

Indiana.—Russell *v.* Pittsburgh, etc., R. Co., 61 N. E. 678, 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214.

the degree of negligence is of no importance. The release from liability applies alike to injuries resulting from slight negligence and gross negligence.[43] Where a contract between a sleeping car porter and his employer bore date as of the date he commenced the service, and recited on its face that it was entered into in consideration of the employment, which was for no particular time, a provision releasing railroads from liability for injuries to such porter was effective as to any occurrence after the contract was executed, though it was not in fact signed until several months after plaintiff's employement.[44] Under statutory provisions denying the carrier the right to restrict his liability, a contract limiting the liability of the railroad company for injury to a pullman as porter is void, the place of injury being immaterial.[45]

§§ 2690-2691. Sufficiency of Assent of Passenger to Limitation of Carrier's Liability—§ 2690. Passenger for Hire.—As has been seen,[46] a carrier can not, as a general rule, limit its liability for an injury to a passenger for hire. Thus, a printed stipulation in a ticket, exempting the carrier from liability for negligent injury to the holder, is void.[47]

§ 2691. Persons Carried Gratuitously.—One who accepts and uses a free pass for carriage, containing a condition that he will assume all risk of personal injury, is deemed to consent to the condition.[48] This is true whether he had actual notice of the condition or not. His knowledge of the limitation of the carrier's liability is immaterial.[49] So, also, the fact that a pullman

43. Chicago, etc., R. Co. *v.* Hamler, 74 N. E. 705, 215 Ill. 525, 1 L. R. A., N. S., 674, 106 Am. St. Rep. 187.

44. Chicago, etc., R. Co. *v.* Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A., N. S., 674, 106 Am. St. Rep. 187.

45. Where plaintiff, a resident of Texas, executed a contract with his employer, a sleeping car company, exempting it, and any corporation over whose railroads its cars might be transported, from liability for any injuries to plaintiff, which contract was void under Laws Tex. 1897, Sp. Sess., p. 14, providing that no such contract will be binding, the fact that plaintiff's injury, for which suit was brought in the federal court in Texas, occurred in Mexico, was immaterial as affecting the invalidity of such contract, when pleaded as a defense. Mexican Nat. R. Co. *v.* Jackson, 118 Fed. 549, 55 C. C. A. 315.

46. See ante, "Power to Limit Liability as to Passengers for Hire," §§ 2668-2671.

47. De Board *v.* Camden Interstate R. Co., 62 W. Va. 41, 57 S. E. 279.

A railroad company can not exempt itself from liability for injuries to passengers caused by the negligence of its servants by having its tickets contain a notice that it will not assume any risk or responsibility for the personal safety of passengers. Flinn *v.* Philadelphia, etc., R. Co. (Del.), 1 Houst. 469.

Where, by agreement between a railroad company and a landowner, the railroad agreed, in consideration of a grant of right of way, to give the landowner transportation for life, on the sole condition that her right to transportation should be forfeited if tickets were presented by any one save herself, and the tickets given the landowner bore a provision exempting the railroad from liability for injuries, such condition was not binding on the landowner in an action by her for injuries owing to the road's negligence, since it was without consideration, and her acceptance of the tickets did not indicate an intention on her part to assent to the terms thereof. Dow *v.* Syracuse, etc., Railway, 80 N. Y. S. 941, 81 App. Div. 362.

48. *United States.*—Boering *v.* Chesapeake Beach R. Co., 20 App. D. C. 500, affirmed in 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742.

Maine.—Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491.

New York.—Wells *v.* New York Cent. R. Co., 24 N. Y. 181.

Washington.—Muldoon *v.* Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787; S. C., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794.

49. Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Muldoon *v.* Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787; S. C., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794.

A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her. Judgment, 20 App. D. C. 500, affirmed in Boering *v.* Chesapeake Beach R. Co., 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742.

porter failed to read his contract before signing it does not invalidate a clause therein exempting the railway from liability in the absence of any evidence of fraud or misrepresentation.[50] The fact that the pass was accepted because it did not have to be signed does not defeat the validity of the release.[51]

§ 2692. Authority of Master to Limit Liability of Carrier for Injury to Servant.—An agreement between a carrier and an employer that the former shall not be liable for any injury done to an employee of the latter, the employee not having assented thereto, does not exonerate the carrier from liability for its negligence resulting in death or injury of an employee carried under such agreement.[52] Thus, a provision in a lease that the landlord shall not be liable for any damages occasioned by a failure to repair an elevator in operation in the leased premises will not preclude a recovery by the tenant's employee, who was not a party to the lease, since the landlord, who occupies the relation of a common carrier of passengers to such employees, could not limit his liability except by express contract with the employee.[53] So, also, it has been held that an infant is not bound by a contract made by his father limiting the carrier's liability for negligent injury to the infant.[54] A contract between an employer and carrier, however, that the former will indemnify the latter for injury to the employee of the former, is valid between the parties.[55]

Implied Notice of Stipulation.—An employee carried upon a railroad in pursuance of a contract between his employer and the railroad company is not chargeable, in the absence of actual notice, with knowledge of a stipulation therein, under which it is claimed that the railroad company is exempt from liability for its negligence.[56]

50. New York, etc., R. Co. *v.* Difendaffer, 125 Fed. 893, 62 C. C. A. 1.

51. Quimby *v.* Boston, etc., R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846.

52. *United States.*—Voight *v.* Baltimore, etc., R. Co., 79 Fed. 561; Chamberlain *v.* Pierson, 87 Fed. 420, 31 C. C. A. 157; Weir *v.* Rountree, 173 Fed. 776, 97 C. C. A. 500, 19 Am. & Eng. Ann. Cas. 1204.

District of Columbia.—Baltimore, etc., R. Co. *v.* Duke, 38 App. D. C. 164.

Illinois.—Springer *v.* Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464.

Indiana.—Cleveland, etc., R. Co. *v.* Henry (Ind. App.), 80 N. E. 636, rehearing denied in 81 N. E. 592.

New Hampshire.—Baker *v.* Boston, etc., R. Co., 65 Atl. 386, 74 N. H. 100, 12 Am. & Eng. Ann. Cas. 1072.

New York.—Brewer *v.* New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 21 Am. St. Rep. 647, 11 L. R. A. 483, affirming 45 Hun 595; Kenney *v.* New York, etc., R. Co., 54 Hun 143, 7 N. Y. S. 225, 26 N. Y. St. Rep. 636; Porter *v.* New York, etc., R. Co., 59 Hun 177, 13 N. Y. S. 491, 36 N Y. St. Rep. 315.

Vermont.—Robinson *v.* St. Johnsbury, etc., R. Co., 66 Atl. 814, 80 Vt. 129, 9 L. R. A., N. S., 1249, 12 Am. & Eng. Ann. Cas. 1060.

53. Springer *v.* Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464.

54 Chicago, etc., R. Co. *v.* Lee, 92 Fed. 318, 34 C. C. A. 365.

55. A contract to transport a circus train at a reduced rate, in consideration of a release from liability for accident or injury occasioned by the negligence of the railroad and from all damages sustained by any person attached to the circus while on the train, was valid as between the railroad company and the circus. Sager *v.* Northern Pac. R. Co., 166 Fed. 526.

A complaint set forth a contract by which a railroad company agreed to haul defendant's circus train, including four passenger cars furnished by defendant, and to provide free transportation on all passenger trains for defendant's agents. The contract provided that plaintiff should not be liable for any injury to any agent or employee of the defendant to an amount greater than $50, and that, if it should be so held liable, defendant would pay it the excess of such amount. Held, that whether plaintiff was to be regarded as a common or public carrier, or as a private carrier, under the contract, the purpose of the contract was not to exempt it from liability for negligence, but to indemnify it in case it should be liable, and hence such contract did not violate either the rule of public policy or the common-law doctrine that a carrier can not by contract secure exemption from liability for injuries to passengers caused by its own negligence. Seaboard Air Line R. Co. *v.* Main, 43 S. E. 930, 132 N. C. 445.

56. Brewer *v.* New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 21 Am. St. Rep. 647, 11 L. R. A. 483.

The fact that a person in charge of

Contract between Express Company and Railroad Company.—The general rule that a master can not release a carrier from liability for negligent injury to the servant of the former applies to express companies. A contract whereby an express company attempts to release a railroad company from liability for negligent injury to express messengers is void, unless assented to by the express messenger.[57] Such a contract is valid, however, when it is assented to by the employee.[58] Where the express messenger, in his contract of employment, releases the express company from liability and gives it authority to release the railroad company, the assent to the limitation of liability is sufficient.[59] So, also, where the express messenger assumes all risks of employment and agrees to indemnify the express company, and the express company agrees to indemnify the railroad company, the express messenger is deemed to have assented to the limitation of the railroad company's liability.[60]

§ 2693. Construction of Contracts Limiting Liability of Carrier.—Contracts releasing a carrier from liability should be strictly construed, and not extended by implication or surmise.[61] Thus, where a carrier is released from liability for injuries from a given cause, the release applies to injuries from no other cause.[62] It has been held, however, that when a passenger is allowed to

his employer's horses, who takes passage in the car in which the horses are being transported, without having made any personal contract with the railroad company, knows that his employer made arrangements with the railroad company for his transportation, does not charge him with knowledge that the contract between his employer and the company exempted the company from liability for any injuries that might be received by him while traveling in such car. Coppock *v.* Long Island R. Co., 89 Hun 186, 34 N. Y. S. 1039, 69 N. Y. St. Rep. 11.

57. *United States.*—Voight *v.* Baltimore, etc., R. Co., 79 Fed. 561; Chamberlain *v.* Pierson, 87 Fed. 420, 31 C. C. A. 157; Weir *v.* Rountree, 173 Fed. 776, 97 C. C. A. 500, 19 Am. & Eng. Ann. Cas. 1204.

New York.—Kenney *v.* New York, etc., R. Co., 54 Hun 143, 7 N. Y. S. 255, 26 N. Y. St. Rep. 636; Brewer *v.* New York, etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 21 Am. St. Rep. 647, 11 L. R. A. 483.

Vermont.—Robinson *v.* St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A., N. S., 1249, 12 Am. & Eng. Ann. Cas. 1060.

58. *United States.*—Long *v.* Lehigh Valley R. Co., 130 Fed. 870, 65 C. C. A. 354.

Delaware.—Perry *v.* Philadelphia, etc., R. Co., 1 Boyce's (24 Del.) 399, 77 Atl. 725.

District of Columbia.—Baltimore, etc., R. Co. *v.* Duke, 38 App. D. C. 164.

Indiana.—Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

A railroad company may lawfully exempt itself by contract with an express company using its cars from liability for negligence of its employees causing the injury of express messengers occupying such cars, and, where a messenger has assented to such exemption in his contract of employment with the express company, there can be no recovery from the railroad company for his injury or death. Kelly *v.* Malott, 135 Fed. 74, 67 C. C. A. 548.

59. Louisville, etc., R. Co. *v.* Keefer, 44 N. E. 796, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. Rep. 348.

60. Baltimore, etc., R. Co. *v.* Voight, 176 U. S. 498, 44 L. Ed. 560, 20 S. Ct. 385.

Exemption not brought home to messenger.—*United States.*—Boering *v.* Chesapeake Beach R. Co., 193 U. S. 442, 48 L. Ed. 742, 24 S. Ct. 515; Long *v.* Lehigh Valley R. Co., 130 Fed. 870, 65 C. C. A. 354.

District of Columbia.—Baltimore, etc., R. Co. *v.* Duke, 38 App. D. C. 164.

Delaware.—Perry *v.* Philadelphia, etc., R. Co., 1 Boyce's (24 Del.) 399, 77 Atl. 725.

Illinois.—Blank *v.* Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332.

Indiana.—Pittsburgh, etc., R. Co. *v.* Mahony, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503.

61. Baltimore, etc., R. Co. *v.* Duke, 38 App. D. C. 164. A carrier's contract of immunity from the consequences of the negligence of its employees must be expressed in unequivocal terms. Kenney *v.* New York, etc., R. Co., 125 N. Y. 422, 26 N. E. 626, affirming 54 Hun 143, 7 N. Y. 255.

Contract exempting from liability. — Blair *v.* Erie R. Co., 66 N. Y. 313, 23 Am. Rep. 55.

62. *United States.*—Fitchburg R. Co. *v.* Nichols, 85 Fed. 945, 29 C. C. A. 500.

Missouri.—Bolton *v.* Missouri Pac. R. Co., 72 S. W. 530, 172 Mo. 92.

An agreement by an owner of a freight car that he will run all risks if an agent of a railroad company will attach his car

ride in a baggage car on condition that he assumes all risk of accidents therefrom, the carrier is released from liability for injuries received by him while so riding, though they were not occasioned by his being in the baggage car.[63] A condition in a cattle dealer's ticket limiting the extent of the railroad company's liability "to him" in case of an accident does not apply to the statutory liability in favor of his next of kin in case of his death by the company's negligence.[64]

When Release Extends to Injuries by Negligence.—A release from "liability of any nature or character whatever," is construed to extend to liability for injuries by negligence.[65]

Contracts Made between Master and Servant.—The mere fact that an employee has contracted with his employer to assume all risks of injury while employed in connection with a carrier does not release the carrier from its liability for injuries to the employees where it had no knowledge of such contract.[66] Where, however, the contract purports to release not only the employer but also any carrier on whose lines the employee is transported from all liability, the release inures to the benefit of the carrier causing an injury to the employee.[67]

to a passenger train contrary to a regulation of the company does not relieve it from liability for an injury to him which was not occasioned by so attaching the car. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. 382, 91 Am. Dec. 168.

63. Hosmer *v.* Old Colony R. Co., 156 Mass. 506, 31 N. E. 652.

64. Clark *v.* Geer, 86 Fed. 447, 32 C. C. A. 295.

65. A contract by a sleeping car employee releasing transportation companies from all claims for "liability of any nature or character whatsoever" includes a release of liability for personal injuries caused by the negligence of the carrier. Russell *v.* Pittsburg, etc., R. Co., 61 N. E. 678, 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214.

A contract by which an express messenger, as a condition of his employment, assumes all risk of personal injury while riding on any transportation line, and agrees to release and indemnify the company or any transportation company with which it may contract from any claim which might be made on account of any such injury, must be construed to apply to an injury resulting from negligence of a railroad company in whose car he is riding in the course of his employment, since, not being a passenger while so riding, no claim could be made against the company except on the ground of negligence. Long *v.* Lehigh Valley R. Co., 130 Fed. 870, 65 C. C. A. 354.

66. Contracts between master and servant.—Louisville, etc., R. Co. *v.* Keefer, 44 N. E. 796, 146 Ind. 21, 38 L. R. A. 93, 58 Am. St. Rep. 348.

67. A contract made between a sleeping car company and an employee releasing the sleeping car company and all transportation companies from all liability for personal injuries while traveling over such lines inures to the benefit of a railway company transporting the car in which the employee was injured. Russell *v.* Pittsburg, etc., R. Co., 61 N. E. 678, 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214.

A railroad company and a sleeping car company entered into a contract, whereby the railroad company agreed to haul the cars of the sleeping car company, and it agreed that its employees injured in consequence of a railroad accident should hold the railroad company liable only to the same extent that it would be liable if the employees so injured were its own employees. A contract between the sleeping car company and its conductor stipulated that the conductor, while engaged in the performance of his duties, should not have the right of a passenger with respect to the railroad company, and released the railroad company from claims for liability for personal injury. Held, that the railroad company was entitled to enforce the provisions of the contract between the conductor and the sleeping car company and avoid a liability for an injury sustained by the conductor. Denver, etc., R. Co. *v.* Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A., N. S., 432, 12 Am. & Eng. Ann. Cas. 732.

CHAPTER XXIV.

Contributory Negligence

I. Substantive Law, §§ 2694-2828.
A. In General, §§ 2694-2704.
a. Application of the Doctrine to Carriers, § 2694.
b. Care Required of Passengers in General, § 2695.
c. Care Required of Children and Others under Disability, §§ 2696-2699.
(1) Children, § 2696.
(2) Intoxicated Persons, § 2697.
(3) Blind Persons, § 2698.
(4) Persons in Feeble Health, § 2699.
d. Disobedience of Rules or Regulations of Carrier, § 2700.
e. Violation of Conditions in Contract of Carriage, § 2701.
f. Disregarding Directions or Warning of Carrier's Employees, § 2702.
g. Acts by Permission or Direction of Carrier's Employees, § 2703.
h. Acts in Emergencies, § 2704.
B. Awaiting and Seeking Transportation, §§ 2705-2716.
a. In General, § 2705.
b. Seeking Entrance to Depot Which Is Obstructed by Train, § 2706.
c. Passing Down Steps Leading to Station, § 2707.
d. Awaiting Train at Station, §§ 2708-2711.
(1) In General, § 2708.
(2) On Platform, § 2709.
(3) Walking on Track, § 2710.
(4) Standing Near Track, § 2711.
e. Using Passageway to Train Shed at Station, § 2712.
f. Crossing Tracks to Reach Station, Train, or Car, § 2713.
g. Passing Along Track or Right of Way to Reach Train or Car, § 2714
h. Flagging or Signaling Train, § 2715.
i. Standing within Reach of Street Car, § 2716.
C. Entering Conveyance, §§ 2717-2738.
a. In General, § 2717.
b. Time of Entering Car, § 2718.
c. Place of Entering Car, § 2719.
d. Manner of Entering Car, § 2720.
e. Entering Particular Car, § 2721.
f. Entering Elevator, § 2722.
g. Negligence of Particular Passengers, § 2723.
h. Boarding Moving Conveyance, §§ 2724-2738.
(1) In General, § 2724.
(2) Speed Car Moving, §§ 2725-2726.
(a) In General, § 2725.
(b) Speed Suddenly Accelerated, § 2726.
(3) Before and after Stopping and Starting, § 2727.
(4) Length of Time Car Stops, § 2728.
(5) Signaling Car to Stop, § 2729.
(6) By Invitation of Carrier, § 2730.
(7) Injured by Act of Operative, § 2731.
(8) Injured by Defective Platform, § 2732.
(9) Injured by Objects Passed, § 2733.
(10) Injury to Person Carrying Bundles, § 2734.

(11) Injury to Children, Women and Invalids, § 2735.
(12) Transferring from One Car to Another, § 2736.
(13) Where Carrier Could Have Avoided Injury, § 2737.
(14) Entering Moving Elevator, § 2738.
D. In Transit, §§ 2739-2784.
a. Conduct in General, § 2739.
b. Dangerous Position, §§ 2740-2781.
(1) In General, § 2740.
(2) Sitting Negligently in Seat, § 2741.
(3) Standing in Car, § 2742.
(4) Riding on Platform, §§ 2743-2756.
(a) In General, § 2743.
(b) Rules and Regulations of Carrier, § 2744.
(c) Direction or Request of Employee, § 2745.
(d) Custom and Usuage, § 2746.
(e) Causes Justifying Riding on Platform, §§ 2747-2750.
aa. Interior Crowded, § 2747.
bb. Interior Uncomfortable, § 2748.
cc. Door to Interior Closed, § 2749.
dd. Escaping Danger, § 2750.
(f) Injury from Particular Causes, § 2751.
(g) Particular Acts of Negligence, § 2752.
(h) Platform of Particular Car, § 2753.
(i) Where Riding in Interior Would Have Avoided Injury, § 2754.
(j) Where Carrier Could Have Avoided Injury, § 2755.
(k) Children and Intoxicated Persons, § 2756.
(5) Riding on Step or Footboard, §§ 2757-2763.
(a) In General, § 2757.
(b) Where Car Crowded, § 2758.
(c) Where Running Board Crowded, § 2759.
(d) Injury from Particular Causes, § 2760.
(e) Injury from Particular Acts of Negligence, § 2761.
(f) Step of Particular Car, § 2762.
(g) Children, § 2763.
(6) Limb or Other Part of Person Protruding from Car, §§ 2764-2771.
(a) In General, § 2764.
(b) Hand or Arm on Window Sill, § 2765.
(c) Hand or Arm Out of Window, § 2766.
(d) Hand on Railing of Platform, § 2767.
(e) Arm Around Post, § 2768.
(f) Head Out of Window or Door, § 2769.
(g) Body Protruding from Train, § 2770.
(h) Feet and Legs Protruding, § 2771.
(7) Riding in Car Not Intended for Passengers, §§ 2772-2781.
(a) In General, § 2772.
(b) Riding on Engine, § 2773.
(c) Riding in Car in Front of Engine, § 2774.
(d) Riding in Freight Car, § 2775.
(e) Riding in Baggage, Express or Mail Car, § 2776.
(f) Riding in Car Intended for Colored Persons, § 2777.
(g) Riding on Hand Car, § 2778.
(h) Riding on Top of Car, § 2779.
(i) Passenger Accompanying Live Stock, § 2780.
(j) Passenger Accompanying Property, § 2781.
c. Changing Position, §§ 2782-2784.
(1) In General, § 2782.

(2) Going on Platform, § 2783.
(3) Passing from One Car to Another, § 2784.
E. Leaving Conveyance, §§ 2785-2828.
a. In General, §§ 2785-2799.
(1) Care Required of Passengers in General, § 2785.
(2) Due Diligence in Leaving Car, § 2786.
(3) On Invitation or Direction of Carrier's Employees, §§ 2787-2789.
(a) In General, § 2787.
(b) Facts Justifying Assumption of Invitation to Alight, §§ 2788-2789.
aa. Stopping Cars, § 2788.
bb. Announcing Station, § 2789.
(4) Using Means Afforded for Alighting, § 2790.
(5) Unnecessary Exposure to Danger, § 2791.
(6) Place of Alighting, §§ 2792-2795.
(a) Right to Assume Place Safe, § 2792.
(b) Duty to Look before Alighting, § 2793.
(c) Knowledge of Character of Place, § 2794.
(d) Customary Stopping Place, § 2795.
(7) Children and Others under Disability, §§ 2796-2797.
(a) In General, § 2796.
(b) Intoxicated Passengers, § 2797.
(8) Alighting from Train in Emergency, § 2798.
(9) Negligence as to Incidental Dangers, § 2799.
b. Preparing to Leave Conveyance before It Stops, §§ 2800-2801.
(1) Standing in Aisle or Seat, § 2800.
(2) Going on Platform or Steps before Train Stops, § 2801.
c. Alighting at Place Other than Station or Platform, §§ 2802-2806.
(1) In General, § 2802.
(2) By Direction, Invitation or Acquiescence of Carrier, § 2803-2805.
(a) In General, § 2803.
(b) Stop after Calling Station as Invitation, § 2804.
(c) Slowing Up for Railroad Crossing—Custom, § 2805.
(d) On Advice of Fellow Passenger, § 2805½.
(3) Running Past or Stopping Short of Destination, § 2806.
d. Alighting at Wrong End or Part of Car or on Wrong Side of Train, §§ 2807-2810.
(1) Wrong End of Car, § 2807.
(2) Wrong Side of Car, §§ 2808-2809.
(a) In General, § 2808.
(b) On Invitation or Acquiescence of Carrier, § 2809.
(3) Side Door of Baggage Car, § 2810.
e. Alighting from Moving Train or Car in General, §§ 2811-2819.
(1) General Rule, § 2811.
(2) Where Danger Obvious, § 2812.
(3) Manner of Alighting, § 2813.
(4) Children and Others under Disability, § 2814.
(5) Justification or Excuse, §§ 2815-2819.
(a) Direction or Invitation of Carrier, §§ 2815-2818.
aa. In General, § 2815.
bb. Slowing Up for Station as Invitation to Alight, § 2816.
cc. Announcing Station as Invitation, § 2817.
dd. After Boarding Wrong Train, § 2818.
(b) Acts in Emergencies, § 2819.
f. Alighting from Moving Car on Failure to Stop at Station, §§ 2820-2821.
(1) In General, § 2820.
(2) By Direction or Invitation of Carrier, § 2821.

g. Alighting from Moving Car on Failure to Stop for Sufficient Time, § 2822.
h. Defective or Unlighted Platform and Obstructions Thereon, § 2823.
i. Leaving Premises by Improper Course, § 2824.
j. Crossing Other Tracks, §§ 2825-2828.
(1) In General, § 2825.
(2) Application to Passengers of Requirement to Stop, Look, and Listen, § 2826.
(3) Passenger Alighting from Train or Car before It Stops, § 2827.
(4) Attempting to Crawl between Cars of Freight Train, § 2828.
II. Procedure, §§ 2829-2968.
A. Pleading, §§ 2829-2835.
a. Petition or Complaint, § 2829.
b. Plea or Answer, §§ 2830-2834.
(1) Proof under General Denial, § 2830.
(2) Special Plea of Contributory Negligence, §§ 2831-2832.
(a) Necessity, § 2831.
(b) Sufficiency of Plea of Contributory Negligence, § 2832.
(3) Plea of Assumption of Risk, § 2833.
(4) Construction, Operation and Effect, § 2834.
c. Reply, § 2835.
B. Issues, Proof and Variance, § 2836.
C. Presumption and Burden of Proof, §§ 2837-2853.
a. Doctrine Placing Burden on Plaintiff, § 2837.
b. Doctrine Placing Burden on Carrier, §§ 2838-2853.
(1) In General, § 2838.
(2) Boarding and Alighting from Train or Street Car, §§ 2839-2842.
(a) In General, § 2839.
(b) Train or Car Prematurely Started, § 2840.
(c) Jumping from Train, Car or Coach, § 2841.
(d) Obeying Order or Direction of Conductor, § 2842.
(3) Riding in Wrong Car or Place Not Intended for Passengers, §§ 2843-2844.
(a) Railway Trains, § 2843.
(b) Riding on Platform of Street Car, § 2844.
(4) Standing in Car, § 2845.
(5) Elbow Resting on Rail at Side of Street Car, § 2846.
(6) Violation of Carrier's Rules, § 2847.
(7) Resisting Ejection, § 2848.
(8) Incapacity to Appreciate Danger, § 2849.
(9) Assumption of Risk, § 2850.
(10) Waiver of Provision in Stock Pass, § 2851.
(11) Imputed Negligence, § 2852.
(12) Last Clear Chance, § 2853.
D. Admissibility of Evidence, §§ 2854-2880.
a. In General, § 2854.
b. Surroundings of Place of Injury, § 2855.
c. Res Gestæ, § 2856.
d. Opinion Evidence, § 2857.
e. General Custom or Usage, § 2858.
f. Habits or Customs of Injured Passenger, § 2859.
g. Character for Negligence or Prudence, § 2860.
h. Previous Experience in Traveling on Trains or Cars, § 2861.
i. Injuries to Other Passengers, § 2862.
j. Rules of Carrier and Violation Thereof, § 2863.
k. Ordinances, § 2864.
l. Evidence as to Specific Acts of Negligence, §§ 2865-2872.
(1) Acts Unconnected with Injury, § 2865.

(2) Drunkenness, § 2866.
(3) Boarding Moving Train, § 2867.
(4) Standing in Train, § 2868.
(5) Riding on Platform, § 2869.
(6) Riding on Running Board, § 2870.
(7) Putting Head or Arms Out of Car, § 2871.
(8) Alighting from Moving Train or Car, § 2872.
m. Evidence Disproving or Excusing Contributory Negligence, §§ 2873-2880.
(1) Evidence of Absence of Negligence, § 2873.
(2) Reason for Injured Person's Actions, § 2874.
(3) Following Directions of Conductor or Trainmen, § 2875.
(4) Failure to Warn Passenger of Danger, § 2876.
(5) Construction and Equipment of Car, § 2877.
(6) Absence of Conductor, § 2878.
(7) Mode of Handling Trains at Point in Question, § 2879.
(8) Similar Negligence of Other Persons, § 2880.
E. Sufficiency of Evidence, §§ 2881-2904.
a. In General, § 2881.
b. Entering Car or Conveyance, §§ 2882-2886.
(1) Disregarding Carrier's Provisions for Safety, § 2882.
(2) Injury on or Near Station Platform, § 2883.
(3) Boarding Moving Train or Car, § 2884.
(4) Injury by Automatic Car Doors, § 2885.
(5) Elevators, § 2886.
c. In Transit, §§ 2887-2895.
(1) Knowledge of Dangerous Position, § 2887.
(2) Riding on Freight Train, § 2888.
(3) Riding on Crowded Street Car, § 2889.
(4) Riding on Platform of Train, § 2890.
(5) Riding on Platform Steps or Running Board of Street Car, § 2891.
(6) Putting Head or Arms Out of Car, § 2892.
(7) Burning Out of Fuse, § 2893.
(8) Passenger Driving Stage Coach, § 2894.
(9) Crossing in Front of Moving Train to Reboard Train on Side Track, § 2895.
d. Leaving Conveyance, §§ 2896-2901.
(1) In General, § 2896.
(2) Falling, § 2897.
(3) Alighting from Moving Train or Car, § 2898.
(4) Injury Caused by Sudden Movement of Train or Car, § 2899.
(5) Alighting from Car between Stations, § 2900.
(6) Passenger Struck by Car on Parallel Track, § 2901.
e. Leaving Depot or Station, § 2902.
f. Willfulness or Wantonness of Carrier's Servants, § 2903.
g. Last Clear Chance, § 2904.
F. Questions for Jury, §§ 2905-2921.
a. In General, § 2905.
b. Care Required of or in Respect to Children and Others under Disability, § 2906.
c. Awaiting and Seeking Transportation, § 2907.
d. Entering Conveyance in General, § 2908.
e. Boarding Moving Conveyance, § 2909.
f. Conduct While in Transit in General, § 2910.
g. Riding on Platform, § 2911.
h. Riding on Steps, Footboard or Projection from Vestibule, § 2912.

i. Leaving Conveyance in General, § 2913.
j. Preparing to Leave Conveyance before It Stops, § 2914.
k. Alighting from Moving Conveyance, § 2915.
l. Alighting from Conveyance at Place Other Than Station or Platform, § 2916.
m. Crossing or Walking on Track after Alighting from Car, § 2917.
n. Acts by Permission or Direction of Carrier's Employees, § 2918.
o. Acts in Emergencies, § 2919.
p. Question of Last Clear Chance, § 2920.
q. Wanton Conduct Excusing Contributory Negligence, § 2921.
G. Instructions, §§ 2922-2967.
a. General Consideration, §§ 2922-2953.
(1) Duty of Court Generally, § 2922.
(2) Necessity for Requests, § 2923.
(3) Correct Declaration of Law, § 2924.
(4) Terminology—Technical Language, § 2925.
(5) Clearness and Definiteness, § 2926.
(6) Conformity to Pleadings and Issues, §§ 2927-2934.
(a) In General, § 2927.
(b) Must Be Germane to Issue, 2928.
(c) Applicability to Evidence, § 2929.
(d) Assuming Facts or Matters in Issue, § 2930.
(e) Sufficiency of Evidence, § 2931.
(f) Party by Whom Contributory Negligence Proved, § 2932.
(g) Pretermitting or Ignoring Proof, § 2933.
(h) Sufficiency of Pleadings, § 2934.
(7) Explanation or Definition of Contributory Negligence, § 2935.
(8) Degree of Care Required of Passenger, § 2936.
(9) Must Postulate Negligence of Passenger's Act, § 2937.
(10) Must Hypothesize State of Facts Authorizing Conclusion of Contributory Negligence, § 2938.
(11) Proximate and Contributory Cause of Injury, §§ 2939-2944.
(a) In General, § 2939.
(b) Must Hypothesize Negligent Act of Passenger as Proximate Cause, § 2940.
(c) Requiring Plaintiff's Negligence to Be Sole Cause, § 2941.
(d) Requiring Plaintiff's Negligence Alone to Be Proximate Cause, § 2942.
(e) Requiring Passenger's Negligence to Contribute to Injury, § 2943.
(f) Concurring Negligence of Plaintiff and Defendant, § 2944.
(12) Omitting One of Two Acts of Contributory Negligence, § 2945.
(13) Ignoring Negligence of Defendant, § 2946.
(14) Enunciating Theories of Case, § 2947.
(15) Conflicting and Inconsistent Instructions, § 2948.
(16) Misleading Instructions, § 2949.
(17) Instruction Invading Province of Jury, § 2950.
(18) Repetition of Instructions, § 2951.
(19) Objections Obviated by Other Instructions, § 2952.
(20) Harmless Error, § 2953.
b. Law of State where Injury Occurred, § 2954.
c. Assumption of Risk, § 2955.
d. Care Required of Children and Others under Disability, § 2956.
e. Awaiting and Seeking Transportation, § 2957.
f. Entering Conveyance, § 2958.
g. Conduct in Transit, § 2959.
h. Leaving Conveyance in General, § 2960.
i. Alighting from Moving Conveyance, § 2961.
j. Disobedience of Rules of Carrier, § 2962.

k. Acts by Permission or Direction of Carrier's Employees, § 2963.
l. Acts in Emergencies, § 2964.
m. Injury Avoidable by Care of Carrier, § 2965.
n. Presumptions and Burden of Proof, § 2966.
o. Comparative Negligence Rule Under Georgia Statute, § 2967.
H. Verdict and Findings, § 2968.

§§ 2694-2828. Substantive Law—§§ 2694-2704. In General—§ 2694. Application of the Doctrine to Carriers.—The doctrine of assumed risk is not applicable in an action by a passenger against a carrier for injuries caused by the carrier's negligence.[1] But as a general rule the passenger can not recover in such an action if he was guilty of negligence which proximately contributed to the injury.[2] If, however, the negligence of the passenger

1. Doctrine of assumed risk inapplicable.—A street railway passenger never assumes the risk of the company's negligence. Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

A passenger does not assume the risk of injury from riding in a defective street car run at a dangerous rate of speed; the carrier being bound to exercise the highest degree of care consistent with the nature of its business to carry him safely. Isbell *v.* Pittsfield Elect. St. R. Co., 196 Mass. 296, 82 N. E. 3.

The law of assumed risk is inapplicable to an action for injuries to a passenger on a street car caused by a collision between the car and a vehicle. Chicago Consol. Tract. Co. *v.* Schritter, 78 N. E. 820, 222 Ill. 364, affirming judgment 124 Ill. App. 578.

If the doctrine of assumed risk has any applicability as between carrier and passenger, a passenger can not be held to have assumed any risk except that of accident not arising from any negligence of the carrier. Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed Galveston, etc., R. Co. *v.* Herring, 102 Tex. 100, 113 S. W. 521.

The doctrine of assumed risk in its application to carrier and passenger involves the doctrine of contributory negligence, since, unless the position voluntarily taken by the passenger exposes him to obvious and patent dangers or such as he is required to anticipate, he can not in case of injury be charged with negligence or to have assumed the risk. United R., etc., Co. *v.* Riley, 71 Atl. 970, 109 Mo. 327.

2. Negligence proximately contributing to injury precludes recovery.—*United States.*—Seymour *v.* Chicago, etc., R. Co., Fed. Cas. No. 12,685, 3 Biss. 43.

Arkansas.—Oliver *v.* Fort Smith Light, etc., Co., 116 S. W. 204, 89 Ark. 222.

Florida.—Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

Georgia.—Central, etc., R. Co. *v.* McKinney, 42 S. E. 229, 116 Ga. 13; Pickett *v.* Central, etc., Co., 138 Ga. 177, 74 S. E. 1027; Hicks *v.* Georgia Southern, etc., R. Co., 108 Ga. 304, 32 S. E. 880.

Illinois.—Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373.

Kentucky.—Kentucky Cent. R. Co. *v.* Dills (Ky.), 4 Bush 593.

Louisiana.—Wood *v.* Jones, 34 La. Ann. 1086.

Maryland.—Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Missouri.—Newcomb *v.* New York, etc., R. Co., 169 Mo. 409, 69 S. W. 348; Weber *v.* Kansas City, etc., R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541.

Ohio.—Interurban R., etc., Co. *v.* Hancock, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036; Railroad Co. *v.* Kassen, 49 O. St. 230, 31 N. E. 282, 16 L. R. A. 674, affirming 19 Wkly. L. Bull. 25, 10 O. Dec. Reprint 133; Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597; Cleveland, etc., R. Co. *v.* Manson, 30 O. St. 451; Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222; New York, etc., R. Co. *v.* Harber, 12 O. C. D. 648; Cleveland Elect. R. Co. *v.* Wadsworth, 1 O. C. C., N. S., 483, 15 O. C. D. 376; Cincinnati, etc., R. Co. *v.* Morley, 4 O. C. C. 559, 2 O. C. D. 706; Holmes *v.* Ashtabula Rapid Transit Co., 10 O. C. D. 638; McBee *v.* Cincinnati St. R. Co., 13 O. D. N. P. 579.

Oklahoma.—Blevins *v.* Atchison, etc., R. Co., 41 Pac. 92, 3 Okla. 512.

Pennsylvania.—Pennsylvania R. Co. *v.* Aspell, 23 Pa. 147, 62 Am. Dec. 323; Pennsylvania R. Co. *v.* Zebe, 33 Pa. 318; Conroy *v.* Pennsylvania R. Co., 1 Pittsb. R. 440; Kennard *v.* New Jersey R., etc., Co. (Pa.), 9 Leg. Int. 34.

South Carolina.—Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130; Renneker *v.* South Carolina R. Co., 20 S. C. 219.

Texas.—Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573; Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; Galveston, etc., R. Co. *v.* Davidson, 61 Tex. 204; Texas, etc., R.

was not proximately contributive to the injury, it is no defense.[3] The authorities are not entirely in harmony as to what constitutes contributory negligence

Co. *v.* Cole, 66 Tex. 562, 1 S. W. 629; International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632; Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 8 S. W. 78; Gulf, etc., R. Co. *v.* Campbell, 76 Tex. 174, 13 S. W. 19; Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266; Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; St. Louis, etc., R. Co. *v.* Casseday, 92 Tex. 525, 50 S. W. 125; Galveston, etc., R. Co. *v.* Morris, 94 Tex. 505, 61 S. W. 709, affirming 60 S W. 813; Parks *v.* San Antonio Tract. Co., 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100, reversing 93 S. W. 130; St. Louis, etc., R. Co. *v.* Cannon (Tex. Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630.

Virginia.—Pendleton *v.* Richmond, etc., R. Co., 104 Va. 813, 52 S. E. 574.

West Virginia.—Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

A carrier of passengers is exonerated for an injury to a passenger when the proximate and moving cause of the injury was the act of the passenger himself, since the rule is general that no one can charge another in damage for negligently injuring him, where he himself failed to exercise due and reasonable care in the premises. Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

Where a passenger, by his own negligence or want of ordinary care and prudence, has so far contributed to injuries received by him that, but for such contributory negligence on his part, the injury would not have happened, he can not recover therefor. South, etc., R. Co. *v.* Schaufler, 75 Ala. 136.

A carrier is not liable when its negligence may be the proximate cause of the injury to the passenger, if the negligence of the passenger also operated as a proximate cause. Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130.

A railroad company is not liable to a passenger for injuries resulting from an accident which he might have prevented by ordinary attention to his safety, even though the agents in care of the train were also remiss in their duty. Wood *v.* Jones, 34 La. Ann. 1086.

Where a street car passenger's own negligence contributes to his injury, he can not recover. Ward *v.* International R. Co., 99 N. E. 262, 206 N. Y. 83, Ann. Cas. 1914A, 1170, reversing judgment 125 N. Y. S. 1149, 140 App. Div. 938.

Where a petition showed that the injuries sustained by plaintiff passenger were the result of a failure on her part to exercise due care to avoid the consequences to herself of the alleged negligence of the railroad company, the general demurrer on this ground should have been sustained. Louisville, etc., R. Co. *v.* Edmondson, 57 S. E. 877, 128 Ga. 478.

In an action against a railway company for personal injuries, it appeared that the plaintiff had committed an act of great imprudence, which was, at least, one of the proximate causes of the injury. Held, that under the circumstances the question of negligence in the conduct of defendant became wholly immaterial. Harper *v.* Erie R. Co., 32 N. J. L. 88.

Where a person is put off a railroad train at the wrong station, at night, through negligence of the company in selling tickets to a point on its line at which its trains do not stop, and the person fails to make any inquiry for a place to find shelter, when he might have found it upon inquiry, there being no houses or lights in sight, known to him, and the agent closing the depot almost immediately upon his arrival, held, that by walking to his destination, instead of trying to find shelter, he contributed to his own injury. Texas, etc., R. Co. *v.* Cole, 66 Tex. 562, 1 S. W. 629.

3. Negligence not proximately contributing to injury no defense.—*Alabama.*—Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847.

Michigan.—Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126; Wood *v.* Lake Shore, etc., R. Co., 49 Mich. 370, 13 N. W. 779;

Mississippi.—Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

New Jersey.—Central R. Co. *v.* Van Horn, 38 N. J. L. 133.

North Carolina.—Kearney *v.* Seaboard, etc., R. Co., 158 N. C. 521, 74 S. E. 593.

Texas.—Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291; Parks *v.* San Antonio Tract. Co., 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100, reversing 93 S. W. 130.

The negligence of a passenger will not exempt a carrier from liability for injury to him by negligence of the carrier, unless such negligence directly contribute to the injury, as a proximate cause thereof. Jacobus *v.* St. Paul, etc., R. Co., 20 Minn. 125, Gil. 110, 18 Am. Rep. 360.

The negligence on the part of a passenger that would defeat a recovery and relieve the carrier of liability must be such negligence as shows itself to have

on the part of a passenger, or as to what degree of negligence on his part will preclude his recovery.[4] But though, as has been stated, a passenger can not, as a general rule, recover from a carrier for injury resulting from its negligence, if the passenger's negligence contributed to the injury, yet if, in such case, the carrier had knowledge of the passenger's peril, and could by the exercise of ordinary or reasonable care have avoided the injury, the passenger's negligence will not excuse or relieve the carrier from liability.[5] If a passenger

been the immediate cause of the injury or a concurring proximate cause. Cooper *v.* Georgia, etc., R. Co., 39 S. E. 543, 61 S. C. 345; Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130.

Though a passenger was guilty of contributory negligence, yet, if his injury would have occurred from defendant's negligence just the same, he is not prevented by his negligence from recovery. Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

A passenger's slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for an injury resulting from negligence of the railroad company. Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919.

4. What constitutes contributory negligence—Degree of negligence that will preclude recovery.—In a case in a federal court it has been held that an instruction that, to preclude a recovery by a passenger for an injury, he must himself have "substantially or directly" contributed to the injury, is not erroneous, since it is only acts or omissions which substantially or directly contribute to an injury which constitute contributory negligence. Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

In Alabama, in an action for injuries to a passenger, a charge that, if plaintiff was guilty of negligence which contributed approximately in the slightest degree to her injury, the jury must find for defendant, was held to be proper. Sweet *v.* Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667.

In Georgia it has been held that: "If with a clear chance to avoid the consequences of defendant's negligence or breach of duty the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but failure to avoid danger, defeating the right to recover." Hill *v.* Louisville, etc., R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A., N. S., 432; Simmons *v.* Seaboard Air-Line Railway, 120 Ga. 225, 47 S. E. 570.

In Iowa it has been held that if the negligence of a passenger on a street car contributed to her injury, as an efficient cause, she can not recover, and the jury need not find that she contributed in a "material" degree. Root *v.* Des Moines R. Co., 98 N. W. 291, 122 Iowa 469.

In Kansas it has been held that slight contributory negligence, or negligence on the part of plaintiff which is only the remote cause of the injury, will not prevent a recovery in an action for personal injuries resulting from defendant's negligence. Sawyer *v.* Sauer, 10 Kan. 466.

In Maryland it has been held that where there is a concurrence of negligence of the carrier and the passenger in causing the injury to the latter, the causes are commingled, and are regarded as equally proximate to the effect produced, and therefore not susceptible of apportionment. Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

In Mississippi it has been held that to exculpate a carrier from liability in an action for injury to a passenger, the passenger's negligence must have been such as materially contributed to the accident. Yazoo, etc., R. Co. *v.* Byrd, 89 Miss. 308, 42 So. 286.

In Texas it has been held that where the negligent act of a person injured unquestionably contributed to his injury, it is improper to charge that the jury must further find such act to have been the proximate or a proximate cause. If the act is one of contributory negligence, it must be, in the nature of things, a proximate cause. Ebert *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 49 S. W. 1105; Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; Texas, etc., R. Co. *v.* McCoy, 90 Tex. 264, 38 S. W. 36.

It has been also held in this state that where a risk is taken voluntarily by a passenger, without fault of the carrier or inducement to procure him to do so, and he is injured and his injury is attributable to the motion and speed the cars are making, without the accident being associated with any other fault or act of the company, he is guilty of contributory negligence barring recovery. Hollman *v.* Houston, etc., R. Co. (Tex.), 2 Posey 557.

5. Carrier liable if by exercise of ordinary care it could have avoided injury.— *United States.*—Norfolk, etc., Terminal Co. *v.* Rotolo, 191 Fed. 4; S. C., 195 Fed. 231.

Colorado.—Montgomery *v.* Colorado Springs, etc., R. Co., 50 Colo. 210, 114 Pac. 659.

District of Columbia.—Metropolitan R. Co. *v.* Snasball, 3 App. D. C. 420, 22 Wash. L. Rep. 377.

Kentucky.—Louisville R. Co. *v.* Mitch-

carelessly places himself in a position exposed to danger, and it is discovered by the carrier in time to avoid the injury by the use of reasonable care on its part, and it fails to use such care, that failure may be found to be the sole cause of the resulting injury.[6] The contributory negligence of a passenger will not

ell, 138 Ky. 190, 127 S. W. 770; Kentucky Cent. R. Co. *v.* Dills (Ky.), 4 Bush 593.

Maryland.—Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69; People's Pass. R. Co. *v.* Green, 56 Md. 84; Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Michigan.—Fox *v.* Michigan Cent. R. Co., 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336.

Missouri.—McKeon *v.* Citizens' R. Co., 42 Mo. 79; Morrissey *v.* Wiggins Ferry Co., 43 Mo. 380, 97 Am. Dec. 402.

New Hampshire.—Wheeler *v.* Grand Trunk R. Co., 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

New York.—Gonzales *v.* New York, etc., R. Co., 39 How. Prac. 407, reversing 31 N. Y. Super. Ct. 506.

North Carolina.—Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

Pennsylvania. — Boulfrois *v.* United Tract. Co., 210 Pa. 263, 59 Atl. 1007, 105 Am. St. Rep. 809, 2 Am. & Eng. Ann. Cas. 938.

Texas.—Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669, affirmed in 93 Tex. 690, no op.; St. Louis, etc., R. Co. *v.* Cannon (Tex. Civ. App.), 81 S. W. 778, affirmed in 98 Tex. 630, no op.; Clairborne *v.* Missouri, etc., R. Co., 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336; Houston, etc., R. Co. *v.* Clemmons, 55 Tex. 88, 40 Am. Rep. 799; Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142; Gulf, etc., R. Co. *v.* Fox (Tex.), 6 S. W. 569; Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83, quoting 6 Wait's Actions and Defenses, p. 583.

Virginia.—Farley *v.* R. & D. R. Co., 81 Va. 783; Virginia Mid. R. Co. *v.* Barksdale, 82 Va. 330; Virginia, etc., R. Co. *v.* White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

West Virginia.—Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Rudd *v.* Richmond, etc., R. Co., 80 Va. 546; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732; Johnson *v.* B. & O. R. Co., 25 W. Va. 570.

The rule that the negligence of the injured party, which proximately contributes to the injury, precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. Railroad Co. *v.* Kassen, 49 O. St. 230, 31 N. E. 282, 16 L. R. A. 674, affirming 19 Wkly. L. Bull. 25, 10 O. Dec. Reprint 133.

Though the contributory negligence of a passenger will relieve the carrier of the duty to exercise that extreme care ordinarily exacted, it still leaves it liable for failure to use ordinary precautions for the safety of such passenger after his danger has been discovered, or brought to its notice, if by its use the injury can be avoided. Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

6. Chunn *v.* City, etc., Railway, 207 U. S. 302, 52 L. Ed. 219, 28 S. Ct. 63, 12 Am. & Eng. Ann. Cas. 595; Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 35 L. Ed. 270, 11 S. Ct. 653; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 36 L. Ed. 485, 12 S. Ct. 679; Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 583, 37 L. Ed. 284, 13 S. Ct. 557.

Notwithstanding the plaintiff, a passenger on defendant's car, may have been guilty of negligence in exposing himself to the risk of injury, if that injury was nevertheless proximately and immediately caused by the gross neglect of the defendant in not avoiding such injury after having had notice of the plaintiff's danger, a recovery may be had. Chicago City R. Co. *v.* Schmidt, 117 Ill. App. 213, judgment affirmed in 75 N. E. 383, 217 Ill. 396.

Though plaintiff was guilty of contributory negligence, yet if the conductor and driver, after seeing his dangerous position, failed to exercise reasonable diligence in guarding against injury to plaintiff, he would be entitled to recover. Holohan *v.* Washington, etc., R. Co., 8 Mackey (19 D. C.) 316.

Where the employees of a railroad company operating its train have notice, such as a person of ordinary prudence would believe and act upon, that a passenger has stepped or fallen from the train, while moving at a high rate of speed, onto the track, where he is exposed to the danger of injury from another of its trains, the company must observe due care to prevent his being so injured, although he was guilty of negligence in so stepping or falling from the train, and this was known to the employees thereon; and, if it fails to stop the train from which the passenger fell, and remove him from the track, if it can be done without danger to those on the train, or to notify those in charge of the train from which he is in danger of receiving injury, or adopt some other reasonable precaution to avoid injury to him, the omission, if injury in conse-

shield the carrier from liability for a willful or intentional injury to him inflicted by a servant of the carrier, or where the injury results from a servant's negligence marked by gross or willful misconduct.[7] But a passenger in the caboose of a freight train who gets into controversy with a brakeman over certain bedding, claimed by the brakeman as his own, and who strikes the brakeman, can not recover of the railroad company for injuries received in the ensuing fight.[8]

§ 2695. Care Required of Passengers in General.—A passenger may assume that the carrier has exercised the highest degree of care in providing for his safety, and whether a passenger, injured by the failure of the carrier to fulfill its duty is guilty of contributory negligence depends on the circumstances surrounding him at the time.[9] A passenger is required to exercise ordinary or reasonable care to avoid injury,[10] and if, by doing so, he could have

quence ensue, is actionable negligence. Railroad Co. *v.* Kassen, 49 O. St. 230, 31 N. E. 282, 16 L. R. A. 674, affirming 19 Wkly. L. Bull. 25.

Though negligence of a passenger contributed to his being thrown from a train, yet, the carrier having left him on the ground in the hot sun and rain for three hours without attention, when it was only four or five miles to the next station, it is liable for the damages suffered by him through its neglect to give him proper attention after the accident. Yazoo, etc., R. Co. *v.* Byrd, 89 Miss. 308, 42 So. 286.

7. Carrier's liability for willful or intentional injury or gross negligence of its servant.—Montgomery *v.* Colorado Springs, etc., R. Co., 50 Colo. 210, 114 Pac. 659; Illinois Cent. R. Co. *v.* Brown, 77 Miss. 338, 28 So. 949; Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

Contributory negligence is no defense to a suit for wanton negligent injury to a street railway passenger. Harrell *v.* Columbia Elect. St. R., etc., Co., 71 S. E. 359, 89 S. C. 97.

A motorman who realizes the helpless condition and peril of an intending passenger asleep on the track at a station in time to avoid injuring him, but recklessly runs over him, is guilty of wanton negligence rendering his employer liable. Tempfer *v.* Joplin, etc., R. Co., 131 Pac. 592, 89 Kan. 374.

If a brakeman sees a passenger's hand in a dangerous position, and closes the door on it regardless of consequences, the passenger's negligence will not relieve the company from liability. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

8. Carrier not liable for injuries to passenger received in fight with brakeman.—Arnold *v.* Atchison, etc., R. Co., 106 Pac. 42, 81 Kan. 530.

9. Whether passenger is guilty of contributory negligence depends on circumstances surrounding him.—Illinois Cent. R. Co. *v.* Daniels, 96 Miss. 314, 50 So. 721, 27 L. R. A., N. S., 128.

10. Passenger required to exercise ordinary or reasonable care.—*United States.*—Mackoy *v.* Missouri Pac. R. Co., 18 Fed. 236.

Illinois.—Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608; West Chicago, etc., R. Co. *v.* Horne, 100 Ill. App. 259, affirmed 197 Ill. 250, 64 N. E. 331.

Indiana.—Jeffersonville R. Co. *v.* Hendrick, 26 Ind. 228; Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 Am. & Eng. Ann. Cas. 1, 16 L. R. A., N. S., 527, rehearing denied 84 N. E. 13.

Louisiana.—Clerc *v.* Morgan's, etc., R. Co., 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319.

Maryland.—Topp *v.* United, etc., Elect. Co., 99 Md. 630, 59 Atl. 52;

Minnesota.—Smith *v.* Paul, etc., R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Farrell *v.* Great Northern R. Co., 111 N. W. 388, 100 Minn. 361, 9 L. R. A., N. S., 1113.

Ohio.—Interurban R., etc., Co. *v.* Hancock, 78 N. E. 964, 75 O. St. 88, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

South Carolina.—Carroll *v.* Charleston, etc., R. Co., 65 S. C. 378, 43 S. E. 870; McLean *v.* Atlantic, etc., R. Co., 81 S. C. 100, 61 S. E. 900, 1071, 18 L. R. A., N. S., 763.

Texas.—Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573; Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525; St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756; St. Louis, etc., R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315; Texas, etc., R. Co. *v.* Cole, 66 Tex. 562, 1 S. W. 629;

Virginia.—Pendleton *v.* Richmond, etc., R. Co., 104 Va. 813, 52 S. E. 574.

A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of care to save the passenger from harm. Rehearing 82 N. E. 1025, denied. Cleveland, etc., R. Co. *v.* Hadley, 84 N. E. 13, 170 Ind. 204, 82 N. E. 1025, 16 Am. & Eng. Cas. 1, 16 L. R. A., N. S., 527.

It is the duty of a passenger in an elevator to use ordinary care to keep from being hurt. Becker *v.* Lincoln Real Estate, etc., Co., 174 Mo. 246, 73 S. W. 581.

prevented the consequences of the carrier's negligence, the carrier can not be held liable therefor.[11] But it is not necessary, in order that a passenger may recover for injuries caused by the negligence of the carrier, that he should have exercised extraordinary diligence.[12] The limit of the passenger's obligation in avoiding injury is ordinary care.[13] The rule requiring ordinary care on the part of a passenger has been embodied in the statute law of some states.[14] But by a Nebraska statute railroad companies are made liable for injuries to passengers, except where the injury was due to the passenger's "criminal negligence."[15] The ordinary care which a passenger is required to exercise has been

11. Carrier not liable if passenger could have prevented injury by exercising ordinary care.—Atlantic, etc., R. Co. *v.* Johnson, 125 Ga. 483, 54 S. E. 91; Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979; Southern R. Co. *v.* Barfield, 115 Ga. 724, 42 S. E. 95; Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

A passenger is bound to use ordinary care to avoid injury, and, if by failure to do so he directly contributes to the injury, he can not recover. Jeffersonville R. Co. *v.* Hendrick, 26 Ind. 228; Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

To render a carrier liable for injuries to a passenger, the carrier's negligence must have mediately or immediately produced the injuries, and the passenger must have been free of any want or ordinary care and prudence directly contributing to the injuries. Jacksonville, St. R. Co. *v.* Chappell, 21 Fla. 175.

A carrier, though far more than slightly negligent and far from using extraordinary diligence in its care for a passenger may absolve itself from liability for injuries received by him by showing that when he was endangered by its negligence he could have avoided the consequences by the exercise of ordinary care. Central R. Co. *v.* Thompson, 76 Ga. 770.

Where the plaintiff in an action for damages does not prove his case as laid in his petition, but, on the contrary, affirmatively shows that he could, by the exercise of ordinary care, have avoided injury, and that the injury was not really attributable to the alleged negligence of the company, a verdict for the plaintiff should be set aside. Southern R. Co. *v.* Barfield, 115 Ga. 724, 42 S. E. 95.

12. Passenger not required to exercise extraordinary diligence.—Macon, etc., R. Co. *v.* Moore, 108 Ga. 84, 33 S. E. 889.

13. Limit of passenger's obligation in avoiding injury is ordinary care.—*Indiana.*—Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 Am. & Eng. Ann. Cas. 1, 16 L. R. A., N. S., 527, rehearing denied 84 N. E. 13.

Louisiana.—Clerc *v.* Morgan's etc., R. Co., 31 So. 886, 107 La. 370, 90 Am. St. Rep. 319.

Maryland.—Topp *v.* United, etc., Elect. Co., 59 Atl. 52, 99 Md. 630.

New York.—Sheridan *v.* Brooklyn, etc., R. Co., 36 N. Y. 39, 34 How. Prac. 217, 93 Am. Dec. 490.

South Carolina.—Carroll *v.* Charleston, etc., R. Co., 43 S. E. 870, 65 S. C. 378.

Texas.—St. Louis, etc., R. Co. *v.* Foster, 46 Tex. Civ. App. 517, 103 S. W. 194, affirmed in 102 Tex. 591, no op.; Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573; Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525; St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266; Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017; Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756, reversing 35 S. W. 31; St. Louis, etc., R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315.

A passenger is bound to exercise ordinary care only for his personal safety, and not to do any possible thing which, in the exercise of ordinary care, does not occur to him or seem feasible. West Chicago, etc., R. Co. *v.* Horne, 100 Ill. App. 259, judgment affirmed in 64 N. E. 331, 197 Ill. 250.

A passenger on a railway train has a right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation with its necessary incidents, and while passively submitting himself to the carrier's care during the journey, and while entering upon or leaving its cars in the usual place and ordinary time and manner, he is not to be deemed guilty of negligence unless knowledge of a defect or peril is thrust upon him, and he then fails to use ordinary care to avoid injury. Ohio, etc., R. Co. *v.* Stansberry, 32 N. E. 218, 132 Ind. 533.

14. Under the Georgia statute, Code of 1882, § 2972, the plaintiff can never recover in an action for personal injuries no matter what the negligence of the defendant may be, short of actual wantonness when the proof shows that he could, by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to himself of that negligence. Americus, etc., R. Co. *v.* Luckie, 87 Ga. 6, 13 S. E. 105.

15. Rule under Nebraska statute.—Comp. St. c. 72, art. 1, § 3.

Under this statute the term "criminal negligence" means "gross negligence," such as amounts to reckless disregard of one's own safety, and a willful indiffer-

defined to be such care as persons of ordinary prudence and intelligence would exercise under the same circumstances.[16] A carrier is not responsible for injuries which were the proximate result of a passenger's negligent failure to use his natural senses for his own safety.[17] Slight negligence on a passenger's part is not incompatible with due and ordinary care.[18] But the negligence that will preclude a passenger from recovering for personal injuries need not amount to rashness.[19] The degree of care which may be termed ordinary care varies according to the more or less threatening circumstances.[20] The character of the train and its method of operation, known to the plaintiff, are circumstances for the consideration of the jury in determining whether he exercised ordinary care or not. But a request to charge which would make the exercise of ordinary care on the part of a passenger dependent entirely on what was usual or customary with the railroad, without reference to his knowledge of it, or to the circumstances of the particular case, is properly refused.[21] But it has been held that railroad passengers are presumed to know the every day incidents of railway travel, and that it can not be expected that they will be treated, or put under restraint, as if they were children.[22] And a street car passenger, familiar with the railway at the place of the accident and the operation of cars there, is bound to avail himself of such knowledge.[23]

Care Required of Passengers on Mixed Trains.—A passenger on a mixed train must exercise care commensurate with the increased dangers ordinarily

ence to the consequences liable to follow. Omaha, etc., R. Co. *v.* Chollette, 33 Neb. 143, 49 N. W. 1114; Chicago, etc., R. Co. *v.* Landauer, 36 Neb. 642, 54 N. W. 976; Chicago, etc., R. Co. *v.* Winfrey, 67 Neb. 13, 93 N. W. 526. See, also, Clark *v.* Zarniko, 106 Fed. 607, 45 C. C. A. 494.

16. Ordinary care defined.—Chesapeake, etc., R. Co. *v.* Robinson, 135 Ky. 850, 123 S. W. 308; Pomroy *v.* Bangor, etc., R. Co., 102 Me. 497, 67 Atl. 561.

A passenger must exercise such care for his own safety as may be reasonably expected of a person of ordinary prudence situated as he was. Illinois Cent. R. Co. *v.* Dallas, 150 S. W. 536, 150 Ky. 442.

The rule for determining whether a passenger has failed to exercise the proper degree of care is whether a person of ordinary prudence, in the same situation and having the knowledge possessed by the passenger, would have done the alleged negligent act. Clerc *v.* Morgan's, etc., R. Co., 31 So. 886, 107 La. 370, 90 Am. St. Rep. 319.

17. Passenger must use his natural senses for his own safety.—Fraser *v.* California, etc., R. Co., 146 Cal. 714, 81 Pac. 29.

Though a passenger on a railroad train has the right to rely upon the performance by the carrier of its duty to exercise the utmost degree of care and skill which human foresight and prudence can suggest, he is not thereby relieved from the duty of using his own senses of sight, hearing, and perception. Judgment 34 N. Y. S. 1072, 89 Hun 75, reversed. Piper *v.* New York, etc., R. Co., 50 N. E. 851, 156 N. Y. 224, 41 L. R. A. 724, 66 Am. St. Rep. 560.

18. Slight negligence not incompatible with due and ordinary care.—Chicago City R. Co. *v.* Dinsmore, 162 Ill. 658, 44 N. E. 887; Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573.

19. Negligence that will preclude recovery need not amount to rashness.—Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

But in Nebraska it has been held that contributory negligence on the part of a passenger, which will avoid a recovery, must be an act committed under such circumstances as to make it obviously perilous and to show a willful disregard of the danger. Chicago, etc., R. Co. *v.* Winfrey, 93 N. W. 526, 67 Neb. 13.

20. What amounts to ordinary care varies according to circumstances.—West Chicago, etc., R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958, affirming 70 Ill. App. 239.

"It is not the least degree of fault on the part of plaintiff that will prevent him from a recovery; but it must be such a degree as to amount to a want of ordinary or reasonable care on his part, under the circumstances at the time of the injury." Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83, quoting Houston, etc., R. Co. *v.* Gorbett, 49 Tex. 573.

21. Circumstances to be conisdered in determining whether passenger exercised ordinary care.—Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979.

22. Passengers presumed to know every-day incidents of railway travel.—Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566.

23. Passenger bound to avail himself of knowledge as to railway and operation of cars.—Elliott *v.* Wilmington City R. Co. (Del.), 6 Pen. 570, 73 Atl. 1040.

incident to the management of such trains, but he is entitled to have his conduct determined in reference to such trains when properly managed, and he is not required to anticipate extraordinary dangers incident to the carrier's negligence.[24]

Care Required of Passengers on Freight Trains.—The discomforts and dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers.[25]

§§ 2696-2699. Care Required of Children and Others under Disability—§ 2696. Children.—A child is not bound to the same degree of care and prudence as an adult, his capacity being the measure of his responsibility;[26] but to entitle him to recover from a carrier for personal injuries received while a passenger, he must have acted with reasonable care and diligence for one of his years;[27] that is, with such care and caution as might have been reasonably expected from one of his age, experience and intelligence.[28] A passenger seventeen years of age should not be treated, with respect to her duty to care for her own safety, as a child of tender years, but as a person who is presumptively chargeable with the exercise of the ordinary discretion possessed by young persons of her class and condition.[29] But a passenger who is between sixteen and seventeen years of age is not chargeable with knowledge of the seating capacity of cars.[30] In Ohio and Texas the contributory negligence of a parent can not be imputed to a child, so as to defeat a recovery against a carrier for injuries to the child resulting from the carrier's negligence.[31]

§ 2697. Intoxicated Persons.—The intoxication of a passenger does not per se constitute contributory negligence,[32] and is immaterial as affecting his right to recover for injuries resulting from the negligence of the carrier, un-

24. Care required of passengers on mixed trains.—Suttle *v.* Southern R. Co., 150 N. C. 668, 64 S. E. 778.

25. Care required of passengers on freight trains.—Harris *v.* Hannibal, etc., R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111.

26. The responsibility of a child measured by his capacity.—Philadelphia City Pass. R. Co. *v.* Hassard, 75 Pa. 367.

27. Child must exercise reasonable care and diligence for one of his years.—Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 14 S. W. 760, affirming 13 S. W. 889; Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315.

In an action to recover for injuries to a minor it is proper to instruct that the degree of diligence which the law requires of him is that care which would reasonably be expected of one of his age and capacity. Georgia, etc., R. Co. *v.* Watkins, 97 Ga. 381, 24 S. E. 34.

28. Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7; Sly *v.* Union Depot R. Co., 134 Mo. 681, 36 S. W. 235; Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

29. East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 17 S. E. 949. See, also, Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952.

30. Not chargeable with knowledge of seating capacity of cars.—Farnon *v.* Boston, etc., R. Co., 180 Mass. 212, 62 N. E. 254.

31. Negligence of parent can not be imputed to child.—*Ohio.*—Cleveland, etc., R. Co. *v.* Manson, 30 O. St. 451.

Texas.—Allen *v.* Texas, etc., R. Co. (Tex. Civ. App.), 27 S. W. 943; Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518, affirmed in 95 Tex. 688, no op.; G., H. & H. R. Co. *v.* Moore, 59 Tex. 64; Williams *v.* T. & P. R. Co., 60 Tex. 205; Northern Texas Tract. Co. *v.* Roye, 38 Tex. Civ. App. 601, 86 S. W. 621, affirmed in 101 Tex. 651, no op. See also, Texas Cent. R. Co. *v.* Stewart, 1 Tex. Civ. App. 642, 20 S. W. 962, affirmed in 93 Tex. 673, no op.

32. Intoxication does not per se constitute contributory negligence.—Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603; Louisville, etc., R. Co. *v.* Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

The mere fact that a passenger at the time he was injured was intoxicated is not in itself evidence of contributory negligence. Trumbull *v.* Erickson, 38 C. C. A. 536, 97 Fed. 891.

Since the intoxication of a plaintiff at the time he received a personal injury is not negligence as a matter of law, where plaintiff alleged that the injury was cased by his being pushed from defendant's street car by the conductor, an instruction that he could not recover if he was intoxicated was erroneous. Kingston *v.* Fort Wayne, etc., R. Co., 70 N. W. 315, 112 Mich. 40, 40 L. R. A. 131; S. C., 74 N. W. 230.

less it contributed to the injury,[33] and was the proximate cause thereof.[34] But voluntary intoxication does not relieve a passenger from the duty of exercising reasonable care,[35] and is a circumstance to be considered in determining whether the passenger, by his own conduct, brought the injury on himself.[36] If the intoxication of the passenger contributed to his injury,[37] and was the proximate cause thereof,[38] he can not recover. But where a railroad company accepts an unattended passenger who is so drunk as to be unable to take care of himself, and has knowledge of such condition when it accepts him as a passenger, the question of contributory negligence can not arise when he is injured.[39]

§ 2698. Blind Persons.—The care to be observed by one who is blind, traveling alone on railroad trains, is greater than that required of one without such infirmity.[40] But the fact that a passenger, killed by collision with another train, was almost blind, and was traveling unattended, does not make him chargeable with contributory negligence, in that, even if sight would have enabled him

33. Intoxication immaterial unless it contributed to injury and was the proximate cause thereof.—*Arkansas.*—Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540, so held where the passenger was injured by being thrown from the train.

Illinois.—Wilcke *v.* Henrotin, 241 Ill. 169, 89 N. E. 329.

New York.—Milliman *v.* New York, etc., R. Co., 4 Hun 409, 6 Thomp. & C. 585, affirmed in 66 N. Y. 642.

Washington.—Rangenier *v.* Seattle Elect. Co., 52 Wash. 401, 100 Pac. 842.

Where an injury to a passenger is due, not to his drunken condition, but to the carrier's breach of duty, the carrier is liable. Cincinnati, etc., R. Co. *v.* Cooper, 22 N. E. 340, 120 Ind. 469, 6 L. R. A. 241, 16 Am. St. Rep. 334.

In a suit by a passenger for personal injuries resulting from the derailment of a train the fact that he was intoxicated would not affect his right to recover if his condition did not contribute to his injury or to the degree of it, nor should it count against him as disqualifying him to avoid the consequences of the carrier's negligence if the circumstances were such that a prudent sober man could not have avoided them by the exercise of ordinary diligence. Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 21 S. E. 66.

That a street car passenger was intoxicated would not prevent a recovery for injuries caused by derailment; his intoxication not contributing thereto. Coburn *v.* Moline, etc., R. Co., 90 N. E. 741, 243 Ill. 448.

34. Davis *v.* Oregon, etc., R. Co., 8 Ore. 172.

If the voluntary intoxication of a passenger was well known to the carrier's servants, and their act was the direct and a proximate cause of the injury, the carrier is liable. Black *v.* New York, etc., R. Co., 79 N. E. 797, 193 Mass. 448, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

35. Intoxication does not relieve from duty of exercising reasonable care.—Wilcke *v.* Henrotin, 241 Ill. 169, 89 N. E. 329; Missouri Pac. R. Co. *v.* Evans, 71 Tex. 361, 368, 9 S. W. 325, 1 L. R. A. 476.

But in Washington, in an action against a street car company for wrongful death resulting from defendant's alleged negligence in setting down decedent from its train while intoxicated at an unsafe place, an instruction assuming that acts which would be negligence if committed by sober persons are also negligence when committed by an intoxicated one was held to be erroneous. Sullivan *v.* Seattle Elect. Co., 86 Pac. 786, 44 Wash. 53.

36. Intoxication should be considered in determining whether passenger brought injury on himself.—Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536; Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603; Milliman *v.* New York, etc., R. Co., 4 Hun 409, 6 Thomp. & C. 585, affirmed 66 N. Y. 642.

37. If intoxication contributed to injury, and was the proximate cause thereof, passenger can not recover.—Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, 19 Am. & Eng. R. Cas. 321; Milliman *v.* New York, etc., R. Co., 66 N. Y. 642; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408; Maguire *v.* Middlesex R. Co., 115 Mass. 239.

38. Black *v.* New York, etc., R. Co., 193 Mass. 448, 79 N. E. 797, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

Where a drunken passenger is put off a train at a place where he could, by ordinary care, have avoided injury, he can not recover for injuries received from following the train. Missouri Pac. R. Co. *v.* Evans, 71 Tex. 361, 368, 9 S. W. 325, 1 L. R. A. 476.

39. Circumstances precluding question of contributory negligence from arising—Price *v.* St. Louis, etc., R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79.

40. Care required of blind persons.—Denver, etc., R. Co. *v.* Derry, 108 Pac. 172, 47 Colo. 584, 27 L. R. A., N. S., 761.

to escape, his blindness was not the proximate cause of his injury, but only a condition that made it possible.[41]

§ 2699. Persons in Feeble Health.—Notice to a railroad conductor that a passenger on his train is in feeble health is notice to the corporation, and the omission by the passenger to repeat such notice to another conductor, who takes charge of the train before the end of the journey, does not constitute contributory negligence precluding a recovery for injuries resulting from the passenger's being obliged to walk to a station from the train, which did not stop until it had passed his station.[42]

§ 2700. Disobedience of Rules or Regulations of Carrier.—A passenger must, at his peril, conform to the reasonable rules and regulations of the carrier made for the government of his conduct, and of which he has knowledge, and if his violation of such a rule or regulation causes or proximately contributes to his injury, it constitutes such contributory negligence as to prevent recovery against the carrier for the negligence of the latter.[43] But a pas-

41. St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 21 S. W. 472.

42. Facts not constituting contributory negligence by person in feeble health.—Foss *v.* Boston, etc., R. Co., 66 N. H. 256, 21 Atl. 222, 11 L. R. A. 367, 49 Am. St. Rep. 607.

43. Effect of disobedience of rules or regulations of carrier.—*United States.*—Chicago, etc., R. Co. *v.* Myers, 80 Fed. 361; Jencks *v.* Coleman, 2 Sumn. 221, Fed. Cas. No. 7258; New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

Alabama.—Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285, 46 So. 747; Birmingham R., etc., Co. *v.* Stallings, 154 Ala. 527, 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319, 45 So. 650; McCaulay *v.* Tennessee, etc., R. Co., 93 Ala. 356, 9 So. 611.

California.—Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Florida.—Florida, etc., R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. Rep. 506.

Illinois.—Chicago, etc., R. Co. *v.* Rielly, 40 Ill. App. 416; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608.

Iowa.—State *v.* Chovin, 7 Iowa 204; Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 20 Am. & Eng. R. Cas., N. S., 464, 84 N. W. 1042.

Kansas.—Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Maryland.—Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277; Baltimore City Pass. R. Co. *v.* Wilkerson, 30 Md. 224; Baltimore, etc., Turnpike Road *v.* Cason, 72 Md. 377, 20 Atl. 113; State *v.* Lake Roland, etc., R. Co. 84 Md. 163, 34 Atl. 1130.

Massachusetts.—McDonough *v.* Boston Elevator R. Co., 191 Mass. 509, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641, 78 N. E. 141; Tompkins *v.* Boston Elevated R. Co., 201 Mass. 114, 32 R. R. R. 487, 55 Am. & Eng. R. Cas., N. S., 48, 87 N. E. 488, 20 L. R. A., N. S., 1063; Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; Burus *v.* Boston Elevated R. Co., 183 Mass. 96, 66 N. E. 418; Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 38 L. R. A., N. S., 689; Pike *v.* Boston Elevated R. Co., 192 Mass. 426, 78 N. E. 497.

Missouri.—Whitehead *v.* St. Louis, etc., R. Co., 22 Mo. App. 60.

Montana.—Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 36 L. R. A., N. S., 1139, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 410.

North Carolina.—Denny *v.* North Carolina R. Co., 132 N. C. 340, 43 S. E. 847.

Ohio.—Cincinnati, etc., R. Co. *v.* Lohe, 68 O. St. 101, 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S., 447, 67 N. E. 161; Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580.

Pennsylvania.—Drake *v.* Pennsylvania R. Co., 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883; Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

Texas.—Houston, etc., R. Co. *v.* Stell, 28 Tex. Civ. App. 280, 67 S. W. 537, 7 R. R. R. 722, 26 Am. & Eng. R. Cas., N. S., 722; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

Vermont.—Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

Washington.—Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 3 R. R. R. 493, 60 Am. & Eng. R. Cas., N. S., 493, 108 Pac. 604, 31 L. R. A., N. S., 991, Olson *v.* Northern Pac. R. Co., 49 Wash. 626, 29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705, 96 Pac. 150, 18 L. R. A., N. S., 209.

West Virginia.—Boston *v.* Chesapeake,

senger can not be charged with negligence in violating a rule of the carrier, unless such rule was brought to his knowledge, either expressly or by necessary implication.[44] But he is bound to obey the reasonable regulations of the carrier, in so far as conditions will permit, if the circumstances are such that he ought to have had notice of them.[45] Thus, if all a carrier's cars contain printed regulations made for the protection of passengers, and a passenger who has used the line frequently, and can read is injured as a result of his disobedience of such regulations, he is guilty of contributory negligence precluding his recovery, though he testifies that he has never seen the regulations.[46] But a passenger can not be charged with knowledge of a regulation, where it had not been brought expressly to his knowledge, and had not been published or posted,[47] or had been posted so inconspicuously as to make it improbable that it would attract his attention.[48] If a passenger's injuries are in no wise traceable to his breach of the carrier's rules, the carrier is not freed from liability.[49] And where

etc., R. Co., 36 W. Va. 318; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Wisconsin.—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

Since a carrier is held to the highest degree of care for the safety of its passengers consistent to carrying on its business, passengers, in order to be entitled to such care, are bound to conform to all reasonable regulations of the carrier applicable to the circumstances in question. Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 38 L. R. A., N. S., 689; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

In a contract for transportation, there is an implied agreement that the passenger will obey the reasonable rules of the carrier and where the passenger purposely violates such a rule, and is thereby injured, he can not recover damages from the carrier in an action on such a contract. Cincinnati, etc., R. Co. *v.* Lohe, 68 O. St. 101, 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S., 447, 67 N. E. 161.

Parcels in street cars unaccompanied by passenger.—If an accident occur in consequence of violating a regulation of a street railway company which prohibits the conveyance of baskets or parcels unaccompanied by a passenger, a passenger participating in such violation, and so sustaining injury, will be debarred from recovering therefor, if it be shown that he had knowledge of the regulation. Baltimore City Pass. R. Co. *v.* Wilkerson, 30 Md. 224.

44. Violating rule not negligence unless it was brought to passenger's knowledge.—Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Ft. Wayne Tract. Co. *v.* Hardendorf, 164 Ind. 403, 72 N. E. 593; Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 44 R. R. R. 632, 67 Am. & Eng. R. Cas., 632, 38 L. R. A., N. S., 689.

45. Passenger bound to obey regulations if under circumstances he ought to have had notice of them.—Judgment, 76 Ill. App. 613, affirmed in Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608.

46. Baltimore, etc., Turnpike Road *v.* Cason, 72 Md. 377, 20 Atl. 113. See, also, State *v.* Lake Roland, etc., R. Co., 84 Md. 163, 34 Atl. 1130.

47. When passenger can not be charged with knowledge of a regulation.—Western, etc., R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

48. Cutts *v.* Boston Elevated R. Co., 202 Mass. 450, 89 N. E. 21.

A street railway company posted a notice containing the rule that "all persons entering or leaving this car while it is in motion or by the front platform do so at their own risk" on the outside of the car, below the windows opening onto the platforms. The rule was set out in the two lower lines of the notice, which in all consisted of five lines, and was at a height, above the floor, between the knee and the waist of an ordinary man. It would not be seen by a passenger who went immediately into the car, but only by a passenger on the platform, and as to him it would be partly hidden by the gate, when shut across it, and by passengers standing in front of it. Held, that the rule was not properly posted. Cutts *v.* Boston Elevated R. Co., 89 N. E. 21, 202 Mass. 450.

49. Violation of rules not cause of injury.—New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

Where the injuries to a passenger on a steamer were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, he was not precluded from claiming the benefit of the contract for safe transportation. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

The passenger may claim protection

it is customary for passengers to disregard a rule of the carrier, a breach of the rule will not necessarily bar recovery.[50]

§ 2701. Violation of Conditions in Contract of Carriage.—A passenger, whose injuries are due to his violation of conditions in his contract of carriage, has no right of action against the carrier for such injures.[51] But where a clause in a contract or ticket provides that the passenger is to remain in a particular car while the train is in motion, this does not bar him from recovering for injuries received by a jerk or jolt, while the train was not moving forward, and while he was not in the place designated.[52]

§ 2702. Disregarding Directions or Warning of Carrier's Employees.—A passenger is bound to obey all reasonable orders or directions of the carrier intended for the protection of passengers, and the carrier may assume that he will obey them. And the carrier owes him no duty to provide for his safety when acting in disobedience. Therefore, the neglect of his duty by a passenger in disregarding the reasonable directions or warnings of an employee of the carrier, acting within the scope of his authority, will, in the absence of a good reason for it, prevent his recovery for an injury growing out of it.[53] But a passenger will not be precluded from recovering from a carrier in an action

for safe transportation in respect to an injury done him by the company's servants while he was upon a part of the boat other than that to which he was restricted by the rule or regulation printed on his ticket. A violation of such a rule gives the carrier the right to compel him to conform to its regulation, or, upon his refusing to do so, to require him to leave the boat, using, in either case, only such force as the circumstances reasonably justify. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

50. Effect of custom to disregard rule.—Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting the requirement to be generally disregarded, and then proceeding upon the theory that every one is bound to comply with it; if the custom of passengers to disregard a rule is so common as to charge the servants of the road with notice of it, it is either their duty to take active measure to enforce the rule, or to so manage their trains as to render it safe to disregard it. Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

51. Effect of violation of conditions in contract of carriage.—Texas, etc., R. Co. *v.* Reeder, 170 U. S. 530, 42 L. Ed. 1134, 18 S. Ct. 705; New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. Ed. 1049, 7 S. Ct. 1039.

52. Clause requiring passenger to occupy certain place while train is in motion.—Texas, etc., R. Co. *v.* Reeder, 170 U. S. 530, 42 L. Ed. 1134, 18 S. Ct. 705.

A clause in a contract for the carriage of live stock providing that the person in charge of the live stock covered by the contract shall remain in the caboose car attached to the train while the same is in motion, does not deprive the person in charge of the stock of the right to attend to his stock whenever the train is not in motion whatever may have been the cause of its stoppage, and whether the same occurred at a station or not although the stipulation is intended to permit such person to visit the stock cars only where the train is at a regular station. Hence where the drover was injured by a jar or jolt occurring while the train was not in motion it was held that he was not guilty of contributory negligence or barred from recovery by the clause in the contract. "By the word motion," said the court, "as here used is intended that continuous movement of the cars towards their destination which is commonly understood when we speak of moving trains or trains in motion." Texas, etc., R. Co. *v.* Reeder, 170 U. S. 530, 42 L. Ed. 1134, 18 S. Ct. 705.

But it has been held that where a cattle shipper riding on free transportation agrees to remain in the caboose while the train is moving, to get off only when it is stationary, and not to get on freight cars, he must ascertain whether he has time to examine his stock at stopping places, and return to the caboose before the train proceeds. Leslie *v.* Atchison, etc., R. Co., 82 Kan. 152, 107 Pac. 765, 27 L. R. A., N. S., 646.

53. Passenger can not recover for injuries resulting from disregarding directions or warning of carrier's employee.—*California.*—Campbell *v.* Los Angeles R. Co., 135 Cal. 137, 67 Pac. 50.

Illinois.—Harvey *v.* Chicago, etc., R. Co., 221 Ill. 242, 77 N. E. 569, affirming 116 Ill. App. 507, and 123 Ill. App. 442; Ohio, etc., R. Co. *v.* Schiebe, 44 Ill. 460.

Massachusetts.—Dodge *v.* Boston, etc.,

for injuries alleged to have resulted from the carrier's negligence, though at the time of the injury he was disobeying a reasonable order intended for his safety, if such disobedience did not cause or contribute to the injury.[54] A passenger's failure to heed a warning which he did not hear,[55] or did not understand,[56] does not constitute contributory negligence which will preclude a recovery from the carrier, even though it contributed to cause his injury. Since a person riding on a footboard of an electric street car is not required to anticipate danger from the close proximately to the track of trolley poles, his failure to listen for warnings by the conductor to watch out for such poles does not render him guilty of contributory negligence.[57] In an action by a passenger on a grip car for injuries caused by a sudden flying back of a brake lever, his failure to obey the gripman's request to stand back was held not to be negligence per se, where the car was crowded, and he was not informed of the danger.[58]

§ 2703. Acts by Permission or Direction of Carrier's Employees.— As a general rule a passenger is not guilty of contributory negligence in obeying the direction or acting upon the permission of an employee of the carrier acting within the scope of his authority, and if he receives injury in doing so the carrier is liable, even if it appears that if he had not so acted he would have escaped injury.[59] But if obedience to the direction, or acting upon the permis-

Steamship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

Michigan.—Nieboer *v.* Detroit Elect. Railway, 128 Mich. 486, 87 N. W. 626.

Minnesota.—Rolette *v.* Great Northern R. Co., 91 Minn. 16, 97 N. W. 431.

Missouri.—Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

Pennsylvania.—Rager *v.* Pennsylvania R. Co., 229 Pa. 335, 78 Atl. 827.

Washington.—White *v.* Peninsular R. Co., 20 Wash. 132, 54 Pac. 999.

West Virginia.—Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

While the conductor is supreme in authority on a railway train, and may by force compel a passenger to remain in the cars provided for passengers, yet his duty to the passenger does not require him to do so. A request is sufficient; and, if unheeded, and an injury to the passenger results, the carrier is not liable therefor. Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 565, 34 S. W. 485.

Where a passenger, after being warned by the conductor not to do so, entered a car standing at the usual place at a station, and open so as to receive passengers, and which was designed for the train on which he was about to leave, but which was not then coupled to said train, he was guilty of contributory negligence as to any injury sustained by him by reason of boarding said car. Tillett *v.* Lynchburg, etc., R. Co., 115 N. C. 662, 20 S. E. 480.

54. Disobedience of order to preclude recovery must have contributed to injury. — Lawrenceburgh, etc., R. Co. *v.* Montgomery, 7 Ind. 474; Lafayette, etc., R. Co. *v.* Sims, 27 Ind. 59.

55. Passenger not affected by warning he does not hear.—A passenger is justified in taking passage on a crowded excursion train where defendant does not warn persons not to do so; and, even though such warning is given, he is not affected by it if he did not hear it. Lynn *v.* Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

56. Carrier not affected by warning he does not understand.—Walter *v.* C. D. & M. R. Co., 39 Iowa 33.

57. Failure to listen for warnings of unanticipated dangers not contributory negligence.—Elliott *v.* Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208.

58. Failure to obey gripman's request held not negligence per se under circumstances.—Judgment, 77 Ill. App. 142, affirmed in West Chicago, etc., R. Co. *v.* Johnson, 180 Ill. 285, 54 N. E. 334.

59. Acts by permission or direction of carrier's employees not, ordinarily, contributory negligence. — *United States.* — Lehigh Valley R. Co. *v.* Dupont, 64 C. C. A. 478, 128 Fed. 840; Eddy *v.* Wallace, 1 C. C. A. 435, 49 Fed. 801.

Alabama. — Mobile, etc., R. Co. *v.* Walsh, 146 Ala. 295, 40 So. 560; Montgomery, etc., R. Co. *v.* Stewart, 91 Ala. 421, 8 So. 708.

Arkansas.—St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; St. Louis, etc., R. Co. *v.* Person, 49 Ark. 182, 4 S. W. 755; St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

District of Columbia.—Jones *v.* Baltimore, etc., R. Co., 21 D. C. 346.

Georgia.—Southwestern R. Co. *v.* Singleton, 67 Ga. 306; Atlanta, etc., R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437; Southern R. Co. *v.* Bandy, 120 Ga. 463, 47 S. E. 923, 102 Am. St. Rep. 112; Western, etc., Railroad *v.* Wilson, 71 Ga. 22.

Illinois.—Judgment, 65 Ill. App. 435, affirmed. Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901; Chicago, etc.,

sion, of the employee will expose the passenger to a known or apparent danger, such as an ordinarily prudent person would not incur, it will constitute such negligence as will preclude recovery from the carrier for an injury of which it is a contributing cause.[60] A railroad company carrying passengers can not al-

R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224; Chicago City R. Co. *v.* McCaughna, 117 Ill. App. 538, judgment affirmed 216 Ill. 202, 74 N. E. 819; Baltimore, etc., R. Co. *v.* Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A., N. S., 115, affirming judgment, 120 Ill. App. 88.

Indiana.—Louisville, etc., R. Co. *v.* Bisch, 120 Ind. 549, 22 N. E. 662; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 14 N. E. 352, 2 Am. St. Rep. 144, affirming 13 N. E. 122.

Iowa.—Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59; Dieckmann *v.* Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338, reversing on rehearing 105 N. W. 526.

Kentucky.—Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

Louisiana.—Leveret *v.* Shreveport Belt R. Co., 110 La. 399, 34 So. 579; Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

Michigan.—McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724; Mensing *v.* Michigan Cent. R. Co., 117 Mich. 606, 76 N. W. 98; Clinton *v.* Root, 58 Mich. 182, 24 N. W. 667, 55 Am. Rep. 671.

Minnesota.—Olson *v.* St. Paul, etc., R. Co., 45 Minn. 536, 48 N. W. 445, 22 Am. St. Rep. 749.

Missouri.—McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739; McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170; Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

New York.—28 N. Y. S. 865, 78 Hun 252, reversed. Distler *v.* Long Island R. Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; Filer *v.* New York Cent. R. Co., 59 N. Y. 351; Abbey *v.* New York Cent., etc., R. Co. (N. Y.), 20 Wkly. Dig. 37.

North Carolina.—Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Watkins *v.* Raleigh, etc., R. Co., 116 N. C. 961, 21 S. E. 409.

Ohio.—Cleveland, etc., R. Co. *v.* Manson, 30 O. St. 451.

Pennsylvania. — Delaware, etc., Canal Co. *v.* Webster (Pa.), 6 Atl. 841, 3 Sad. 280; Reber *v.* Pittsburg, etc., Tract. Co., 179 Pa. 339, 36 Atl. 245, 57 Am. St. Rep. 599; O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. 239, 98 Am. Dec. 336; Hanover Junction, etc., R. Co. *v.* Anthony (Pa.), 3 Walk. 210; West Philadelphia, etc., R. Co. *v.* Gallagher, 108 Pa. 524.

South Carolina.—Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16.

Tennessee.—East Tennessee, etc., R. Co. *v.* Conner, 83 Tenn. (15 Lea) 254.

Texas.—Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ. App. 435, 23 S. W. 618; Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653; S. C., 70 S. W. 359, affirmed in 96 Tex. 301, 72 S. W. 165; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; International, etc., R. Co. *v.* Smith (Tex.), 14 S. W. 642.

Virginia.—Chesapeake, etc., R. Co. *v.* Harris, 103 Va. 635, 49 S. E. 997.

West Virginia.—Killmeyer *v.* Wheeling Tract. Co. (W. Va.), 77 S. E. 908.

Wisconsin.—Leasum *v.* Green Bay, etc., R. Co., 138 Wis. 593, 120 N. W. 510.

Passengers are in many cases excused from the imputation of negligence where they obey the direction or advice of the trainmen, whom the passenger may justly suppose, by reason of their experience, to be better able to judge whether a given act is dangerous than the passenger himself. Owens *v.* Atlantic, etc., R. Co., 67 S. E. 993, 152 N. C. 439.

The direction or invitation of a railroad-car conductor or other person, within the scope of his authority, justifies a passenger in complying therewith, unless by so doing he will expose himself to danger, plainly open to his observation, that a prudent man would not incur. Irish *v.* Northern Pac. R. Co., 4 Wash. 48, 29 Pac. 845, 31 Am. St. Rep. 899.

A passenger who takes a seat in a chair car, as directed by the carrier's servants, is not thereby guilty of contributory negligence so as to preclude his recovery for injuries by derailment of the car. Terre Haute, etc., R. Co. *v.* Sheeks, 56 N. E. 434, 155 Ind. 74.

Where a passenger, transferred because of an obstruction from one car to another follows the course suggested by employees and without fault is injured, the injury is not chargeable to his negligence, unless the danger is obvious. Killmeyer *v.* Wheeling Tract. Co. (W. Va.), 77 S. E. 908.

60. When acts by permission or direction of carrier's employees will preclude recovery.—*United States.*—Eddy *v.* Wal-Wallace, 1 C. C. A. 435, 49 Fed. 801.

Alabama. — South, etc., R. Co. *v.* Schaufler, 75 Ala. 136.

Arkansas.—St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

Georgia.—Southwestern R. Co. *v.* Singleton, 66 Ga. 252; East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 17 S. E. 949; Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840; Southwestern R. Co. *v.* Singleton, 67 Ga. 306.

Indiana.—Cincinnati, etc., R. Co. *v.*

lege that a passenger is in fault in obeying specific instructions of the conductor instead of the general directions of which he has been informed.[61] That a passenger upon a railroad train was, at the request of the superintendent of the road, and at the time of the accident by which he was injured, acting as a brakeman, is not negligence on his part which will prevent his recovering for the injury.[62]

§ 2704. Acts in Emergencies.—If a passenger placed in apparent imminent peril through the negligence of the carrier is injured in attempting to escape therefrom, he is not guilty of such contributory negligence as will preclude him from recovering from the carrier, if he exercised ordinary prudence in view of the circumstances as they appeared to him at the time, even though had he not acted as he did he would have escaped injury.[63] But if, under such

Carper, 112 Ind. 26, 14 N. E. 352, 2 Am. St. Rep. 144, affirming 13 N. E. 122.

Iowa.—Pence *v.* Wabash R. Co., 116 Iowa 279, 90 N. W. 59; Dieckmann *v.* Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338, reversing on rehearing 105 N. W. 526.

Kentucky.—Chesapeake, etc., R. Co. *v.* Gregston 12 Ky. L. Rep. 604.

Michigan.—Clinton *v.* Root, 58 Mich. 182, 24 N. W. 667, 55 Am. Rep. 671.

Missouri.—Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

New York.—Hunter *v.* Cooperstown, etc., R. Co., 126 N. Y. 18, 26 N. E. 958, 12 L. R. A. 429; S. C., 112 N. Y. 371, 19 N. E. 820, 8 Am. St. Rep. 752, 2 L. R. A. 832.

Ohio.—Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

South Carolina.—Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16.

Texas.—Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83.

West Virginia.—Farley *v.* Norfolk, etc., R. Co., 67 W. Va. 350, 67 S. E. 1116, 27 L. R. A., N. S., 1111; Killmeyer *v.* Wheeling Tract. Co. (W. Va.), 77 S. E. 908.

A railway passenger is himself responsible for the result of placing himself in a position of obvious peril, even if permitted or encouraged to do so by the servants of the carrier. Aufdenberg *v.* St. Louis, etc., R. Co., 132 Mo. 565, 34 S. W. 485.

A passenger can not rely on a conductor's instructions as a sufficient excuse for doing an act obviously dangerous. Southern R. Co. *v.* Bandy, 47 S. E. 923, 120 Ga. 463, 102 Am. St. Rep. 112.

Attempting to pass around conductor on running board of street car.—Plaintiff mounted the running board on the side of a street car, and while the car was in motion the conductor called to him to come forward to a vacant seat. In passing forward on the running board, he met the conductor, and in attempting to pass around him on the outside struck against a pillar standing near the track, and was injured. Held, that the fact that plaintiff was acting in obedience to the invitation or direction of the conductor, or that the conductor obstructed his passage, did not absolve him from the duty of exercising reasonable prudence and care for his own safety, and that, to entitle him to recover for the injury, it must appear from all the circumstances shown that in attempting to pass the conductor he acted with ordinary prudence. Third Ave. R. Co. *v.* Barton, 107 Fed. 215, 46 C. C. A. 241, 52 L. R. A. 471.

61. Passenger not in fault in obeying specific instructions of conductor instead of general directions.—Pennsylvania R. Co. *v.* McCloskey, 23 Pa. 526.

62. Passenger acting as brakeman at request of superintendent of road.—Chamberlain *v.* Milwaukee, etc., R. Co., 11 Wis. 238.

63. When acts by passenger in apparent peril do not constitute contributory negligence.—*Alabama.*—Selma St., etc., R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598.

District of Columbia.—Washington, etc., R. Co. *v.* Hickey, 5 App. D. C. 436.

Georgia.—Southwestern R. Co. *v.* Paulk, 24 Ga. 356; Georgia R., etc., Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944, 26 L. R. A., N. S., 585.

Illinois.—Frink *v.* Potter, 17 Ill. 406; Mobile, etc., R. Co. *v.* Klein, 43 Ill. App. 63.

Indiana.—Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

Kentucky.—Louisville, etc., R. Co. *v.* Cecil, 9 Ky. L. Rep. 402; South Covington, etc., R. Co. *v.* Ware, 84 Ky. 267, 8 Ky. L. Rep. 241, 1 S. W. 493; Big Sandy, etc., R. Co. *v.* Blankenship, 133 Ky. 438, 118 S. W. 316, 19 Am. & Eng. Ann. Cas. 264, 23 L. A., N. S., 345; South Covington, etc., St. R. Co. *v.* Crutcher, 135 Ky. 698, 123 S. W. 268.

Louisiana.—Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177; Chretien *v.* New Orleans R. Co., 113 La. 761, 37 So. 716, 104 Am. St. Rep. 519.

Maryland.—Western, etc., R. Co. *v.* State, 95 Md. 637, 53 Atl. 969.

Massachusetts.—Ingalls *v.* Bills (Mass.), 9 Metc. 1, 43 Am. Dec. 346; Caswell *v.* Boston, etc., R. Corp., 98 Mass. 194, 93

circumstances, the passenger acted contrary to the way an ordinarily prudent person would have acted, and his conduct contributed to his injury, he can not

Am. Dec. 151; Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843.

Michigan.—Howell *v.* Lansing City Elect. R. Co., 136 Mich. 432, 99 N. W. 403.

Minnesota.—Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410.

Missouri.—Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868; Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; Bischoff *v* People's R. Co., 121 Mo. 216, 25 S. W. 908.

Nebraska.—St. Joseph, etc., R. Co. *v.* Hedge, 44 Neb. 448, 62 N. W. 887.

New York.—Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162;

Ohio.—Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597.

Pennsylvania.—Quinn *v.* Shamokin, etc., R. Co., 7 Pa. Super. Ct. 19; Lehner *v.* Pittsburgh R. Co., 223 Pa. 208, 72 Atl. 525, 16 Am. & Eng. Ann. Cas. 83.

South Carolina.—Wade *v.* Columbia Elect., etc., Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676.

Virginia.—Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

A passenger placed suddenly in a position of danger is not required to exercise infallible judgment, but only ordinary care. Fulghum *v.* Atlantic, etc., R. Co., 74 S. E. 584, 158 N. C. 555, 39 L. R. A., N. S., 558; Georgia R., etc., Co. *v.* Gilleland, 133 Ga. 621, 629, 66 S. E. 944, 26 L. R. A., N. S., 585.

Where a passenger is placed in imminent danger by the negligence of the carrier's servants, and makes an error in judgment in attempting to save himself, the carrier is, nevertheless, liable. Brown *v.* New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Cuyler *v.* Decker (N. Y.), 20 Hun 173.

The instinctive effort of one on board a conveyance to escape peril brought about by the carrier's negligence will not constitute contributory negligence, barring a recovery. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 438, 35 S. W. 493, affirmed in 93 Tex. 720, no op.; Williams *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 145, 78 S. W. 45, affirmed in 98 Tex. 637, no op.; International, etc., R. Co. *v.* Neff, 87 Tex. 303, 28 S. W. 283, reversing 26 S. W. 784; Houston Elect. St. R. Co. *v.* Elvis, 31 Tex Civ. App. 280, 72 S. W. 216, affirmed in 97 Tex. 636, no op.; Horton *v.* Houston, etc., R. Co., 46 Tex. Civ. App. 639, 103 S. W. 467, affirmed in 102 Tex. 585, no op.

The rule that instinctive effort to escape peril brought about by carrier's negligence is not contributory negligence, is only applicable where the acts or omissions have thrown the person off his guard or where he is overcome by sudden terror. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

It is error for the court to instruct the jury "that a coach proprietor is never responsible for the imprudence of his passengers." The real question is whether, assuming the person injured to be ordinarily reasonable and prudent, the circumstances were so alarming as to deprive her of her ordinary reason, and to induce her instinctively to seek safety by an act which, although not such as the jury might believe to be prudent or discreet, was such as the generality of persons would have adopted in the dilemma in which she was placed. Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428.

If the want of proper skill or care of the driver of a stagecoach placed the passengers in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage. Stokes *v.* Saltonstall (U. S.), 13 Pet. 181, 10 L. Ed. 115.

Attempting to leave car to avoid impending danger.—When a passenger, to avoid impending danger, attempts to leave the car in which he is riding, believing, upon reasonable grounds, that by so doing he will escape, and, while in the act of leaving, is injured through the company's negligence, he is not chargeable with contributory negligence, although, had he made no attempt to leave the car, the injury would not have happened. Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597. And see Cincinnati, etc., R. Co. *v.* Lohe, 48 W. L. Bull. 507.

Plaintiff's intestate had taken his seat as a passenger in the rear end of defendant's train, and, while waiting for it to start, another train approached from the rear, at great speed. He tried to escape from the car, but the collision occurred as he reached the platform, and he was killed. Other passengers left the car, and were uninjured, and one who remained in it was not hurt. Held insufficient to show any negligence on the part of plaintiff's intestate, it not being incumbent on him to keep his seat in a

recover.[64] In such case, however, the obligation resting on the passenger to exercise ordinary care for his own safety does not require him to act with the same

car about to be wrecked. St. Louis, etc., R. Co. *v.* Maddry, 57 Ark. 306, 1 S. W. 472.

Leaping from train to avoid injury from collision.—A railway train, on which plaintiff was a passenger, riding in the last car but one, stopped between stations at night. While it remained standing, another train was heard approaching from the rear on the same track. The conductor ran back with his lantern to stop it, and a passenger in the same car with plaintiff, looking out of the window, hallooed, "Here comes another train running into us; we had better get out!" whereupon plaintiff and others rushed to the car door, and leaped from the train, and plaintiff was injured by falling into a ditch. The approaching train was an engine and caboose, moving about ten miles an hour, and was stopped within about thirty feet of the passenger train. Had it been a train of loaded cars, a collision could not have been prevented. Held that, in an action against the railway company for the injuries to plaintiff, the jury were properly instructed that the question of his contributory negligence was not to be determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made; and that if, by defendant's negligence, he was placed in a position of danger in the car, he had a right to judge of the danger in remaining, and also of the danger in attempting to escape, from the circumstances as they appeared to him, and not by the result; and if he, in making such attempt to escape, used such care as a prudent man under such circumstances should have used, and in doing so received an injury, he should recover damages. St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32.

Attempting to escape after explosion in electric car.—Where a female passenger reasonably anticipated injury from an explosion in an electric car, accompanied by a slight outburst of flame, she was not chargeable with contributory negligence in unnecessarily attempting to escape the danger, though it appears that, if she had remained in her seat, all danger would have been avoided. Steverman *v.* Boston Elevated R. Co., 91 N. E. 919, 205 Mass. 508.

Where, following an explosion in an electric car, caused by the blowing out of a fuse box, there is a stampede of the passengers, resulting in one of them, a woman jumping or being pushed from the car, she can not be said to have been guilty of contributory negligence, precluding recovery for injuries so received. Kight *v.* Metropolitan R. Co., 1 App. D. C. 494.

Where, by reason of the electric current being suddenly reversed to prevent a collision, the circuit breaker blew out causing a loud explosion and a flash of light in the car, which was followed by the crash of breaking glass from the collision, the fact that plaintiff, a nervous woman, was injured by jumping from the car, while the other passengers remained in the car and were uninjured, did not preclude her from the right to recover for her injuries. Wanzer *v.* Chippewa, etc., Elect. R. Co., 84 N. W. 423, 108 Wis. 319.

Where an old and infirm passenger was thrown down by the premature starting of a street car, and in the fall caught hold of the running board of the car, and was dragged a considerable distance, his act in so doing, having been under an impulse created by a sudden danger, did not constitute contributory negligence. Indiana Ry. Co. *v.* Maurer, 66 N. E. 156, 160 Ind. 25.

Where a woman was induced to alight by the negligence of a street car company, at night, at a strange place, remote from her destination, in a storm, she was under no legal duty to apply for shelter at houses in the vicinity of the place rather than attempt to reach her destination on foot over a highway which was in reasonably safe condition. Georgia R. etc., Co. *v.* McAllister, 54 S. E. 957, 126 Ga. 447, 7 L. R. A., N. S., 1177.

64. When passenger's conduct will preclude his recovery. — *Alabama.*—Selma, St., etc., R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598.

Indiana.—Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

Louisiana.—Chertien *v.* New Orleans R. Co., 113 La. 761, 37 So. 716, 104 Am. St. Rep. 519.

Missouri.—Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868.

Texas.—Gulf, etc., R. Co. *v.* Wallen, 65 Tex. 568.

Plaintiff, a passenger on a car about to be attached to a train, was standing on the front platform, when he saw the train approaching at a great rate of speed, and knew that danger was imminent. He entered the car, but before he gained his seat in the rear thereof he was knocked down by the force of the collision. He testified that he could have stepped off the car, and avoided the danger, or taken a nearer seat, and he did not explain his failure to do so. Held, that he was guilty of contributory negligence, and a verdict in his favor would be set aside, and a new trial granted. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

deliberation and foresight which would have been required of him under ordinary circumstances.[65] The passenger must have believed the danger to be imminent, to escape the implication of contributory negligence and to entitle him to recover.[66]

§§ 2705-2716. Awaiting and Seeking Transportation—§ 2705. In General.—Persons going to trains must know that depots are more or less crowded on such occasions, and should at such times and places look where they are stepping and be observant of what is going on around them.[67] In an action for the death of one intending to take passage on a street car, to authorize a recovery on the theory of negligence of the defendant, supervening contributory negligence of the plaintiff's intestate, it must appear that the motorman failed to exercise reasonable care after the peril of the intestate became, or in the exercise of due care ought to have become, known to him, when from the exercise of such care the intestate would not have been injured.[68]

§ 2706. Seeking Entrance to Depot Which Is Obstructed by Train.—When a train of cars is extended entirely across the street, and there is no way for one who wishes to take passage in the train to reach the depot, except by passing over the platform of the cars or by waiting till they are removed, he may enter the train from the street where he is standing, and in case of an injury to him from the sudden starting of the train he can not be considered guilty of contributory negligence.[69] While it is the duty of a female passenger, whose access to a railroad depot is obstructed by a train standing across the track for an unreasonable length of time, to seek shelter from the cold, and not recklessly to remain outside, it is not her duty to enter a nearby store, which, to her knowledge, has the reputation of being a place that a modest woman can not with propriety enter.[70]

§ 2707. Passing Down Steps Leading to Station.—One passing down steps leading to a railroad station which are covered with snow and ice is not, as a matter of law, guilty of contributory negligence in failing to take hold of the railing running alongside of such steps.[71]

§§ 2708-2711. Awaiting Train at Station—§ 2708. In General.—A passenger awaiting his train at a station has a right to assume that the railroad company will exercise the strictest vigilance to protect him from injury, either by the train he intends to take, or one passing through the station before it ar-

65. **Passenger not required to act with same deliberation and foresight as under ordinary circumstances.**—Chicago Union Tract. Co. *v.* Newmiller, 116 Ill. App. 625, affirmed in 215 Ill. 383, 74 N. E. 410.

A passenger confronted with sudden danger while on a car is not guilty of contributory negligence merely because he fails to exercise what might have seemed to others the best judgment in trying to avoid the danger. Sweeney *v.* Kansas City, etc., R. Co., 51 S. W. 682, 150 Mo. 385.

Allowance to be made for state of emotion.—The duty of a person to look after his own safety where a collision threatens, is not to be measured by the ordinary standard, but allowance is to be made for the state of emotion. Smith *v.* Wrightsville, etc., R. Co., 83 Ga. 671, 10 S. E. 361.

66. **Passenger must have believed danger to be imminent.**—Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868, so holding where the passenger attempted to escape a peril, and it appeared that he would not have been injured if no attempt to escape had been made.

67. **Care required of persons going to trains.**—Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

68. **Negligence of carrier supervening contributory negligence of plaintiff's intestate.**—Kruck *v.* Connecticut Co., 80 Atl. 162, 84 Conn. 401.

69. **Passenger injured on train which he enters to reach depot.**—Keating *v.* New York, etc., R. Co., 3 Lans. 469, affirmed in 49 N. Y. 673.

70. **Female passenger not required to seek shelter in store of evil repute.**—Louisville, etc., R. Co. *v.* Daugherty, 108 S. W. 336, 32 Ky. L. Rep. 1392, 15 L. R. A., N. S., 740.

71. **Passing down steps leading to station.**—Illinois Cent. R. Co. *v.* Keegan, 112 Ill. App. 28, judgment affirmed 71 N. E. 321, 210 Ill. 150.

rives.[72] But the fact that one waiting at a railroad station is to be regarded as a passanger, and entitled to that high degree of care for his protection due from a common carrier of passengers, does not relieve him of the duty of exercising ordinary care for his own safety.[73] Where a passenger, while awaiting the arrival of a train, was led to believe by the conduct of the carrier's servant that she was in imminent peril from the approach of a train in an unexpected direction, and became alarmed, and in attempting to escape the apprehended peril fell and was injured, she could recover, though the course she took in escaping from the threatened peril brought her into greater peril than she would have been subject to had she remained where she was.[74] If the hour is late, and the station house is closed when a passenger goes to take a train, and he stands where the railroad company's watchman conducts him, he is not guilty of negligence in being there, so as to defeat the right of his widow to recover for his death.[75]

§ 2709. On Platform.—Right to Use of Platform.—A passenger at a railway station may lawfully use the platform for any lawful purpose connected with his journey, but his use thereof must be limited to the purposes for which it was manifestly adapted.[76] One who is on a depot platform for the purpose of changing from one train, on which he was a passenger, to another, is there lawfully.[77]

Right to Go upon Platform before It Is Necessary to Board Train.—A passenger waiting at a depot for his train need not remain in the waiting room, but may, without being charged with negligence, go upon the platform before it is necessary to board his train.[78] If the station house of a railroad company is separated by a side track from a platform provided for passing to the trains, and there are no regulations or directions as to when or how passengers shall pass to them, the question whether a passenger is bound to wait in the station house until the arrival of a train at the platform, or may go to and stand on the platform during its approach, depends on what is a reasonably safe and prudent course for him to adopt, in determining which it is proper for a jury to consider what is the usage of passengers there, and whether such usage is known to and permitted by the company.[79]

Right to Rely on Safety of Platform.—The duty enjoined by law upon railroad companies in respect to their passenger station platforms is that they shall be kept free from obstructions, and in such condition generally as that passengers may go to and from trains with reasonable safety.[80] Therefore a

72. Right of passenger to assume that carrier will exercise strictest vigilance.—Struble *v.* Pennsylvania Co., 226 Pa. 118, 75 Atl. 17.

73. Passenger must exercise ordinary care for his own safety.—Pendleton *v.* Richmond, etc., R. Co., 52 S. E. 574, 104 Va. 813.

74. Injury to passenger attempting to escape threatened peril.—Caswell *v.* Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec. 151.

75. Passenger standing where carrier's watchman conducts him.—Pennsylvania R. Co. *v.* Henderson, 51 Pa. 315.

76. Right to use of platform.—Dotson *v.* Erie R. Co., 68 N. J. L. 679, 54 Atl. 827.

77. Philadelphia, etc., R. Co. *v.* Young, 90 Fed. 709, 33 C. C. A. 251.

78. Passenger may go upon platform before it is necessary to board train.—Chicago, etc., R. Co. *v.* Woolridge, 32 Ill. App. 237; McCollin *v.* Railroad Co., 1 Del. Co. R. 445.

That a passenger went from the waiting room to the platform a few minutes before boarding the train where he was injured was not contributory negligence per se. Kansas, etc., R. Co. *v.* Watson, 102 Ark. 499, 144 S. W. 922.

One at a depot to take a train is rightfully on the platform as a passenger, it being train time, though the train was late, and the waiting room being closed, and he being three feet further from the track than the corner of the depot, when, as claimed, he was struck by a piece of coal from the tender of a passing train. Louisville, etc., R. Co. *v.* Reynolds, 71 S. W. 516, 24 Ky. L. Rep. 1402.

79. Right to go upon platform separated from station house by side track.—Caswell *v.* Boston, etc., R. Corp., 98 Mass. 194, 93 Am. Dec. 151.

80. Duty enjoined upon railroad companies in respect to their platforms.—Matthieson *v.* Burlington, etc., R. Co., 125 Iowa 90, 100 N. W. 51.

person, going to a depot to become a passenger, has the right to presume that the platforms are safe, and is not bound to keep a lookout, other than such as ordinary prudence may require.[81] And since a passenger has a right to assume that the platform over which it is necessary for him to pass to reach the cars is safe, his walking thereon while the platform is covered with ice and snow is not of itself contributory negligence precluding a recovery for injuries caused by his slipping.[82]

Care Required of Passenger While on Platform.—In determining the degree of care required of a passenger while on a station platform, consideration must be given to the condition of the platform and the passenger's knowledge thereof, and all the circumstances surrounding him at the time of the injury.[83]

Care Required of Passenger on Approach of Train.—The care required of a passenger upon a railway station platform on the approach of a train is that of a reasonably careful and prudent man, when called upon to act under similar conditions, in view of his entire conduct from the time he went upon the platform until injured by a train.[84] In some jurisdictions it has been held that a passenger has a right to rely on the safety of a station platform as against passing trains, and therefore if he is struck by a projection from a passing train, while standing on the platform waiting for a train, he is not guilty of negligence in being on the platform, unless he knew that the train or projection would ex-

81. Right of passenger to presume that platforms are safe.—Barker *v.* Ohio River R. Co., 41 S. E. 148, 51 W. Va. 423, 90 Am. St. Rep. 808.

The holder of a railroad ticket has the right to rely on the safety of a freight platform without exercising extraordinary care to keep from putting his foot on a rotten board. Cassady *v.* Texas, etc., R. Co., 60 So. 15, 131 La. 626.

An instruction in an action for injuries to a passenger by falling over certain iron left on a station platform, that, if there was a reasonable amount of room left for passengers to walk in boarding the cars, and such passengers were reasonably safe in so walking if they looked where they were stepping, defendant could not be charged with negligence because of the presence of iron on the platform, the accident having occurred during full daylight, was properly refused. Matthieson *v.* Burlington, etc., R. Co., Co., 100 N. W. 51, 12 Iowa 90.

82. Walking on platform covered with ice and snow.—Weston *v.* New York, etc., R. Co., 73 N. Y. 595, affirming 42 N. Y. Super. Ct. 156.

83. Carelessly stepping backward upon ice.—Plaintiff testified that he walked down an inclined depot platform with which he was familiar, noticed that there was ice upon it, and afterwards, within a few minutes, while standing near it, carelessly stepped backward upon it, and slipped and fell, injuring himself. Held, that his own negligence produced the fall and injury. Waterbury *v.* Chicago, etc., R. Co., 73 N. W. 341, 104 Iowa 32.

Falling over lumber obstructing platform.—Where a passenger, in passing from the station to a train, fell over lumber obstructing the platform in part, which he knew was on the platform, but had forgotten at the time he fell, he was guilty of contributory negligence. Wood *v.* Richmond, etc., R. Co., 100 Ala. 660, 13 So. 552.

Stepping backward into hole in platform.—Where a person, while trying to get her children onto the platform of the depot, steps back into a hole in the platform, she is not guilty of contributory negligence, though, if she had been walking face forward in the direction of the hole, she could easily have seen it. Barker *v.* Ohio River R. Co., 41 S. E. 148, 51 W. Va. 423, 90 Am. St. Rep. 808.

Walking upon unlighted platform on a dark night.—An intending passenger came to a railroad way station on a dark night to take a train. There were no lights and no railing to the platform, which on the east side was several feet high. She went upon the platform on the west side, and, supposing it to be of the same height on the east side, she walked across, intending to sit down on the edge, but fell off and was injured. Held, that she was guilty of contributory negligence. Missouri, etc., R. Co. *v.* Turley, 85 Fed. 369, 29 C. C. A. 196.

A passenger, waiting at a station on a dark night for his train, who is permitted to remain in a well-lighted car provided with necessary conveniences, is guilty of contributory negligence where he leaves the car to walk, for the mere purpose of exercise, on the unlighted station platform. Abbott *v.* Oregon R. Co., 80 Pac. 1012, 46 Ore. 549, 114 Am. St. Rep. 885, 1 L. R. A., N S., 851.

84. Care required of passenger on approach of train.—Savageau *v.* Boston, etc., Railroad, 96 N. E. 67, 210 Mass. 164, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147.

tend over the same while passing.[85] But in other jurisdictions it has been held that while trains are passing a platform at a station, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains, and if they fail to do so they will be guilty of contributory negligence.[86] Where a prospective passenger leaves a waiting room and sits down on the edge of the platform, with his feet on the ground, within a foot or a foot and a half of the track, and goes to sleep in front of an approaching train, the railroad company owes him no duty, except not to wantonly injure him after its employees discover him.[87]

§ 2710. Walking on Track.—A railway company which has provided a station room and platform for the use of those who have occasion to depart from and enter its trains is not liable to a person who, before the arrival of the train, leaves the platform, and, while walking unnecessarily on an adjacent track, is injured by a switch engine of another railway company.[88]

§ 2711. Standing Near Track.—A person at or near a station awaiting

85. Metcalf *v.* St. Louis, etc., R. Co., 156 Ala. 240, 47 So. 158.

A passenger awaiting a train on the platform provided by the company for his occupancy has a right to suppose that he will be safe from collision with a train running on the track, so long as he occupies a place on the platform; and the mere fact that plaintiff, while on the platform, did not look behind him for an approaching train, can not be held evidence of contributory negligence. * * * Negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended. Georgia R., etc., Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409.

In an action brought to recover damages for alleged negligencec causing the death of D., plaintiff's testator, plaintiff's evidence tended to show that D. crossed the tracks of the railroad operated by defendant, in front of an approaching train, to a platform constructed for the accommodation of passengers taking local trains, and after reaching and while standing upon the platform was struck by a car of the train and killed. The train was an express train which did not stop at the platform. The car projected from three to five inches over the platform. Held, that the questions as to negligence and contributory negligence were properly submitted to the jury. Georgia R., etc., Co. *v.* Adams, 127 Ga. 408, 56 S. E. 409.

In an action to recover for the death of plaintiff's testator it appeared that, while standing on a platform constructed for the accommodation of passengers taking local trains, deceased was struck by an express train which did not stop at the depot, and that the cars projected four inches over the platform. Held, that in the absence of proof it would not be presumed that deceased knew that the platform was for a train which he did not intend to take and that he was therefore negligent in standing there. Dobiecki *v.* Sharp, 88 N. Y. 203.

Where a railroad company maintained a narrow passenger platform at a curve, where trains approaching could be seen only for a short distance, and the station master, on hearing a train approach, informed deceased, who had a ticket for transportation on the expected train, to go to the platform, under the mistaken belief that such train was the regular train, instead of a special, which passed the platform at a very high rate of speed, and killed deceased just as he reached the platform, by reason of the fact that the train overhung the same some 13 or 14 inches, deceased was not guilty of contributory negligence as a matter of law. Lehigh Valley R. Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478.

86. Dotson *v.* Erie R. Co., 54 Atl. 827, 68 N. J. L. 679.

Where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable. Matthews *v.* Pennsylvania R. Co., 148 Pa. 491, 24 Atl. 67.

A passenger walking on a depot platform towards an approaching train, so near the track as to be struck and killed by the train, is guilty of contributory negligence precluding a recovery where he had stepped on the platform after the operator told him that the train would soon arrive. Pennsylvania R. Co. *v.* Bell, 122 Pa. 58, 15 Atl. 561.

87. Sitting down on edge of platform and going to sleep.—Gulf, etc., R. Co. *v.* Bolton, 51 S. W. 1085, 2 Ind. T. 463.

88. Injury to passenger while walking unnecessarily on track.—Spavin *v.* Lake Shore, etc., R. Co., 90 N. W. 325, 130 Mich. 579.

his train is not guilty of contributory negligence in standing near the track, unless so close as to be struck by an ordinary train.[89] It can not be said, as matter of law, that one who had been taken by a street railway company to an amusement park conducted by it was guilty of contributory negligence in taking a position near the track in the front rank of the 7,000 people about the platform, after the close of the entertainment, waiting for cars, from which position she was pushed under a car.[90] Where a person, while waiting to take a train, of his own free will, and without any necessity or reason for so doing, places himself between two tracks in a position of manifest danger, before the arrival of the train he is awaiting, and stands so near an approaching train that he is struck and injured, he is guilty of contributory negligence, and can not recover.[91]

§ 2712. Using Passageway to Train Shed at Station.—One on a passageway maintained by a railroad company to a train shed at its station, to take a train, must exercise ordinary care for his protection, or he will be guilty of contributory negligence.[92]

§ 2713. Crossing Tracks to Reach Station, Train, or Car.—A passenger seeking to reach a train has a right to assume that the carrier will furnish reasonable and adequate protection to him while so doing, and is not guilty of contributory negligence, as a matter of law, in crossing the tracks of the carrier in order to reach the train or station.[93] A railroad company owes to one standing to it in the relation of a passenger, who must necessarily cross its tracks at a station to reach his train, a higher degree of care than that due to mere trespassers or strangers; and the passenger has a right to rely on the exercise of such care by the company.[94] The passenger in such case may assume that the railroad company will so regulate its trains that the tracks will be free from danger when his train stops at the station.[95] The passenger is not, however,

89. Injury to passenger standing near track.—Louisville, etc., R. Co. *v.* Glasgow (Ala.), 60 So. 103.

90. Cousineau *v.* Muskegon Tract., etc., Co., 108 N. W. 720, 145 Mich. 314.

91. McGeehan *v.* Lehigh Valley R. Co., 149 Pa. 188, 24 Atl. 205.

92. Using passageway to train shed at station.—Woodbury *v.* Maine Cent. R. Co., 110 Me. 224, 85 Atl. 753, 43 L. R. A., N. S., 682.

93. Crossing tracks not contributory negligence as matter of law.—Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68; Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748; Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

Crossing intervening tracks in front of an approaching train, in order to board a train just moving off, was not, as a matter of law, negligence in the passenger, if the motion of the departing train was so slow as not to make an attempt to board it dangerous. Brooks *v.* New York, etc., R. Co. (N. Y.), 21 Wkly. Dig. 464.

Where the railroad track is the usual and only practicable route by which a passenger may go from the station to his train, the railroad company will not be heard to say that a passenger, by taking such route, becomes guilty of negligence. Chicago, etc., R. Co. *v.* Lagerkrans, 91 N. W. 358, 65 Neb. 566, affirmed on rehearing 95 N. W. 2.

Plaintiff is not negligent as a matter of law who on hearing his train approaching the flag station, where he is, and seeing no train coming in the opposite direction, goes diagonally across the first track, which was planked, towards his train, which has nearly stopped, and is still when he reaches his car, though a witness called by him says that, before the passenger train stopped, the freight, which struck plaintiff, was passing. Kohler *v.* Pennsylvania R. Co., 135 Pa. 346, 19 Atl. 1049.

94. Degree of care carrier owes to passenger crossing tracks at station.—Judgment 7 App. D. C. 79, reversed. Warner *v.* Baltimore, etc., R. Co., 18 S. Ct. 68, 168 U. S. 339, 42 L. Ed. 491.

95. Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 28 Ky. L. Rep. 598, 89 S. W. 714; Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560; Brassell *v.* New York, etc., R. Co., 84 N. Y. 241; Keifner *v.* Pittsburg, etc., R. Co., 223 Pa. 50, 72 Atl. 253; Karr *v.* Milwaukee Light, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

Where a way is provided at a station for a passenger going to or from his train, he may rely on the duty of the railroad company to keep the track clear,

relieved from the duty of exercising ordinary or reasonable care in crossing the tracks to take his train.[96] It is incumbent on him to use such care and attention as may be usually expected of persons of ordinary prudence under like circum-

where passengers are passing between the train and the station. Harper *v.* Pittsburg, etc., R. Co., 68 Atl. 831, 219 Pa. 368.

A passenger, while going to the depot to take passage on a train scheduled to stop there at the very instant, may assume that a train on a parallel track will not be running in excess of the maximum speed limit, and that the carrier will not run its trains over the parallel track in such a way as to subject him to unusual danger. Illinois Cent. R. Co. *v.* Daniels, 96 Miss. 314, 50 So. 721, 27 L. R. A., N. S., 128.

Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care; and if it appears that there is a double track, and a person has just bought a ticket at a station for a train which is to pass upon the further track, and the station agent says to him, "The train is coming; we will cross over," and he attempts to follow the agent, upon the premises of the railroad company, to take his place in the train, which meanwhile has arrived, and, in crossing over the nearer track for that purpose, is struck by a train coming from the other direction, and partially behind him, which he did not look for or see until too late to save himself, it is proper to submit as a question of fact, for the jury to determine, whether he was careless. And while so going from the ticket office to take his seat in the cars he is to be considered as a passenger, and is entitled to the rights of a passenger; and it is the duty of the railroad company to use the utmost care and diligence in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle which would unreasonably impede him or expose him to harm while proceeding to take his seat in the cars, in order to prevent those injuries which human care and foresight can guard against. Warren *v.* Fitchburg R. Co., (Mass.), 8 Allen 227, 85 Am. Dec. 700.

Plaintiff's interstate entered the waiting room at a station on defendant's railroad, having the return part of a round-trip ticket, and, after inquiring the time of his train, sat down and waited for it. There were two tracks in front of the station building, and his train passed on the farther one. A street crossed the tracks at the end of the station, paved with concrete, and from it and on the same level a paved platform extended on the outer side of each track; there being no division between the pavements of the street and the platforms. A picket fence also extended from the street between the tracks past the station, which prevented crossing except on the street. An automatic bell was rung by every train from the time it approached until it left the station. The train of plaintiff's intestate stopped with the rear car on the street crossing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. Held, that deceased had the right to act on the assumption that defendant would exercise proper care not to injure passengers while passing from the waiting room to the train by the only way open to them. Atlantic City R. Co. *v.* Clegg, 183 Fed. 216, 105 C. C. A. 478.

96. Passenger must exercise ordinary or reasonable care.—St. Louis, etc., R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527; Karr *v.* Milwaukee Light, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

"While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encounted and the circumstances attending the exposure." Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68.

Whether a passenger, killed while running to a depot to catch a passenger train by being struck by a rapidly moving freight train arriving on a parallel track at the depot at the instant of the arrival of the passenger train, was guilty of contributory negligence, must be determined from the standpoint of whether he exercised ordinary precaution at the time, in view of the circumstances of the situation. Illinois Cent. R. Co. *v.* Daniels, 96 Miss. 314, 50 So. 721, 27 L. R. A., N. S., 128.

A rule for the government of defendant's employees provided that, when a train was standing at the station, an approaching train should stop, and allow the standing train to clear the station, before proceeding. Held, that even though deceased knew of the rule, and relied on its observance, this did not absolve him from the duty of exercising ordinary care for his own protection. Chaffee *v.* Old Colony R. Co., 17 R. I. 658, 24 Atl. 141.

stances.[97] But he is not required to exercise the same degree of care and caution as would be imposed on him if he were not a passenger.[98] Thus he is not required to use the same degree of care for his safety as a traveller at a highway crossing,[99] or as a trespasser who ventures upon the carrier's tracks.[1] The passenger may rely for his safety in crossing the tracks upon the usual signals given by cars approaching upon such tracks.[2] In the appended notes will be found cases in which the crossing of railroad tracks by a passenger to board his train or car was, under the peculiar circumstances, held to constitute contributory negligence,[3] and other cases in which the crossing of tracks for the

97. Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598.

98. Passenger not required to exercise the degree of care required of persons not passengers.—Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68; Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560.

Where the station, in which is the waiting room, was so situated, and the trains of the company so operated, that passengers obliged to board a train which was to arrive and depart on the east track could not do so without crossing the west track, over which a train bound in an opposite direction was momentarily to arrive, one waiting at a station to take the train may assume from the stopping of the train at the station that it is safe for him to board the train away from a platform, and he is not required to exercise the same degree of care and caution as would be imposed on him if he were not a passenger. Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68.

99. Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68; Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748; St. Louis, etc., R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527; Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560.

1. Warner *v.* Baltimore, etc., R. Co., 168 U. S. 339, 42 L. Ed. 491, 18 S. Ct. 68; Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748.

2. Passenger may rely upon usual signals.—Chaffee *v.* Boston, etc., R. Corp., 104 Mass. 108.

3. Facts held to constitute contributory negligence.—A passenger, in his attempt to board a train which had left the station, stood on the track in full view of an approaching train, which rang its bell and whistle, but failed to distract his attention from the other train. Held, that he was negligent. Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560.

In an action against a railroad company for wrongfully causing the death of decedent, evidence that decedent was waiting at defendant's station for a train, was familiar with the locality and with the position of the tracks, knew that the train was approaching, and had unobstructed view thereof, and was struck while crossing the track to the opposite platform, and while walking with the head down and seemingly in a state of abstraction, showed contributory negligence on decedent's part. Pendleton *v.* Richmond, etc., R. Co., 52 S. E. 574, 104 Va. 813.

Plaintiff came to defendant's railroad station, intending to take a train. There were several tracks, and the train he intended to take stood on the further track from where plaintiff approached the station. The platform gates on the side nearest plaintiff were closed, and he passed the gate on the sidewalk, crossing the near track diagonally, intending to go round the train, and reach the platform on the further side. While crossing the near track he was struck by an approaching train. A dense smoke was hanging over the track, and the engine which struck him had no headlight, though it was getting dark. Held, that plaintiff was negligent. Debbins *v.* Old Colony R. Co., 154 Mass. 402, 28 N. E. 274.

On one side of a track was a station with platform, and on the other side a platform for the convenience of passengers going the other way. A woman 47 years old, having purchased a ticket, was told by the ticket agent to cross. When part way across, she turned back to get a bundle, though warned of her danger, and in attempting to cross after getting the bundle she was killed. The evidence was conflicting whether the train was one-half or one-quarter of a mile distant when the agent told her to cross. Held, that she was guilty of contributory negligence. Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

A passenger, a man of mature years, in good health, having had considerable experience in traveling, asked for no information or guidance as to the method of reaching a train on which he was about to embark, though the night was dark and cloudy and the station premises new and uncompleted. He started with others from the station, but, in buttoning his coat, fell behind them, and, on hearing the station agent say. "Come on," crossed a side track, then a platform, and then passed on to the main track, erroneously believing that the agent was

same purpose was held not to constitute such negligence.[4]

Application to Passengers of Requirement to Stop, Look and Listen.—According to the weight of authority, the rule requiring that one crossing a railroad over a highway should stop, look and listen is not to be rigorously applied to a passenger at a station going to his train.[5] If the passenger is invited by the carrier to cross a track in going to his train,[6] or if the railroad is so constructed that the passenger is required to cross intervening tracks to get from the station to his train,[7] the passenger is not guilty of contributory negligence.

on the other side of the main track, and was struck by the coming train. The main track was straight for 900 feet, and the engine was equipped with a headlight which could be seen 2,000 feet, and was running not more than six miles an hour. The passenger at all times saw the train and its headlight, but erroneously believed that it had stopped, and stepped in front of it while not more than seven feet away, and did not look at the engine while crossing. The engineer saw the passenger, and applied the emergency brake and stopped the train within 50 or 60 feet. Held, that the passenger was guilty of contributory negligence precluding a recovery, though it be conceded that the carrier did not perform the full measure of duty in the manner of supplying lights for its premises. Pere Marquette R. Co. *v.* Strange, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied 85 N. E. 1026.

A freight train was standing on the track between the ticket office and the passenger train, in the night, both of the trains being nearly ready to start. The plaintiff, a passenger, in attempting to pass between the freight cars in order to reach the other train, was injured by their moving, and died. It did not appear that he notified those in command of the freight train, or that they had knowledge of his intention. Held, that the company was not liable. Chicago, etc., R. Co. *v.* Dewey, 26 Ill. 255, 79 Am. Dec. 374.

In an action against a street-railroad company for an injury, evidence that plaintiff, in attempting to get on an approaching street car, crossed over and placed himself between parallel tracks, instead of remaining on the outer side, and that he saw another car coming on the other track, 50 or 75 feet away, as he was getting on, but paid no more attention to its until struck by it, justifies a nonsuit, for contributory negligence. Davenport *v.* Brooklyn City R. Co., 100 N. Y. 632, 3 N. E. 305.

4. Facts held not to constitute contributory negligence.—Deceased, who attempted to cross defendant's tracks to take a south-bound train, was killed by a north-bound train as he stepped on the track. The night was dark and stormy, and deceased looked first to the south, and then to the north, before attempting to cross. The testimony as to how far the headlight of the north-bound train could be seen was conflicting, and the view was obstructed by telegraph poles and freight cars on the side track. Held, that deceased was not guilty of contributory negligence as a matter of law. Judgment, 66 N. Y. S. 605, 54 App. Div. 636, affirmed. Albrecht *v.* New York, etc., R. Co., 59 N. E. 1118, 166 N. Y. 622.

A pedestrian, who, after signaling an approaching car about half a block away to stop at a customary place for taking passengers, proceeds diagonally across the tracks to such place, assuming that the motorman, as the car approaches the stopping place, will use reasonable care to permit her to cross in safety, is not negligent as a matter of law for failing to look behind her after she had started in her diagonal course across the tracks. Judgment, 79 N. Y. S. 1054, 78 App. Div. 418, affirmed. Copeland *v.* Metropolitan St. R. Co., 69 N. E. 1121, 177 N. Y. 570.

5. Requirement to stop, look, and listen not rigorously applied.—Brassell *v.* New York, etc., R. Co., 84 N. Y. 241; Struble *v.* Pennsylvania Co., 226 Pa. 118, 75 Atl. 17; Keifner *v.* Pittsburg, etc., R. Co., 223 Pa. 50, 72 Atl. 253.

6. Karr *v.* Milwaukee Light, etc., Co., 113 N. W. 62, 132 Wis. 662, 13 L. R. A., N. S., 283.

7. Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598; Jewett *v.* Klein, 27 N. J. Eq. 550.

The rule that any person who goes upon a railroad track, incautiously, or without using all reasonable precaution to escape injury, assumes the hazard, and, if injury ensues, is without remedy, is to be applied in determining the liability of a railroad corporation where the injury is sustained by a person while crossing the track on a public highway; but it has no application to a case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to the cars. Klein *v.* Jewett, 26 N. J. Eq. 474.

Where an intending passenger was walking on the path used for entering steam cars, and was struck by an electric car of the same railroad on the next track, the rule as to his duty to look and listen is not applicable. Conway *v.* New Orleans, etc., R. Co., 24 So. 780, 51 La. Ann. 146.

Defendant railroad company had for

as a matter of law in failing to look and listen for an approaching train before crossing. The passenger, under such circumstances, has the right to assume that trains will be so regulated as to permit his crossing in safety, and he is chargeable only with reasonable care.[8] But in some jurisdictions it has been held that although a passenger is required to cross the carrier's tracks in order to reach the train he intends to take, he will be guilty of contributory negligence if he neglects to look and listen before doing so.[9] In Massachusetts it has been held that, although it was proper and necessary for a passenger to cross the carrier's tracks to reach the platform from which he was to take his train when it should arrive, yet if there was no reason for crossing when he did, and there was no inducement or invitation held out to him to cross when he did, his failure to look for an approaching train before crossing constituted contributory negligence.[10] In the same state it has been held that if a passenger with-

many years run a certain train on the southerly of two tracks, and passengers, in taking said train, had been accustomed to pass over the northerly track, lying between it and the station, to reach such train. Plaintiff's intestate, with others, on such train being announced, left the station to board the train. Though it was dark, deceased could have seen, had he looked, that the train was coming on the north track, but was killed by the train while passing over the north track to take the train, as he thought, on the south track, as usual. Held, deceased could not be said, as a matter of law, to be guilty of contributory negligence in not looking to see which track the train was on. Order, 55 N. Y. S. 23, 35 App. Div. 292, affirmed. Beecher *v.* Long Island R. Co., 55 N. E. 899, 161 N. Y. 222.

The act of an engineer of a freight train in propelling his train at a speed of more than six miles an hour, on a track between a railroad station and the track on which a passenger train was approaching in an opposite direction, before the latter could stop, held to be gross negligence, and this, whether bell or whistle was sounded or not; and, as matter of law, it would not be negligence for a passenger seeking to get aboard the passenger train to attempt to cross the track at the station and fail to look for the other. Terry *v.* Jewett, 78 N. Y. 338, affirming 17 Hun 395.

8. Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598; Jewett *v.* Klein, 27 N. J. Eq. 550; Keifner *v.* Pittsburg, etc., R. Co., 223 Pa. 50, 72 Atl. 253; Karr *v.* Milwaukee Light, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

A passenger, when taking a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will discharge the duty requiring it to provide passengers a safe passage to and from the train. A passenger, therefore, is not in all cases liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. Brassell *v.* New York, etc., R. Co., 84 N. Y. 241.

The failure of a passenger, about to cross the track at a station in order to take his train, to stop, look, and listen for other trains, is not, as a matter of law, contributory negligence, where he knew of and relied on a rule of the company requiring a train approaching a station where another train is receiving or discharging passengers to stop before reaching the station, and not proceed until the other train has moved away, or a signal been given to approach. Betts *v.* Lehigh Valley R. Co., 43 Atl. 362, 191 Pa. 575, 45 L. R. A. 261.

9. Strict compliance with requirement essential in some jurisdictions.—Dieckmann *v.* Chicago, etc., R. Co. (Iowa), 105 N. W. 526; Hall *v.* Southern Railway, 88 S. C. 430, 70 S. E. 1039.

Where a railroad station was so arranged that it was necessary for a passenger to cross the track on which his train was approaching, and the headlight could be seen plainly for two miles before it reached the station, and the whistle was sounded and the bell rung, and he was killed by being struck by the train, he was guilty of contributory negligence. Dieckmann *v.* Chicago, etc., R. Co. (Iowa), 105 N. W. 526.

10. Rule in Massachusetts.—Winslow *v.* Boston, etc., R. Co., 165 Mass. 264, 42 N. E. 1133. See, also, Roberts *v.* New York, etc., R. Co., 175 Mass. 296, 56 N. E. 559.

In order to take her train, plaintiff was required to cross the double tracks between the station platforms to the platform opposite that on which she stood; and, in attempting to do so, she passed behind a train standing on the track nearest her, which wholly obstructed her view of the other track in the direction from which trains arrived thereon; and while between the tracks, and after such train had ceased to be an obstruction to her view, she failed to look to see whether a train was coming, and, shortly after stepping on the track, was struck and injured. Held, that her failure to look constituted contributory negligence. Winslow *v.* Boston, etc., R. Co., 165 Mass. 264, 42 N. E. 1133.

out looking for an approaching train attempts to cross the carrier's track at a place not designed or adapted for crossing, and at which the carrier had held out no invitation or inducement for him to cross, he is guilty of contributory negligence, although the carrier had tolerated a practice, which the passenger and others had adopted, of crossing at that place, without taking any active measures to prevent it.[11] If an intending passenger, who has not presented himself at the carrier's platform or depot as a passenger, is injured by passing in front of the identical train upon which he intended to travel, as it is approaching the station and arriving at its stopping place, he is guilty of contributory negligence if he did not stop, look or listen for a train before stepping on the track.[12] While, if a railway company permits the practice of passengers leaving and re-entering their train while on a side track at an intermediate station, for the purpose of letting another train pass on the main track, it is bound to use reasonable care not to expose such passengers to unnecessary danger, yet it is not bound to so regulate its business as to make the side track as safe a place of ingress or egress as the station platform; nor does it give any assurance, under such circumstances, to passengers that no trains will pass while they are crossing or recrossing the main track. Neither does the call of "All aboard!" by the conductor of the side-tracked train give an assurance to those who have left their train that they may cross the main track in safety, without looking for approaching trains. Passengers who have thus left their train, when they attempt to cross the track, under these circumstances, are bound to exercise reasonable care and caution to avoid injury from passing trains, and must use their senses for that purpose.[13]

11. Wheelwright *v.* Boston, etc., R. Co., 135 Mass. 225.

At a railroad station the tracks ran easterly and westerly. On the south side of the tracks were the station house, and a platform over 500 feet in length, which ran, on the east, to a highway crossing the railroad at grade. On the north side of the tracks was a platform 500 feet in length, which ran, on the west, to a passageway leading from a highway parallel with the railroad on its northerly side. Between the two platforms were two strips of planking, each 10 feet wide, and the rest of the space was left unplanked. The railroad tracks were straight from the passageway for the distance of a quarter of a mile in an easterly direction. Passengers going eastward could enter the cars only from the south platform. A woman who lived on the north side of the railroad, intending to take a train going eastward, went, in the daytime, down the passageway to the northerly platform, and found a freight train passing, which was going westward. She waited until it had passed, looked eastward to see if any other train was coming, and saw none. Her attention was then attracted to the incoming of the train on which she was going, and knowing that, by the rules of the road, while one train was at a station another was not allowed to pass, and that one train was not allowed to follow another within five minutes, she, without looking again to see if a train was coming, stepped on the north track, attempted to cross at a place where there was no planking, and was struck by a train coming from the east, a few hundred feet behind the other freight train. Held, in an action against the railroad corporation for the injuries sustained, that there was no evidence to warrant a finding that the plaintiff was in the exercise of due care, although, for nearly 20 years, persons coming from the north side of the railroad had been accustomed to cross to the south platform in the place where the plaintiff was attempting to cross. Wheelwright *v.* Boston, etc., R. Co., 135 Mass. 225.

12. Passenger passing in front of train he intends to take.—Gregg *v.* Northern Pac. R. Co., 49 Wash. 183, 94 Pac. 911.

13. Passengers leaving and returning to train while it is temporarily on a side track.—DeKay *v.* Chicago, etc., R. Co., 41 Minn. 178, 43 N. W. 182, 16 Am. St. Rep. 687, 4 L. R. A. 632.

A train going south, on which plaintiff was a passenger, was side-tracked at a station to permit a north-bound train to pass on the main track. The conductor of plaintiff's train remarked, in his hearing, that they would have to wait for the north-bound train some twenty or thirty minutes, and that there would be time to go to the village near by. Plaintiff went to the village, and on his return, after an absence of about 15 minutes, hearing the conductor cry "All aboard," started on a run for his train, and in crossing the main track was struck by the north-bound train. Plaintiff neither looked nor listened for the north-bound train, although for the last 100 feet of the distance which he ran the view in

Information or Request of Carrier's Employee as Precluding Contributory Negligence.—Information given by a baggage master to a person waiting for a train, that the same will be along in six minutes, and must be taken from the other side of the track, does not amount to an assurance that there will be no danger in crossing, or relieve such person from the responsibility of exercising due care.[14] But where a carrier's agent requests passengers to cross the tracks to a platform so as to take their train, his invitation is an implied assurance, upon which a passenger can rely, that he can cross the tracks safely, and he will not be negligent unless the danger from the train's approach is so imminent that, as an ordinarily prudent person, he should know the peril in crossing.[15]

§ 2714. Passing Along Track or Right of Way to Reach Train or Car. —Walking on Track.—While plaintiff was walking up the track to overtake an electric car waiting for passengers (including plaintiff) transferred from a cable line, the car was suddenly backed up, and, there being no one on the rear end on the lookout, plaintiff was run down. It was the custom of the electric car to wait for such transferred passengers at any place within a block from the junction with the cable line, but not to back up to the junction for such passengers. It was held that in walking up the track plaintiff was not, as a matter of law, guilty of contributory negligence, although she neither looked nor listened, and though she heard the signal to back the car.[16] But it has been held that a person who voluntarily steps down on a railroad track from a station platform, and walks thereon towards a standing train that is liable to move backward or forward almost immediately, when it is too dark to see when it begins to move, or in which direction it is moving, is guilty of contributory negligence.[17] Where one comes onto a railroad track to take passage on a freight train, several hundred feet below the freight depot, at two o'clock on a dark night, knowing nothing of the road, and being at the southern end, and wishing to reach the northern end of the train, passes up the track, which is on a high embankment, and falls into a passway over a road, left open at the top to serve as a cattle guard, he is guilty of contributory negligence.[18] Intoxication of a passenger walking on a side track to take passage on his train does not affect his right to recover for injuries sustained by being struck by a freight train running on the side track, unless by reason of his intoxication he failed to ex-

the direction of such train was unobstructed. Held, that plaintiff was guilty of negligence, and could not recover. De Kay *v.* Chicago, etc., R. Co., 41 Minn. 178, 43 N. W. 182, 16 Am. St. Rep. 687, 4 L. R. A. 632.

14. Information by baggage master.—Roberts *v.* New York, etc., R. Co., 56 N. E. 559, 175 Mass. 296.

15. Request by carrier's agent that passengers cross tracks.—Dieckmann *v.* Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338.

While a passenger's right to assume that the company's agent had announced an approaching train in time to enable him to cross the tracks to the platform in safety, and that a safe access to the platform was provided, did not relieve him from exercising due care for his own safety, those considerations were material in determining whether the passenger exercised due care in crossing. Dieckmann *v.* Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338.

16. Walking on track.—Cameron *v.* Union Trunk Line, 10 Wash. 507, 39 Pac. 128.

17. St. Louis, etc., R. Co. *v.* Whittle, 74 Fed. 296, 20 C. C. A. 196.

W. came to a station on defendant's railroad, at midnight, on a dark night, to board a train which did not stop unless flagged. The station agent had gone to bed, but a bystander flagged the train, which, however, ran 200 feet beyond the station, before stopping. Another bystander then told W. that he could go ahead, and get on, and W. started to run up the track. The train backed down, and ran over and killed W. Held, that W. was guilty of contributory negligence, and the jury, in an action by his representatives, should have been instructed to find for the defendant. St. Louis, etc., R. Co. *v.* Whittle, 74 Fed. 296, 20 C. C. A. 193.

18. Murch *v.* Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631. Compare Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.

ercise such care for his safety as may usually be expected of a sober person of ordinary prudence under like circumstances.[19]

Walking on Right of Way Near Track.—Where a prospective passenger runs along the carrier's right of way in the face of an approaching train, and neglects to avail himself of an opening between freight cars on a side track, which he passes, but on the contrary attempts to board the moving train, he is guilty of contributory negligence which will preclude his recovering for injuries sustained.[20] Where a prospective passenger, in order to board his train, although aware of the approach of an engine in his rear, passes along a path close to the track in a railroad yard, in the midst of a network of tracks and switches where there is a continuous movement backward and forward of engines and cars, and where switching from one track to another is constantly to be expected, he is guilty of such contributory negligence as will preclude his recovery for injuries resulting from his being struck by the overhang of the engine.[21] But it has been held that the fact that one going to a depot walked in the space on a double-tracked railroad, between the two tracks, with an umbrella over her head, so near one of the tracks as to be struck by a train coming back of her, does not show such negligence on her part as to justify the taking of the case from the jury, there being evidence that those in charge of the train knew that people were in the habit of walking between the tracks at that point, and that they did not use proper means to prevent the accident after they saw, or by ordinary care should have seen, her peril.[22]

§ 2715. Flagging or Signaling Train.—Even if one signaling a train at a flag station to stop be considered a passenger, he owes the duty of exercising ordinary care for his safety.[23] A prospective passenger who has gone to a flag station, and taken a position of peril to flag a train, and has stayed there until it is too late to extricate himself, is guilty of contributory negligence.[24] But where an electric railway company, whose cars can be boarded only from the outside rail of each track, maintains between its parallel tracks a night signal device, with directions to passengers to hold up the handle thereof, and thereby cause a light to appear until a car comes in sight, the device is an invitation to passengers to cross the track to give the signal, and to recross to board the car, and a passenger in doing so is chargeable only with the exercise of reasonable care to avoid danger.[25]

§ 2716. Standing within Reach of Street Car.—One who, after signaling an approaching street car which is about to round a curve, places himself in such close proximity to the track that he will inevitably be struck by the overhang of the car when it rounds the curve, assumes the risk incident to the dangerous position which he has taken, and can not hold the street railroad company liable for his injuries.[26] If one, intending to board an approaching street car the side of which projects over the rail about eight inches, stands in a space about two feet from the south rail of the track at a stopping place, and as the car approaches leans his head forward and signals the car, when he is struck on the head by some part of the car, but his body is not injured, he is guilty of contributory negligence in not taking a position outside the reach of the car, and is not entitled to recover.[27]

19. Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598.

20. Walking on right of way near track.—French *v.* Detroit, etc., R. Co., 89 Mich. 537, 50 N. W. 914.

21. Kaiser *v.* Northern Pac. R. Co., 203 Fed. 933.

22. Kreis *v.* Missouri Pac. R. Co., 131 Mo. 533, 33 S. W. 64, 1150.

23. Flagging or signaling train.—Wright *v.* Atlantic, etc., R. Co., 110 Va. 670, 66 S. E. 848, 19 Am. & Eng. Ann. Cas. 439.

24. Bruff *v.* Illinois Cent. R. Co. (Ky.), 121 S. W. 475.

25. Karr *v.* Milwaukee Light, etc., Co., 113 N. W. 62, 132 Wis. 662, 13 L. R. A., N. S., 283.

26. Standing within reach of street car.—Garvey *v.* Rhode Island Co., 58 Atl. 456, 26 R. I. 80.

27. Neale *v.* Springfield St. R. Co., 189 Mass. 351, 75 N. E. 702.

§§ 2717-2738. Entering Conveyance—§ 2717. In General.—A street car passenger is bound to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and to see that the car has stopped, and that he can safely get on before attempting to do so.[28] But while attempting to board a street car, whether stopped on signal or not, he is entitled to rely on the reasonableness of the conduct of the operatives, judged by what they knew, or ought to have known, of the operation of the car.[29] Where a passenger while boarding a street car was injured by placing his hand on the door as it was opening, the fact that in feeling for the handle plaintiff may have accidentally put his hand on the door before it was entirely open would not constitute contributory negligence if he was in the exercise of due care, and the injury which he received was due either to the negligent manner in which the door was operated or to a defect in the construction of the car.[30]

Degree of Care.—In an action to recover for injuries received while entering a train, where the evidence is contradictory, it is not error to instruct that the care to be taken in entering a train must be proportionate to the ordinary risks connected therewith, and the passenger must use the means provided with reasonable care.[31] The standard for determining whether a person injured in attempting to board a car used due care is not whether he could by looking have seen the danger, and did not look, but whether it was reasonable conduct for ordinarily prudent people under the circumstances surrounding the accident to so look as to discover the danger.[32] The reasonable promptness on the part of a passenger in entering a train depends largely on the particular circumstances, including his physical ability, his incumbrance with baggage, and his being accompanied by those dependent upon him for attention.[33]

Injury from Defective Machinery.—In an action by a passenger for injuries received in attempting to enter a car defendant claimed that the attempt to enter the car with the facilities furnished by it was such contributory negligence as defeated a recovery. Such claim, coming from a defendant whose servants had invited plaintiff to enter the car by means of the facilities furnished by defendant, was not entitled to favorable consideration, and that when a passenger has carefully used the means provided by the carrier to enter its cars at a regular station, the danger in attempting to enter must be very apparent to even a person without experience to justify setting aside a judgment in his favor.[34]

Injured by Approach of Car.—One waiting to board an approaching street car, who took a position which was safe with reference to the ordinary cars which the street railroad used, and with which he was familiar, having no notice up to the time he was struck by it that an approaching car was of a greater

28. Entering conveyance.—File *v.* Wilmington City R. Co. (Del.), 80 Atl. 623.

29. Moffitt *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16.

30. Carter *v.* Boston, etc., R. Co., 91 N. E. 142, 205 Mass. 21.

31. Degree of care.—Weaver *v.* Pennsylvania R. Co., 61 Atl. 1117, 212 Pa. 632.

32. Haas *v.* Wichita R., etc., Co., 89 Kan. 613, 132 Pac. 195, 48 L. R. A., N. S., 974; Plummer *v.* Boston Elevated R. Co., 84 N. E. 849, 198 Mass. 499.

The rule for determining whether a person, injured in attempting to board a street car by stepping into the space between the curved end of a platform and the car steps, used due care, is not whether by looking she could have seen the open space, but whether, under the circumstances of the accident, an ordinarily prudent person would have discovered the opening. Brisbin *v.* Boston Elevated R. Co., 207 Mass. 553, 93 N. E. 572.

33. St. Louis, etc., R. Co. *v.* Hartung, 95 Ark. 220, 128 S. W. 1025.

34. Injury from defective machinery.—Where it appears that a woman in pregnancy was seriously injured in boarding a train at a regular station; that she was obliged to step from the ground to a height of 30 or 36 inches, no intervening step being provided, as was the custom; and that she used due care, with the means provided,—judgment for damages will not be disturbed on the ground of contributory negligence, though it also appears that she had some assistance from the company's employees, and that other women, and possibly at times she herself, had boarded the train in a similar manner, without injury. Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731.

width than the ordinary cars, was not guilty of contributory negligence. Nor did he assume the risk of such car's striking him.[35]

Entering Crowded Car.—The mere fact that the car on which a person attempted to take passage was crowded when he was injured by the sudden starting thereof does not render such person guilty of contributory negligence per se.[36]

§ 2718. Time of Entering Car.—Entering Ahead of Proper Time.—A carrier is not liable for an injury to a person who enters and unlighted car ahead of the time the car should have been prepared and lighted for passengers.[37] But where it was the custom of the defendant to receive passengers on its boats in the evening, and allow them to sleep there, for which they were charged extra, there was no contributory negligence in plaintiff's trying to board the boat in the evening instead of waiting until morning, and defendant is liable for failing to keep its approach lighted and in safe condition in the evening.[38]

After Signal to Start.—Where a street car stops for a reasonable time for passengers and gives the signal to start before one attempts to enter, the invitation to enter ceases, and one thereafter attempting to enter would be negligent, especially if he heard and understood the signal.[39]

Car Not Stopped Required Time.—In an action against a railroad company for the death of a passenger while attempting to board a train at a station, a charge that if the train did not stop at the station five minutes as required by statute the company was liable, was erroneous for eliminating the question of contributory negligence of decedent in attempting to board the train in motion.[40]

Car Started Suddenly.—A street railway passenger may assume that, while boarding a car and passing to a seat, the car would not be started until all danger was removed of its running so near to a team as to injure him.[41] Under a stat-

35. Injured from approach of car.—Denison, etc., R. Co. *v.* Craig, 80 S. W. 865, 35 Tex. Civ. App. 548.

36. Entering crowded car.—Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935.

37. Time of entering car.—Cars of defendant's train were left standing at a platform with the steps of the car 2½ inches from the platform. Half an hour before the time for the train to start plaintiff attempted to get on the cars, and in so doing fell between the steps and the platform. The cars had not been lighted and prepared for the reception of passengers, and it was dark at the place where plaintiff attempted to board the car. Held, that plaintiff's negligence precluded a recovery for her injuries. Hodges *v.* New Hanover Transit Co., 107 N. C. 576, 12 S. E. 597.

38. Skottowe *v.* Oregon, etc., R. Co., 22 Ore. 430, 30 Pac. 222, 16 L. R. A. 593.

Plaintiff, having gone into a sanitarium in a car which was switched into the latter's grounds, boarded the same to return. No one was in charge, and, a boy eight years old having loosened the brakes, the car ran at the rate of ten miles an hour down a grade. The car was open, and other passengers were therein. Held, that such act was not per se negligence, and the fact that the railroad and the sanitarium had a regulation prohibiting passengers from entering until an official announcement that the car was ready is immaterial, where such regulation was not published or posted, and plaintiff had no knowledge thereof. Western Maryland R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

39. After signal to start.—Quinn *v.* Metropolitan St. R. Co., 118 S. W. 46, 218 Mo. 545.

40. Car not stopped in required time.—Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189.

41. Car started suddenly.—Lockwood *v.* Boston Elevated R. Co., 86 N. E. 934, 200 Mass. 537, 22 L. R. A., N. S., 488.

A person about to take passage on a street car has the right to rely on the due care of the company, and is not bound to anticipate that the car will start suddenly, and throw him against poles in close proximity to the track. Citizens' St. R. Co. *v.* Merl, 59 N. E. 491, 26 Ind. App. 284.

Plaintiff signaled a horse car, which stopped, but, as he was getting aboard, having one foot on the lower step, was started again suddenly on signal of the conductor, and the plaintiff was thrown off and injured. Plaintiff testifies that the platform was crowded, and by reason of the sudden shock he could not reach it with either foot or get hold of the hand rail. Held that, the evidence being conflicting, the verdict for plaintiff was conclusive of the question of contributory negligence. Black *v.* Brooklyn City R. Co., 108 N. Y. 640, 15 N. E. 389, 1 Silvernail Ct. App. 580.

ute requiring that when cars stop at a station, and a gate has been opened, the car shall not start until the gate be firmly closed, where a person intending to embark as a passenger saw the train standing still, and the gates open, it was an invitation to enter with safety, and an attempt to do so, when no signal had been given to start, was not contributory negligence.[42]

While Cars Being Coupled.—A passenger who steps on a train when it is apparent that a coach is about to be shoved against it with dangerous violence is guilty of contributory negligence.[43] But a passenger is not negligent per se in failing to look whether the engine is being backed against a detached car as he is entering it on invitation of the carrier.[44]

While Other Cars Passing.—Where, though the plaintiff knew that the tracks where he attempted to board a street car ran close together so that the bumpers of passing cars sometimes touched, he also knew that it was defendant's practice to avoid having cars pass at that point, and the place where he attempted to board the car was provided by defendant for taking on passengers, he could assume that there was no danger from passing cars on the other track and was not bound to watch a car on the other track on the other side of the cross-street to see if it was going to pass the car he was boarding.[45]

§ 2719. Place of Entering Car.—A passenger may board a street car at the places designated by the railway company as stopping points, and at such other points as the railway may stop its cars on the public streets.[46] The exercise

42. Schestanber *v.* Manhattan R. Co., 44 Hun 628, 9 N. Y. St. Rep. 215.

43. While cars being coupled.—Wise *v.* Wabash R. Co., 115 S. W. 452, 135 Mo. App. 230.

44. Moore *v.* Saginaw, etc., R. Co., 78 N. W. 666, 119 Mich. 613.

In accordance with defendant's custom to allow passengers to board a freight train at a station before the coach had been drawn up to the depot after the switching had been done, plaintiff attempted to enter the coach when it was standing still, but, as she did so, the engine backed into the car with such force as to throw her, and cause the injury of which she complains. Held, that she was entitled to assume that the engine would approach with such care as not to cause her injury and that she was not required to look for its approach. Jones *v.* New York Cent., etc., R. Co., 61 N. Y. S. 721, 46 App. Div. 470.

Coupling in violation of statute.—Code 1892, § 3548, makes it unlawful for any railroad company to switch a railroad car by a "kicking switch" within the limits of a municipality. Held, that where a passenger train was standing at the station in the limits of a municipality, and the time for its departure had arrived, and a passenger was permitted to board the train, and was subsequently injured by the making of a "kicking switch," his boarding the train was not contributory negligence, precluding a recovery. Yazoo, etc., R. Co. *v.* Roberts, 40 So. 481, 88 Miss. 80.

45. While other cars passing.—Scott *v.* Metropolitan St. R. Co., 120 S. W. 131, 138 Mo. App. 196.

46. Place of entering car.—Moffitt *v.* Connecticut Co., 86 Atl. 16, 86 Conn. 527.

Circumstances known to passenger.—Plaintiff, while attempting to board defendant's train, struck her foot against the side of the car platform, which was some inches higher than the station platform, causing her serious injury. She testified that the space was covered by the dress of a lady passenger, who was entering the car just ahead of her, so that she did not see it. She was a frequent passenger on the road, and always used the station where the injury occurred. She did not look to see where she placed her foot. A space of from two to six inches or more between the car and station platform is essential in operating a road, and it was shown to be impossible to have the platform on exactly the same level, owing to the difference in the car springs. Similar accidents had occurred on defendant's road at other stations. At one station a movable platform was used, but it was not adapted to the station in question. Held, that plaintiff did not use ordinary care, and a verdict for her should be set aside. Hanrahan *v.* Manhattan R. Co., 53 Hun 420, 6 N. Y. S. 395, 24 N. Y. St. Rep. 790.

A public crossing.—Defendant's passenger depot at a regular station having been burned, its trains were thereafter stopped at a public crossing, where there was no platform, and where the distance from the ground to the lowest step of the coaches was nearly three feet. Plaintiff, while attempting to board a coach to take passage, none of defendant's servants being present to assist her, fell, and was injured. Held, that the questions of negligence and contributory negligence were for the jury. Eichhorn *v.*

of ordinary care does not require that passengers on street cars should be all the time on the lookout for deep and unguarded holes in or close to the entrance of such cars, nor to watch for unheralded removal of safeguards formerly existing.[47] Where a passenger was injured while attempting to board a street car which had stopped at an unsafe place, the question of her negligence depended upon whether she acted as persons of ordinary prudence would have acted under the same circumstances.[48]

In Car Yard.—A person who goes in the nighttime, in the midst of a car yard, and at a place where the railroad company is not accustomed to receive passengers, and, without the knowledge of those in charge of a freight train standing there, attempts to enter the caboose attached to such freight train, and is injured, is guilty of contributory negligence, and can not recover for such injury.[49]

At Place Other than Usual Stopping Place of Car.—In an action for the death of a person attempting to board a street car, where there was no evidence to show wanton or intentional misconduct of the street car employees, or to show that they knew decedent was in peril, an instruction that, if decedent attempted to board defendant's car at a place where they did not usually or frequently stop to take on or let off passengers, the jury must find for the defendant, was not error.[50]

At Place Other than Station of Railroad Train.—Passengers entering cars can not be supposed to be ignorant of the necessity and use of platforms, and when a platform is in plain sight, which they must know was made for their use, they can not properly complain that they are not accommodated. They are required to conform to the reasonable business arrangements of the railroad.[51] It is not negligence per se to board a passenger train at a point elsewhere than at a depot platform, so as to prevent a recovery for injuries caused by the sudden

Missouri, etc., R. Co., 130 Mo. 575, 32 S. W. 993.

Over other tracks.—Defendant's street car stopped on a signal from plaintiff, who was approaching across the other tracks of the company, and while plaintiff was getting on the car it started, pulling him along, with his hand on the handle, for eight or ten feet, when he was struck and injured by another car, running in an opposite direction. There was evidence tending to show an invitation from the conductor of the car to plaintiff to get on on that side. In an action for the injuries, held that, under the circumstances, it was not negligence per se for the plaintiff to attempt to enter the car between the tracks, but that it was a question for the jury whether plaintiff was guilty of contributory negligence. Dale *v.* Brooklyn City, etc., R. Co., 1 Hun 146, 3 Thomp. & C. 686.

Place fixed for employees.—The evidence showed that plaintiff was attempting to enter the caboose at the place fixed for employees when he was struck by the pipe of a water tank, and there was nothing to show that it was obviously dangerous so to enter, or that plaintiff was negligent in the manner of his attempt to enter. Held, that a verdict in his favor would not be disturbed. Missouri Pac. R. Co. *v.* Callahan (Tex.), 12 S. W. 833.

47. Lake, etc., R. Co. *v.* Burgess, 99 Ill. App. 499, affirmed in 66 N. E. 215, 200 Ill. 628.

Where a passenger attempts to board a street car on a dark night, and there was a shadow cast around the car for several feet, and the passenger falls into a ditch that she could not see, and which the railroad company should have guarded against, it authorizes a finding that the passenger was in the exercise of ordinary care. Call *v.* Portsmouth, etc., Railway, 45 Atl. 405, 69 N. H. 562.

48. Haas *v.* Wichita R., etc., Co., 132 Pac. 195, 89 Kan. 613, 48 L. R. A., N. S., 974.

Where plaintiff, while boarding a train, slipped and was injured, owing to the negligence of the railroad company in stopping the car in such a position that the car steps were directly over a slope in the platform of the station on which grease was allowed to accumulate, an instruction that plaintiff's omission to look out for her own safety was not negligence is erroneous. Savannah, etc., R. Co. *v.* Flaherty, 35 S. E. 677, 110 Ga. 335.

49. **In car yard.**—Haase *v.* Oregon R., etc., Co., 19 Ore. 354, 24 Pac. 238.

50. **At place other than usual stopping place of street car.**—Smith *v.* Birmingham R., etc., Co., 41 So. 307, 147 Ala. 702.

51. **At place other than station of railroad train.**—Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

starting of the train.[52] Where the rules of a railroad company require passengers of the combined freight and passenger train to get on and off wherever it is convenient for the train to stop, it is not negligence for a passenger to board the train while it is standing forty feet from the station platform.[53] But where a passenger goes on the side of a platform car opposite the platform, and not at the place arranged to receive passengers, and attempts to climb on the train from between the cars, and in so doing places his foot on the bumper, where it was injured by the engine moving up to couple the train, he is guilty of contributory negligence, and can not recover.[54]

At Street Crossings.—A notice posted in a street car, which states that "cars stop to take on and let off passengers at near side of cross streets," and that those violating the notice do so at their own risk, not meaning that cars will stop only at such places, does not preclude a passenger getting on or off at any other place from recovering for injuries sustained by reason of the company's negligence.[55]

§ 2720. Manner of Entering Car.—Entering on Wrong Side.—A passenger, injured by the starting of a street car while boarding it, is not guilty of contributory negligence in boarding by the side away from the curb, where the car was an open one with a running board on either side.[56] A street car passenger, who was directed to change cars at a car barn, could assume that the way he took to board the other car by going around to the other side, after finding that the bars on one side were down, which was the ordinary and natural way of doing so, was safe and unobstructed.[57] But where a passenger has plenty of time to reach the platform, but deliberately waits on the ground on the far side of the track, though it is dark, and when the train arrives attempts to board on that side, and is thrown off by the cars starting before she is securely on, she is guilty of contributory negligence.[58]

Entering by Front Platform.—An attempt to board a stationary car by the front platform is not negligence per se.[59] A passenger sought to enter a

52. Stoner *v.* Pennsylvania Co., 98 Ind. 384, 49 Am. Rep. 764.

Empty passenger cars were standing upon the siding opposite a station; the incoming train passed on the main track, and after reaching the switch was backed down upon the side track and coupled to the stationary cars. Held, that it was not a rule of law that a passenger was guilty of contributory negligence if, after a signal had been given to start the train, he attempted to get on, the train being then at rest. Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

In an action for injury to a passenger an answer, setting up that defendant maintained a platform at its depot for the use of passengers at the station at which such passenger was injured, that plaintiff did not attempt to board the train from the platform, but at a point where there was no platform, and that neither defendant nor its employees in charge of the train had any knowledge or notice that plaintiff would attempt to board the train at such place, was insufficient, as it did not state that at the time named the train stopped at the platform, or that the defendant was not in the habit of receiving and discharging passengers at the place the plaintiff attempted to take passage, as well as at the platform. Stoner *v.* Pennsylvania Co., 98 Ind. 384, 49 Am. Rep. 764.

53. Louisville, etc., R. Co. *v.* Long, 94 Ky. 410, 15 Ky. L. Rep. 199, 22 S. W. 747.

54. Wardlaw *v.* California R. Co., 110 Cal. xviii, 42 Pac. 1075.

55. At street crossings.—United R., etc., Co. *v.* Woodbridge, 97 Md. 629, 55 Atl. 444.

56. Manner of entering car.—Costello *v.* St. Louis Transit Co., 96 S. W. 425, 119 Mo. App. 391.

57. Gurley *v.* Springfield St. R. Co., 92 N. E. 714, 206 Mass. 534.

58. Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440.

59. Entering by front platform.—Maher *v.* Central Park, etc., R. Co., 39 N. Y. Super. Ct. 155, affirmed in 67 N. Y. 52; Pfeffer *v.* Buffalo R. Co., 4 Misc. Rep. 465, 24 N. Y. S. 490, 54 N. Y. St. Rep. 342.

In an action against a street-car company for injury to a passenger, the evidence showed that plaintiff, an old woman, entered the car by the front platform, and that before she reached her seat the car started, and she fell down. Held, that whether plaintiff's conduct in entering the car from the front platform, and going towards a seat with

street car by the rear platform, but, finding it full, walked along the outside of the car, intending to mount to front platform. He slipped on a ridge of hardened snow which should have been removed by defendant, fell under the car, and received the injuries for which he sued. A verdict for the passenger against the street car company should not be disturbed, as it could not be said, as matter of law, that he was guilty of contributory negligence.[60] But a passenger, injured in attempting to enter an electric car through the front entrance, which was a dangerous place to enter, after the signal to start had been given, and before it had emerged from a barn for the housing and repair of its cars, and while the car was not to exceed three or four feet from the barn door, so that he would inevitably be caught in passing through the door, unless he got inside the car before it reached the barn door, which he failed to do; all of which dangers were open, and which he had a better opportunity to observe than any other person, is guilty of contributory negligence as matter of law, which was the direct and proximate cause of his injuries.[61] Where a boy of twelve years, without invitation, got on the step of the front platform of an electric street car, access to which was barred by a closed door, the method of entering being by a rear door, and the motorman did not open the door or stop the car, and it struck a wagon and the boy was injured, in an action against the company a nonsuit was proper.[62]

Entering through Baggage Car.—Passengers have no right to enter or pass through a baggage car attached to the train on which they are about to take passage; and, if plaintiff got upon the platform of the rear car, and discovered that the car, or that portion of it next to the platform upon which he got, was set apart for baggage, he would not be negligent in withdrawing therefrom to seek his place in a passenger car without going through the baggage car.[63] Although a railroad company at a particular station gives passengers a convenient means of boarding its train by crossing a gang plank laid between the station platform and the baggage car of the train, and thence passing through the baggage car into

her back to the horses, without steadying herself by the use of the straps placed in the car for that purpose, constituted contributory negligence, was for the jury. Holmes *v.* Allegheny Tract. Co., 153 Pa. 152, 25 Atl. 640.

Entering side door of freight car.—Plaintiff was in charge of a car load of horses. Before arriving at B., the conductor told plaintiff that he would thereafter have to ride in the car with his horses; that at B. the train would stand for forty-five minutes where left, and that plaintiff could get supper, and then take the train. At B. plaintiff left the train for supper, and returned in about thirty minutes, when the train had been shifted two tracks further off, and a locomotive attached to its rear. To get on the train, plaintiff had to walk around such engine by a passage used by defendant only in connection with its cattle yards. He passed close to the engineer, who was looking in the direction plaintiff was going. While entering the car by the side door, the train started, injuring plaintiff. Held, that it was not negligence in plaintiff to attempt to enter the door on the side of the car instead of the one at the end, when the evidence showed that the end door was used in cases of emergency only, or when the drovers had occasion to enter the car while the train was in motion. Pitcher *v.* Lake Shore, etc., R. Co., 61 Hun 623, 16 N. Y. S. 62, 40 N. Y. St. Rep. 896.

60. Dixon *v.* Brooklyn, etc., R. Co., 100 N. Y. 170, 3 N. E. 65.

61. Kroeger *v.* Seattle Elect. Co., 79 Pac. 1115, 37 Wash. 544.

A regulation of a street railway company prohibiting passengers from getting on or off at the front end of any car and requiring them to enter and alight from the rear platform only is a reasonable regulation, and knowingly to violate it, without the compulsion of some existing necessity, is conclusive evidence of negligence on the part of the passenger, so that should he sustain an injury in consequence thereof, he will have no right of action against the company, although the driver of the car may also have been negligent. And the circumstance that the driver or conductor may have given permission thus to use the front platform is immaterial, for the carrier can not be bound by the act of its servant in attempting to dispense with a known and positive regulation. Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

62. Barlow *v.* Jersey, etc., R. Co., 51 Atl. 463, 67 N. J. L. 364.

63. Entering through baggage car.—Union Pac. R. Co. *v.* Sue, 25 Neb. 772, 41 N. W. 801.

the coaches, it can not say that a passenger who was injured by its starting one of its trains without warning would not have been hurt, had he adopted this means of boarding the train, instead of attempting to mount the steps at a point beyond the platform, where no notice of this peculiar method of receiving passengers at a baggage car door had been given.[64]

Entering without Stepping Stool.—A passenger is not chargeable with contributory negligence in entering a car by a step three feet high, no stepping stool being furnished.[65] Complaint alleging that defendant neglected to construct and maintain a platform at its station; that the train plaintiff desired to board was stopped where the distance between the ground and the lowest step of the car was three feet; that those in charge invited her to board it there; that it was the custom to procure a stool or step for use of passengers; that plaintiff, observing the distance from the ground to the step, requested them to procure a step or stool to assist her to board the train; that they neglected and refused to procure it, but assured her they could and would assist her to safely board the train as it stood, without a stool; that she, believing and relying on their statements and representations, and depending on them for assistance, attempted to, and did, board the train, but that they negligently failed to render her proper and sufficient assistance, and, in stepping from the ground to the car, she, without any fault on her part, and by reason of the great distance she had to step, and because of the lack of assistance, sustained injuries—does not show contributory negligence, as matter of law.[66]

Entering in Darkness.—It is contributory negligence to enter a car in an unsafe place in the dark.[67] Where a passenger has purchased a ticket, intending to take passage on the expected train, and remains in the office until the approach of the train is announced, and when he does what all other persons, in like circumstances, had done for years, without accident or injury, he can not be deemed prima facie guilty of a want of ordinary care, if he fails to call for a light or assistance in taking the train, although familiar with the situation.[68]

Entering While Carrying Bundles.—It is not negligence, as a matter of law, for a woman with her arms full of packages to attempt to board a standing street car.[69] Where an accident happens to a person carrying a plank on the shoulder, measuring in length about six feet, when attempting to board a steam street railway, and the defendant company is not in fault, damages will not be allowed.[70]

Entering without Grasping Handhold.—A party gets onto the step of a street car before grasping the handholds on the body of the car and the platform, or either of them, and though, after being on the step, he catches the rear platform handhold with the hand furthest from it, having to reach across his body to do so,—his right hand being incapacitated by reason of packages he is carrying,—is not negligent, as a matter of law, in such attempt to board the car.[71] Where a passenger, having signaled the driver, approaches a street car on

64. Atlantic, etc., R. Co. *v.* Anderson, 45 S. E. 271, 118 Ga. 288.

65. Entering without stepping stool.—Where it appears that a woman in pregnancy was seriously injured in boarding a train at a regular station; that she was obliged to step from the ground to a height of thirty or thirty-six inches, no intervening step being provided, as was the custom; and that she used due care, with the means provided, judgment for damages will not be disturbed on the ground of contributory negligence, though it also appears that she had some assistance from the company's employees, and that other women, and possibly at times she herself, had boarded the train in a similar manner, without injury. Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731.

66. Illinois Cent. R. Co. *v.* Cheek, 53 N. E. 641, 152 Ind. 663.

67. Entering in darkness.—Haase *v.* Oregon R., etc., Co., 19 Ore. 354, 24 Pac. 238.

68. Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

69. Entering while carrying bundles.—Jaques *v.* Sioux City, etc., Co., 99 N. W. 1069, 124 Iowa 257.

70. Byrd *v.* New Orleans, etc., R. Co., 43 La. Ann. 822, 9 So. 565.

71. Entering without grasping handhold.—Birmingham R., etc., Co. *v.* Brannon, 31 So. 523, 132 Ala. 431.

its right-hand side, and, while it is standing, attempts to board it by placing his right foot first on the platform, he can not, as matter of law, be said to be guilty of contributory negligence in taking hold, with his right hand, of the rail around the guard on the rear of the platform, instead of taking hold of the rail placed on the body of the car.[72]

Passing over Another Train.—A railroad company placed a freight train on a switch between its depot building and a passenger train on the regular track. A passenger, intending to board the passenger train, stepped upon a flat car in the freight train directly in front of the depot building and undertook to jump from the top of it to the platform of the passenger train. His foot was caught in a stirrup in the top of the flat car, and he was injured. The flat car was not out of order. The passenger was, as a matter of law, guilty of contributory negligence, precluding a recovery, though the freight train should have been cut in two and a way opened for passengers to walk from the depot to the passenger train.[73]

Permitting Others to Enter First.—In an action for injuries by being squeezed between two cars at a point where the tracks converged, it was not negligence for plaintiff, attempting to board one of the cars, to let a more infirm person board the car ahead of him.[74]

§ 2721. Entering Particular Car.—Car Not Intended for Passengers.—It was the custom of a railraod company to carry passengers on some of its freight trains, and plaintiff, supposing a certain freight train to be one on which passengers were carried, attempted to board it, and while so doing was thrown under the cars by their sudden starting. In an action for his injuries, it was held, that the fact that the train was not standing at the station, that the caboose was not convenient for passengers, and that the ticket office at the station was not open, was not sufficient notice to the passenger that the particular train on which he was injured did not carry passengers.[75]

Car Detached from Train.—An intending passenger was not, as a matter of law, negligent in entering a detached car standing on a track by a station platform, with which it was connected by a gang plank, it being in apparent readiness to receive passengers, and to be attached to the train when it should arrive.[76]

§ 2722. Entering Elevator.—Where the defendant invited a passenger to enter an elevator, the latter was not bound to exercise a high degree of care to ascertain whether the elevator car was in the shaft.[77] An elevator for the carriage of persons is not, like a railroad crossing at a public highway, supposed to be a place of danger, to be approached with caution; but, on the contrary, it may be assumed that, when the door of the elevator is thrown open by the servant in charge, it is a place which may be safely entered, without stopping to look, listen, or make a special examination.[78] Plaintiff, a tailor boy, who had been

72. Ganiard *v.* Rochester City, etc., R. Co., 50 Hun 22, 2 N. Y. S. 470, 18 N. Y. St. Rep. 692.

73. **Passing over another train.**—Louisville, etc., R. Co. *v.* Lawler, 107 S. W. 702, 32 Ky. L. Rep. 994, rehearing denied in 109 S. W. 908.

74. **Permitting others to enter first.**—Christensen *v.* Brooklyn Heights R. Co., 119 N. Y. S. 509, 134 App. Div. 703.

75. **Entering praticular car.**—Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

75. **Entering particular car.**—Lucas *v.* Catskill Mountain R. Co., 33 Fed. 858.

Plaintiff, having gone to a sanitarium in a car which was switched into the latter's grounds, boarded the car to return. No one was in charge, and, a boy of eight years old having loosened the brakes, the car ran at the rate of ten miles an hour down a grade. The car was open, and other passengers were therein. Held, that such act was not per se negligence. Western Maryland R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

77. **Entering elevator.**—Burgess *v.* Stowe, 96 N. W. 29, 134 Mich. 204.

78. Chicago Exch. Bldg. Co. *v.* Nelson, 98 Ill. App. 189, judgment affirmed in 64 N. E. 369, 197 Ill. 334. But see Bremer *v.* Pleiss, 121 Wis. 61, 98 N. W. 945.

An elevator in a hotel was located in a dark corner, and in the daytime it was

taken in defendant's passenger elevator to a room where he wanted to leave part of the clothes he had with him, not knowing anything about the working of the elevator lever or how it had been left by the elevator boy, and being entitled to think that the elevator boy intended him to re-enter the elevator in his absence for the purpose of being taken to the street, the door being left well open, could be found not guilty of negligence in doing so.[79]

§ 2723. Negligence of Particular Passengers.—Passenger Having Knowledge of Circumstances.—Acquaintance with the peculiar construction of a platform at a station does not require a greater degree of caution than is incumbent on all persons in boarding a car.[80] The fact that a passenger knows the car steps are unreasonably high from a cinder platform at a country station will not prevent him from recovering for injuries in boarding, because of those facts.[81]

Women and Children Passengers.—Where a passenger showed that she, being six months pregnant, attempted to board an excursion train from a low platform which was not the regular station; that she was directed to board the train here by a man in the company's uniform; that hundreds of others did then, and were generally accustomed to, board the cars from this platform; and that, as she stepped on the car, the train gave a sudden jerk, and she was thrown under the wheels, held to be the question of contributory negligence was for the jury.[82] It is a question for the jury whether a boy thirteen years old, who was ordered to go from the front to the rear platform of a street car to board it, then was ordered back again, and who slipped on snow banks which the company had left sloping towards the track, was negligent.[83]

§§ 2724-2738. Boarding Moving Conveyance.—§ 2724. In General.—A passenger attempting to board a moving train is generally guilty of contributory negligence, precluding a recovery for the injuries received,[84] though the carrier is guilty in the first place in not stopping its train a reasonable time for

nearly impossible to see into the shaft, and on the occasion in controversy the door of the shaft was left partly open when the car was not there. Plaintiff was familiar with the elevator, and approached it, having in mind the question whether the car was there, and before stepping in he looked at the open hole and saw no car. The door was about half open and he pushed it open with his shoulders and stepped in. Only a few minutes before he had stepped into the car through the door, which was then fully open. Held, that he was guilty of contributory negligence. Bremer *v.* Pleiss, 98 N. W. 945, 121 Wis. 61.

79. Toohy *v.* McLean, 85 N. E. 578, 199 Mass. 466.

80. Negligence of particular passengers.—Gulf, etc., R. Co. *v.* Fox (Tex.), 6 S. W. 569.

81. Louisville, etc., R. Co. *v.* Dyer, 153 S. W. 194, 152 Ky. 264, 48 L. R. A., N. S., 816.

82. Women and children passengers.—Baltimore, etc., R. Co. *v.* Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387.

83. Mowrey *v.* Central City Railway, 51 N. Y. 666, affirming 66 Barb. 43.

84. Boarding moving conveyance.—*United States.*—Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 34 Fed. 92; S. C., 36 Fed. 879; Lauterer *v.* Manhattan R. Co., 63 C. C. A. 38, 128 Fed. 540.

Alabama. — Smith *v.* Birmingham R., etc., Co., 147 Ala. 702, 41 So. 307.

Colorado. — Denver, etc., R. Co. *v.* Pickard, 8 Colo. 163, 6 Pac. 149.

Delaware.—Waller *v.* Wilmington City R. Co., 61 Atl. 874, 5 Pennewill 374.

Illinois.—Chicago, etc., R. Co. *v.* Koehler, 47 Ill. App. 147; Walthers *v.* Chicago, etc., R. Co., 72 Ill. App. 354; Chicago, etc., R. Co. *v.* Stewart, 77 Ill. App. 66; Pope *v.* Chicago City R. Co., 113 Ill. App. 503.

Iowa.—Pence *v.* Wabash R. Co., 90 N. W. 59, 116 Iowa 279.

Louisiana.—Knight *v.* Pontchartrain R. Co., 23 La. Ann. 462.

Pennsylvania.—Bacon *v.* Delaware, etc., R. Co., 143 Pa. 14, 21 Atl. 1002.

Where the plaintiff, in attempting to get on the platform of a moving street car, succeeded in getting his feet on the lower step, when he was thrown off by the motion of the car, binding instructions for the defendant are proper. Bradney *v.* Philadelphia Rapid Transit Co., 81 Atl. 187, 232 Pa. 127.

South Dakota.—A passenger who attempts to board a moving train leaving on schedule time, without an invitation or direction from the conductor or some one in charge, assumes the hazards incident thereto. Larson *v.* Chicago, etc., R. Co., 31 S. Dak. 512, 141 N. W. 353.

the passenger to enter it in safety.[85] A passenger injured in attempting to get upon a moving passenger train can not maintain an action for such injuries, in the absence of evidence of any circumstances tending to excuse his lack of ordinary care.[86] Where the speed of a train and the difficulties in the way of boarding it are so obviously dangerous that a person of ordinary prudence would not attempt to board it, a passenger who makes the attempt and is injured is guilty of contributory negligence.[87] Injuries received by one intending to become a passenger on, and while attempting to board, an interurban car in motion and before the car is stopped, are the result of contributory negligence on the part of such prospective passenger. Hence no recovery therefor can be had, especially if the jerking motion complained of was caused by slippery rails while the motorman was attempting to stop the car, the motorman not knowing, or by the exercise of ordinary care not having knowledge, that such passenger was attempting to get on the car.[88] According to the Texas decisions it would seem that it is not negligence per se for a passenger to board a moving train at a station, unless it is moving so fast as to make the danger of boarding or alighting obvious to a person of ordinary prudence.[89]

Assumption of Ordinary Risks.—A person attempting to board an electric street-railway car while in motion assumes the risks of injury only from the ordinary movements of the car.[90]

Failure to Grasp Handhold.—Whether plaintiff, after he lost his grasp on the rail attached to the car, in attempting to board the same while it was in motion, was negligent in seizing the rail of the dasher in an involuntary effort to protect himself, was a question for the jury.[91]

Proximate Cause of Injury.—Though a person who attempts to board a trolley car while in motion is not negligent as a matter of law, yet when the fact that the car is in motion is the sole cause of the injury the risk is one which the person making the attempt must be held to have assumed.[92] When plaintiff, in attempting to board a train as it is leaving a station, slips and is dragged along the platform, and injured by falling into a ditch several yards distant which the railroad company is digging for the purpose of drainage, the negligent act of plaintiff in attempting to board the moving train is the proximate cause of the injury.[93] Where the injury to a passenger received while attempting to board a moving train was not caused by any of the ordinary dangers incident to boarding a moving train, but was caused by a trunk which the trainmen had placed near the track, the act of the passenger in attempting to board the moving train was not of itself the proximate cause of the injury.[94]

Negligence Per Se.—Attempting to enter a moving street car is not contributory negligence per se,[95] but the question is for the jury, where there is any

85. Johnson *v.* St. Joseph R., etc., Co., 128 S. W. 243, 143 Mo. App. 376.

86. Harvey *v.* Eastern R. Co., 116 Mass. 269.

87. Atchison, etc., R. Co. *v.* Holloway, 71 Kan. 1, 80 Pac. 31.

88. Ohio Cent. Tract. Co. *v.* Mateer, 21-31 O. C. D. 478, 12 O. C. C., N. S., 327, judgment affirmed in 91 N. E. 134, 81 O. St. 494.

89. Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Galveston, etc., R. Co. *v.* Smith, 59 Tex. 406; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756; Galveston, etc., R. Co. *v.* Morris, 94 Tex. 505, 61 S. W. 709; Dallas Rapid Trans. Co. *v.* Payne, 98 Tex. 211, 82 S. W. 649.

90. Assumption of ordinary risks.—Schepers *v.* Union Depot R. Co., 126 Mo. 665, 29 S. W. 712.

91. Failure to grasp handhold.—Briggs *v.* Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. Rep. 518.

92. Proximate cause of injury.—Murphy *v.* North Jersey St. R. Co., 58 Atl. 1018, 71 N. J. L. 5.

93. Bailey *v.* Cincinnati, etc., R. Co., 14 Ky. L. Rep. 226, 20 S. W. 198.

94. Roberts *v.* Atlantic, etc., R. Co., 70 S. E. 1080, 155 N. C. 79.

95. Negligence per se. — *Alabama.* — Birmingham Elect. R. Co. *v.* Clay, 108 Ala. 233, 19 So. 309.

Illinois.—South Chicago City R. Co. *v.* Dufresne, 65 N. E. 1075, 200 Ill. 456, affirming judgment, 102 Ill. App. 493; West Chicago St. R. Co. *v.* Dudzik, 67 Ill. App. 681; Pope *v.* Chicago City R. Co., 113 Ill. App. 503; Cicero, etc., R. Co. *v.* Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Chicago Union Tract. Co.

evidence that the one making the attempt was exercising due care.[96]

§§ 2725-2726. Speed Car Moving—§ 2725. In General.—Slowly Moving Railroad Train.—The courts will not declare, as a matter of law, a person guilty of contributory negligence who attempts to get on a train while it is moving slowly, especially at a platform.[97] Where a strong able-bodied man, accustomed to travel, attempted to board a train, moving at about four miles an hour, which he was waiting to take, but which he had not been afforded a reasonable opportunity to board, he can not be said as a matter of law to be guilty of contributory negligence in so doing.[98]

Slowly Moving Street Car.—It is not necessarily negligence in law to get upon a street car while it is moving slowly.[99] The rule that it is not negligence per se for a strong able-bodied man to attempt to board a slowly moving street car applies only in cases where the act is not attended by unusual and extraordinary dangers, and one attempting to board a moving car which had started to run over a viaduct used exclusively for street car traffic is as a matter of law negligent.[1]

Slowed Down on Signal to Stop.—Where a person having the free use of his faculties and limbs has given proper notice of his desire to board a street car, and the car has slackened up in the usual manner, it is not negligence for him to attempt to get on while it is moving slowly.[2] For one to attempt to board a

v. Lundahl, 74 N. E. 155, 215 Ill. 289, affirming judgment, 117 Ill. App. 220.

Maryland.—Baltimore, etc., R. Co. *v.* Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387.

Michigan.—Cousins *v.* Lake Shore, etc., R. Co., 56 N. W. 14, 96 Mich. 386.

Missouri.—McKee *v.* St. Louis Transit Co., 108 Mo. App. 470, 83 S. W. 1013; Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

Nebraska.—Omaha St. R. Co. *v.* Martin, 48 Neb. 65, 66 N. W. 1007.

New York.—Wallace *v.* Third Ave. R. Co., 55 N. Y. S. 132, 36 App. Div. 57.

It is not negligence per se to board a horse car while it is moving very slowly. Brown *v.* Washington, etc., R. Co., 11 App. D. C. 37; Sexton *v.* Metropolitan St. R. Co., 57 N. Y. S. 577, 40 App. Div. 26.

An attempt of a passenger to board a moving train, though attended with some danger, is not, under all circumstances, contributory negligence. Atchison, etc., R. Co. *v.* Holloway, 80 Pac. 31, 71 Kan. 1.

It is not negligence per se for a passenger to attempt to board a moving train. Whether the train stopped long enough for passengers to get on, and other circumstances, may affect the question, which, if the evidence is conflicting, is for the jury. Swigert *v.* Hannibal, etc., R. Co., 75 Mo. 475.

It is contributory negligence, as a matter of law, to attempt to board a moving train. Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331.

96. Judgment, 68 Ill. App. 443, affirmed in North Chicago St. R. Co. *v.* Wiswell, 48 N. E. 407, 168 Ill. 613.

97. Speed car moving.—Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

A person attempting to board a train moving three miles an hour is not negligent as matter of law. Creech *v.* Charleston, etc., R. Co., 45 S. E. 86, 66 S. C. 528.

98. Atchison, etc., R. Co. *v.* Holloway, 80 Pac. 31, 71 Kan. 1.

99. Slowly moving street car.—*Kentucky.*—Central Pass. R. Co. *v.* Rose, 15 Ky. L. Rep. 209, 22 S. W. 745.

Louisiana.—Pitard *v.* New Orleans R., etc., Co., 45 So. 943, 120 La. 925.

Massachusetts. — Briggs *v.* Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. Rep. 518; McDonough *v.* Metropolitan R. Co., 137 Mass. 210.

Minnesota.—Sahlgaard *v.* St. Paul City R. Co., 48 Minn. 232, 51 N. W. 111.

New York. — Valentine *v.* Broadway, etc., R. Co., 4 N. Y. S. 481, 14 Daly 541, 16 N. Y. St. Rep. 602.

Pennsylvania. — Stager *v.* Ridge Ave. Pass. R. Co., 119 Pa. 70, 12 Atl. 821.

It is not negligence per se for one to attempt to board a street car moving slower than a man can walk. Kimber *v.* Metropolitan, etc., R. Co., 74 N. Y. S. 966, 69 App. Div. 353.

It is not negligence per se for a person to get on or off a street car, drawn by horses, while it is in motion. Schacherl *v.* St. Paul City R. Co., 42 Minn. 42, 43 N. W. 837.

1. Mathews *v.* Metropolitan St. R. Co., 137 S. W. 1003, 156 Mo. App. 715.

2. Slowed down on signal to stop.—Conner *v.* Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 55 Am. Rep. 177; Schmidt *v.* North Jersey St. R. Co. (N. J.), 58 Atl. 72.

In an action against a street railway for personal injuries, it appeared that plaintiff signaled the driver of defend-

street car, the speed of which has merely been slackened in response to his signal that he wished to get on, can not, in the absence of exceptional circumstances, be declared negligence, as a matter of law; and that though the attempt is to get on the front platform, especially where there is a rule of the road that persons smoking should ride thereon, and the person attempting to get on is smoking at the time.[3] But where a person signals an electric car to stop at a crossing, and the signal is heeded, and the car is slacking its speed, and he attempts to get on while it is running three miles an hour, and is injured thereby, he cannot recover.[4]

Running at Unlawful Rate.—A town ordinance making it unlawful to run trains at a greater speed than six miles per hour within the limits of the town was for the protection of persons who might be lawfully on or crossing the track and had no application to one attempting to board a moving train at a station.[5]

Moving Faster than Man Can Walk.—To attempt to board a car going faster than a man could walk was negligence barring a recovery for injuries sustained.[6]

§ 2726. Speed Suddenly Accelerated.—One who attempts to board a moving street car assumes the risk of attempting to board the car, but not of negligence in accelerating speed.[7] While the plaintiff was attempting to board a slowly moving car, its speed was accelerated and he was struck and injured by a car on an adjoining track, which he had seen. He did not indicate his desire

ant's car to stop. The car was an open one, with a step or rail along the side. The driver, in obedience to the signal, applied the brake. While the car was moving slowly, plaintiff stepped upon the rail, taking hold of the end of a seat to raise himself from the ground, when the driver, who was looking at him, without any signal, started the car with a jerk, throwing plaintiff to the ground. Held, that plaintiff was not, as a matter of law, guilty of contributory negligence. Eppendorf *v.* Brooklyn, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171.

In an action for personal injuries, the evidence for plaintiff showed that, as a street car approached, he signaled twice, being in full view of the conductor and person driving, and that after the second signal the horses commenced to slacken their speed, and came to a walk, as they approached the crossing where he stood; that he seized the rail, and placed one foot upon the step, and was raising the other, when the conductor called, "Don't stop there," and the horses were given a slap with the lines, which caused a sudden jerk, throwing plaintiff to the ground. Held, that the case was properly submitted to the jury as to contributory negligence of plaintiff. Butler *v.* Glens Falls, etc., St. R. Co., 121 N. Y. 112, 24 N. E. 187, affirming 49 Hun 610, 2 N. Y. S. 72.

3. Finkeldey *v.* Omnibus Cable Co., 45 Pac. 996, 114 Cal. 28.

4. Hunterson *v.* Union Tract. Co., 55 Atl. 543, 205 Pa. 568.

5. Running at unlawful rate.—Houston, etc., R. Co. *v.* Schuttee (Tex. Civ. App.), 91 S. W. 806.

6. Moving faster than man can walk.—Quinn *v.* Philadelphia Rapid Transit Co., 224 Pa. 162, 73 Atl. 319.

7. Speed suddenly accelerated.—Orth *v.* Saginaw Valley Tract. Co., 162 Mich. 353, 127 N. W. 330; Schmidt *v.* North Jersey St. R. Co. (N. J.), 58 Atl. 72.

The act of a passenger in attempting to board a moving train was not, as a matter of law, the proximate cause of his injury, where the train gave a sudden jerk after he had gotten one foot on the car platform and the other on the step below, and he was thrown off. Distler *v.* Long Island R. Co., 45 N. E. 937, 151 N. Y. 424, 35 L. R. A. 762.

Plaintiff, in an action against a horse railway company, testified that on the approach of one of defendant's cars he signaled it to stop; that the speed of the car was slackened; that, as it passed, he seized the hand rail on the rear platform, and planted his foot on the step; that the break was relaxed, and the car started with a sudden jerk, throwing his feet from under him, and dragging him some distance, injuring him severely. Held, that the question as to contributory negligence on the part of plaintiff was for the jury. Morrison *v.* Broadway, etc., R. Co., 130 N. Y. 166, 29 N. E. 105, affirming 55 Hun 608, 8 N. Y. S. 436.

Where plaintiff attempted to get on a moving electric car, and was safely on when he was thrown off by the act of the motorman in suddenly starting the car with a jerk, the company is liable, though the original act of plaintiff was negligent; but if the sudden jerk happens while plaintiff is getting on the car, and before he has reached a place of safety, the company is not liable. Boulfrois *v.* United Tract. Co., 59 Atl. 1007, 210 Pa. 263, 105 Am. St. Rep. 809.

to board the moving car. He admitted that the interval of time between his placing his foot on the running board and the collision was very brief, and that the space between the cars was not wider than a hand. If the injury resulted from any negligence, it was the plaintiff's more than the company's preventing recovery from it.[8]

After Slowing Down.—Where one stepped aboard a car when it had almost stopped, and was injured by its sudden starting, it cannot be said, as a matter of law, that he was guilty of contributory negligence.[9] But where, in an action against a street railway company, plaintiff while stepping onto a slowly moving car, which he had signaled, was thrown off by its starting forward with a jerk, the refusal of the court to charge that "the slowing up of the car as it approached the street crossing was not an invitation to the plaintiff to board it before it stopped," was error.[10]

After Invitation to Enter.—Where a passenger is invited to enter a street car by the conductor in response to his signal to stop, and the car has stopped, or, in the act of stopping, is moving very slowly, and, while he is in the act of getting on it in a careful and prudent manner, the car is suddenly started, throwing him off and injuring him, the street-car company is liable.[11]

§ 2727. Before and after Stopping and Starting.—Before Car Stops.—A person who attempts to get upon a street car while it is in motion after being directed to wait until the car stops, and who persists in attempting to get on and is injured by running against the arm of a passenger on the step of the car, can not maintain an action against the company owning the car.[12]

After Car Starts.—Where one pursues a street car after it has started, and in attempting to board it fails, he is guilty of contributory negligence, barring recovery for his injury.[13] Where one runs to catch a train as it is starting, and is not seen by any of the trainmen, and, without any negligence on their part, is injured while attempting to board it while moving, he is not a passenger, and

8. Kriedermacher *v.* Union R. Co., 110 N. Y. S. 1113, 59 Misc. Rep. 410.

9. After slowing down.—Mulligan *v.* Metropolitan St. R. Co., 85 N. Y. S. 791, 89 App. Div. 207.

Passenger's peril known to carrier.—In an action against a street railroad company for injuries sustained in attempting to board a moving electric car, where plaintiff's evidence shows that the attempt was not made until the car had slowed up, when the electric current was suddenly turned in, and the car started with a jerk, throwing him off his feet, it is proper to instruct that plaintiff is entitled to recover, if defendant, after knowing of plaintiff's peril, could have avoided injuring him by the exercise of ordinary care, notwithstanding any previous conduct of his may have contributed to place him in such position of peril or danger. Central Pass. R. Co. *v.* Rose, 15 Ky. L. Rep. 209, 22 S. W. 745.

10. Monroe *v.* Metropolitan St. R. Co., 80 N. Y. S. 177, 79 App. Div. 587.

11. After invitation to enter.—Sahlgaard *v.* St. Paul City R. Co., 48 Minn. 232, 51 N. W. 111.

12. Before and after stopping and starting.—Gallagher *v.* West End St. R. Co., 156 Mass. 157, 30 N. E. 480.

13. After car starts.—Lee *v.* Rhode Island Co. (R. I.), 68 Atl. 475.

One who came running towards a street car from the rear, and seized the handle bar and attempted to board the car after the signal had been given and the car was starting forward in the usual manner, assumed all the natural risks incident to such an attempt to board the car, and could not hold the street railway company responsible for injuries caused thereby. Foster *v.* Seattle Elect. Co., 76 Pac. 995, 35 Wash. 177.

A person who approached a street car from the rear in a crowded thoroughfare, out of the sight of the conductor, and did not reach it until after the signal to go ahead had been given and the car had started, and then seized the handrail and attempted to board, though others standing by appreciated her danger and sought to warn her by hallooing, was guilty of contributory negligence. Foster *v.* Seattle Elect. Co., 76 Pac. 995, 35 Wash. 177.

A railroad company is not called upon to hold its train for a person running to get aboard, and, if he attempts to get aboard while the train is in motion, he is guilty of gross negligence, and can not recover for injuries then received. A person must place himself in charge of the carrier to make it liable for an injury to him as a passenger. Spannagle *v.* Chicago, etc., R. Co., 31 Ill. App. 460.

the company is not liable.[14] Where a train stopped at a station a reasonable time for passengers to board it, and a passenger attempted to board it just as it started, and was injured, the jury could find that the injury was caused by his want of ordinary care in not boarding the train promptly.[15] Where a passenger, having plenty of time to get on a standing train, waited until it began to move, and, in an attempt to get on board by seizing the railing of the car, his body came in contact with trucks left on the station premises and he was injured, he can not recover on the ground that the railroad was negligent in allowing trucks to be placed near the track.[16] A person who attempted to get onto a train of cars as it was leaving the depot, after having stood on the platform long enough to allow everybody who desired to do so to get on board, and, while hanging on to the railing of the car, was crushed between it and one of the posts which supported the roof, and which was very near the track, could not recover, because of his own negligence.[17]

After Signal to Start.—A passenger is not, as a matter of law, negligent in boarding the train after a signal is given to start it, but before it has started.[18]

After Gates Closed.—Where a passenger attempts to board a street car after the gates have been closed and the car has started, he is guilty of contributory negligence as a matter of law.[19] A person, injured while attempting to

14. Jones *v.* Boston, etc., Railroad, 163 Mass. 245, 39 N. E. 1019.

Where a person attempts to board a train in motion, after it has left the station, he no longer acts on the invitation, or stands under the protection of the company, and, while crossing or occupying the track, is bound to use proper care for his own protection. Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560.

15. Hurt *v.* Illinois Cent. R. Co., 140 S. W. 650, 145 Ky. 475.

"In the case of Meeks *v.* Atlantic, etc., R. Co., 122 Ga. 266, 50 S. E. 99, the plaintiff was nonsuited. It appears from the statement of facts in that case that Meeks, relying upon a promise of the conductor to notify him 'when to get aboard,' but which was not done, attempted to get aboard a train that was in motion. He had seized the hand rail, and had one foot on the step, when the engine gave a jerk, 'which misplaced his foot and left him in a swinging position, his hands still clinging to the railing, and caused his leg to strike against the depot platform, injuring him.' It does not appear that the train was moving rapidly when Meeks attempted to board it. The contrary is to be inferred from the record as it appears in the report. Yet the court affirmed the judgment awarding a nonsuit, holding, that 'under this evidence, the trial judge was right. It clearly appears that Meeks could have avoided the injury to himself by the exercise of ordinary care.'" Louisville, etc., R. Co. *v.* Edmondson, 128 Ga. 478, 57 S. E. 877.

16. Southern R. Co. *v.* Nichols, 135 Ga. 11, 68 S. E. 789.

17. Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586.

Where the conductor of a freight train has ordered a passenger to go to a coach attached to the train, and get in it, and then signals the engineer to start the train, without waiting to see whether the passenger had gotten on, the company is not liable for injuries received by him in trying to get on the car in motion, where the train had already been stopped a reasonable time, and the passenger had willfully delayed to get on it. Browne *v.* Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958.

18. After signal to start.—Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

19. After gates closed.—Sigl *v.* Green Bay Tract. Co., 149 Wis. 112, 135 N. W. 306, 39 L. R. A., N. S., 65, Ann. Cas. 1913c, 863.

Plaintiff was guilty of contributory negligence which barred a recovery by attempting to board and in persisting in clinging to a moving car on an elevated railway train after the gates thereon had been closed or were being closed. Plutschow *v.* Metropolitan West Side Elevated R. Co., 155 Ill. App. 589.

A. attempted to board a moving train on an elevated railroad, after the gate had been closed. He attempted to open the gate, but the conductor again closed it, and, A.'s foot being caught, he was dragged and injured. The conductor's action was not willful, nor did he intend to injure A. Held, that A.'s negligence being the proximate cause of his injury, the company could not be made liable therefor. Solomon *v.* Manhattan R. Co. (N. Y.), 31 Hun 5.

One intending to become a passenger on an electric street car, who attempts to board the car while in motion, and when the gates are closed, is chargeable with negligence as matter of law, which will bar recovery from the company for an injury received by striking or being

board a train of cars with closed gates moving away from a station with a quickly increasing speed, is guilty of contributory negligence, defeating a recovery; and this is so, even if the train was moving very slowly at the time he attempted to board it.[20] The boarding by a person of an elevated railway train while the gate is closing and the train moving, and persisting, against an effort to remove him, in the precarious position thus obtained, is such contributory negligence as bars recovery for his death in consequence thereof.[21]

§ 2728. Length of Time Car Stops.—The fact that a train did not stop a reasonable time, so as to allow a person to get on, does not render the railroad liable for injuries received in attempting to board a moving train.[22] Where the evidence shows that a railway company violated its duty as a common carrier, in that its train did not stop a sufficient length of time at a station to give plaintiff an opportunity to board it, and plaintiff was injured while attempting to board the train while it was in motion, a nonsuit is properly granted.[23] While it appeared from the testimony introduced by the plaintiff that the defendant railway company was chargeable with a violation of its duty as a common carrier, in that its train was not stopped at the station at which he wished to board it a sufficient length of time to afford him a reasonable opportunity to do so, yet as he confessedly, in order that he might not be left at that station, voluntarily assumed the risk of attempting to get aboard after the train was started and while it was in motion, the trial court committed no error in granting a nonsuit, he having made no effort to show that the servants of the company were guilty of any misconduct save that of not stopping the train at the station a reasonable length of time.[24]

§ 2729. Signaling Car to Stop.—After Signaling Car to Stop.—Where a person signals a street car to stop at a crossing, but the driver, not seeing the signal, does not stop the car, and he attempts to board it while in motion, and is injured, the failure to stop the car is not the proximate cause of injury, and such person can not recover.[25]

Without Signaling Car to Stop.—A street railroad is not liable for injury to one who attempts to board a moving car without signaling it to stop.[26]

struck by another car while so outside the gates, unless, after his peril was apparent, defendant negligently failed to protect him when it was within its power by the exercise of reasonable care to do so. Norfolk, etc., Terminal Co. *v.* Rotolo, 112 C. C. A. 583, 191 Fed. 4.

20. Sheehan *v.* Nassau Elect. R. Co., 128 N. Y. S. 545, 143 App. Div. 621.

21. Robinson *v.* Manhattan R. Co., 5 Misc. Rep. 209, 25 N. Y. S. 91, 54 N. Y. St. Rep. 792.

22. Length of time car stops.—McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

A railroad passenger can not recover for injuries to which his negligence in attempting to board a train while it was in motion contributed, though the conductor negligently failed to wait at the station for five minutes, as required by Pasch. Dig., art. 6532. Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189.

23. Ricks *v.* Georgia, etc., R. Co., 45 S. E. 268, 118 Ga. 259.

24. Ricks *v.* Georgia, etc., R. Co., 118 Ga. 259, 45 S. E. 268. See, also, Meeks *v.* Atlantic, etc., R. Co., 122 Ga. 266, 50 S. E. 99.

25. Signaling car to stop.—North Chicago St. R. Co. *v.* Wrixon, 51 Ill. App. 307.

A boy of twelve signaled a cable car when at a crossing to stop. The gripman did not see him, and the car slackened speed at the crossing, but did not stop. The boy ran towards it, caught the rear platform, but was thrown under a trailer, and killed. Held that, the boy not being a passenger, the company was not liable for the injuries sustained. West Chicago St. R. Co. *v.* Binder, 51 Ill. App. 420.

Plaintiff was injured while attempting to get on board a street car propelled by electricity, which he had signaled to stop. He attempted to enter before it came to a full stop. It started suddenly, throwing him down. Held, that the question of his contributory negligence was for the jury. Corlin *v.* West End St. R. Co., 154 Mass. 197, 27 N. E. 1000.

26. Without signaling car to stop.—Woo Dan *v.* Seattle Elect. R., etc., Co., 5 Wash. 466, 32 Pac. 103.

§ 2730. By Invitation of Carrier.—Where a person who had frequently boarded a moving street car was asked by the motorman to board a car while moving, there was an invitation to him to board the car.[27] But where the danger of boarding a moving train is obviously great and imminent, the invitation of the conductor or other employee in charge to a passenger to board it does not relieve him from contributory negligence.[28]

Passenger Requested to Take Next Car.—Where plaintiff, wishing to board defendant's street car, signaled for the motorman to stop, and the car slowed down almost to a standstill, and, while plaintiff was in the act of stepping on, the motorman called to him to take the next car, and immediately quickened the speed of the car, throwing plaintiff off, the jury was justified in finding that there was no negligence on the part of plaintiff.[29]

§ 2731. Injured by Act of Operative.—Where a person gets on a moving train, his negligence in so doing does not contribute to his death, caused by his being pushed therefrom by an employee of the company.[30]

§ 2732. Injured by Defective Platform.—One who voluntarily and unnecessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.[31]

§ 2733. Injured by Objects Passed.—A person attempting to get on a moving car can not recover from injuries from objects passed by the car which were in plain view.[32]

27. By invitation of carrier.—Fults *v.* Metropolitan St. R. Co., 164 Mo. App. 101, 148 S. W. 210.

A shipper of live stock who accompanies the stock may rely on the directions of the conductor and station agent as to where the caboose will be, and that it can not be boarded at the station. Chorn *v.* Missouri, etc., R. Co., 153 S. W. 1060, 168 Mo. App. 518.

28. Larson *v.* Chicago, etc., R. Co., 31 S. Dak. 512, 141 N. W. 353.

29. Passenger requested to take next car.—Schmidt *v.* North Jersey St. R. Co. (N. J.), 58 Atl. 72.

30. Injured by act of operative.—Pennsylvania R. Co. *v.* Reed, 60 Fed. 694, 9 C. C. A. 219; Reed *v.* Pennsylvania R. Co., 56 Fed. 184; Sharrer *v.* Paxson, 171 Pa. 26, 33 Atl. 120.

31. Injured by defective platform.—Lauterer *v.* Manhattan R. Co., 128 Fed. 540, 63 C. C. A. 38

32. Injured by objects passed.—Plaintiff, attempting to get on a moving street car, seized the hand rail and placed one foot on the step, and with the other on the ground was dragged along until he came in contact with some railroad ties near the track in the middle of an intersecting street, when he lost his hold and was severely injured. The evidence as to whether the speed of the car was increased after plaintiff took hold was conflicting. No proof was offered that the motorman in any way indicated that he meant to stop at the upper corner of the street where plaintiff stood, and he stated that he did not notice any one there. Held, that plaintiff was not entitled to recover, since, being in full view of the ties, he assumed all risk of injury from them when he attempted to get on the moving car. Schmidt *v.* North Jersey St. R. Co., 49 Atl. 438, 68 N. J. L. 424.

Plaintiff sued to recover for injuries received while attempting to board a moving street car, claiming that they were caused by the act of the conductor in increasing the speed at that time so that he was thrown against a barrier surrounding an excavation in the street. He knew of the barrier, and when he attempted to board he stood within three or four feet of it. Held, that he was guilty of contributory negligence. Judgment, 83 N. Y. S. 1102, 87 App. Div. 620, reversed in Berry *v.* Utica, etc., St. R. Co., 73 N. E. 970, 181 N. Y. 198.

The plaintiff, in an action against a street railway company for personal injuries, testified that he signaled the company's motorman to stop; that the car was stopped, and as he stepped on the running board the car was suddenly started, and he was carried about fifteen feet, and struck by a pillar of an elevated road. He was facing in the direction in which the car moved. Several witnesses testified that the plaintiff jumped on the car while in motion, and swung himself along the running board, and that the conductor warned him when he boarded the car to look out for the pillar. Held, that plaintiff was guilty of contributory

§ 2734. Injury to Person Carrying Bundles.—The fact that one attempting to board a street car carried a large package did not require him to exercise a greater degree of care than ordinary care.[33] It is not per se negligence for a person with an umbrella in one hand and a handkerchief in the other to attempt to board an electric street car while it is in the act of stopping to receive passengers, and before it has come to a full stop.[34] But where a person attempts to board a car in the nighttime, when the train is running from four to six miles an hour, and when he is incumbered by a bundle, he is guilty of negligence.[35]

§ 2735. Injury to Children, Women and Invalids.—Whether or not deceased, who was a boy fourteen years of age, was guilty of contributory negligence in trying to board a street car while in motion, depended to some extent

negligence. Cassio *v.* Brooklyn Heights R. Co., 69 N. Y. S. 208, 59 App. Div. 617.

Injured by striking platform.—In an action for personal injuries sustained in striking against a high platform while boarding a train, evidence that plaintiff stood near by for two minutes while the train was waiting; that the conductor gave the signal, "All aboard," before the train started; that when plaintiff attempted to board the train it was moving several miles per hour; that he knew of the dangerous proximity of the platform, but did not "have the matter in his mind at the time;" and that the conductor had often warned him not to board a moving train, shows that plaintiff was negligent. McLaren *v.* Alabama Mid. R. Co., 100 Ala. 506, 14 So. 405.

A passenger bought a ticket on a railroad, and attempted to get upon one of the cars, while in motion. The train did not stop at the station, but was passing slowly by. Others succeeded in getting on the train. The platform of the car was crowded, so that he could only get upon the lower step and cling to an iron rod. A sudden movement of the train threw him off the platform, and he held onto the iron, and ran along, trying to get again upon the car, the speed of which was increasing, when he was struck by a platform near the track, and injured. Held, in an action brought by him against the railroad company, on appeal from a nonsuit, that the plaintiff was guilty of contributory negligence; that the facts that a brakeman on the train had called out the name of the station before plaintiff attempted to get on the train, that others made the same attempt successfully, and that plaintiff himself had done so before, when trains were moving, did not justify his persistence, when thrown off the step, he not regarding objects near the track. Phillips *v.* Rensselaer, etc., R. Co., 49 N. Y. 177, reversing 57 Barb. 644.

Question for jury.—In an action against a street railway company it appeared that plaintiff, in boarding one of defendant's horse cars while in motion, was knocked off the platform by a telegraph pole near the curb of the street, and was thereby injured. Defendant requested the charge that, where a man gets on a horse car while in motion, it is such proof of contributory negligence that he can not recover. Held, that such charge was properly refused, as the question of contributory negligence was for the jury. North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672, affirming, 40 Ill. App. 590, distinguishing Chicago, etc., R. Co. *v.* Scates, 90 Ill. 586.

33. Injury to person carrying bundles.—Omaha St. R. Co. *v.* Martin, 48 Neb. 65, 66 N. W. 1007.

34. White *v.* Atlanta Consol. St. R. Co., 92 Ga. 494, 17 S. E. 672.

35. Smith *v.* Birmingham R., etc., Co., 41 So. 307, 147 Ala. 702; McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

A person forty-five years of age, and weighing 200 pounds, who, with a basket in one hand and a bottle in the other, attempts to board a street car moving six miles an hour, is guilty of such negligence as will bar an action for his death, unless the trainmen, with reasonable diligence, could have avoided the accident after discovering his peril. Baltimore Tract. Co. *v.* State, 78 Md. 409, 28 Atl. 397.

Where a passenger, entitled to ride in the caboose of a freight train, being some distance ahead of it when the train started, attempts to reach it by clambering on one of the forward cars, in the nighttime, with one hand incumbered with a lantern and prod pole, and while so attempting falls, and is run over, he is guilty of contributory negligence. McCorkle *v.* Chicago, etc., R. Co., 61 Iowa 555, 16 N. W. 714.

One who, having his left arm incumbered with his coat and dinner bucket, attempts to board a street car while still in motion, and falls off by reason of the slipping of his foot from the step on which he has placed it, and of his inability to hold onto the car with his right hand alone, is guilty of contributory negligence. Reddington *v.* Philadelphia Tract. Co., 132 Pa. 154, 19 Atl. 28.

on his experience, intelligence, and the rate of speed at which the car was then moving, and he was not wholly absolved from the exercise of care in boarding the car while it was moving at a rate of speed of from three to seven miles per hour.[36] An instruction, in an action for injuries to an infant while attempting to board a moving train, that in determining the issue of contributory negligence the jury should consider the infant's age, intelligence, and discretion, may be given, where there is evidence that the infant was, on account of his age, so wanting in intelligence that he could not appreciate the danger of boarding a moving train.[37] A woman unaccustomed to boarding trains, who attempted to get on a train after it had started and was in motion and was gaining headway, can not recover for injuries received thereby, on account of her contributory negligence.[38]

When an old man attempted to board a street car, without invitation from the company or its agents, while it was in motion, very much crowded both inside and on the platform, and while he was incumbered with a cane and umbrella, he was guilty of contributory negligence precluding a recovery for injuries sustained by reason of his letting go of his hold on the railing after getting a footing on the car.[39]

§ 2736. Transferring from One Car to Another.—In an action for personal injuries, it appeared that a passenger was traveling as a stock shipper on a freight train; that at the end of a run, on a rainy night, the train stopped just before crossing a bridge, where it was customary to detach the caboose in which plaintiff had been riding, that he could walk across or ride on the rear freight car; that the stop was long enough to enable him to make a change, but he remained in the caboose till it was uncoupled, and the train had started, when he went forward, with a large valise in his hand, and in attempting to climb on the car while in motion fell through the bridge. The passenger's own negligence was the cause of his misfortune.[40]

§ 2737. Where Carrier Could Have Avoided Injury.—Where a person attempted to board a street car after being warned by the motorman not to do so, and the car should not, by the exercise of ordinary care, be stopped in less than thirty-five feet, the defendant is not liable for injuries received by such person while being dragged that distance, but would be liable only for injuries

36. Injury to children, women and invalids.—Sly *v.* Union Depot R. Co., 134 Mo. 681, 36 S. W. 235.

In an action for the death of plaintiff's son at about the age of fourteen years, it appeared that while attempting, as a passenger, to board one of defendant's cars while in motion, he was swung in front of one coupled to it, and sustained fatal injuries. At defendant's request instructions were given which required only, to free deceased from negligence, that he must have exercised that care and caution which might have been reasonably expected from one of his age, experience, and intelligence. Held, that they were properly given. Sly *v.* Union Depot R. Co., 134 Mo. 681, 36 S. W. 235.

37. San Antonio, etc., R. Co. *v.* Trigo (Tex. Civ. App.), 101 S. W. 254.

38. International, etc., R. Co. *v.* Gorman, 2 Texas App. Civ. Cas., § 776.

39. Reynolds *v.* Richmond, etc., R. Co., 92 Va. 400, 23 S. E. 770.

Plaintiff, sixty-eight years old, weighing 200 pounds, signaled to the driver of a street car to stop, and, when the car had slowed up and was going at about four miles an hour, attempted to get on, but his foot slipped, and, losing his grasp on the rail with one hand, he, while trying to keep up, fell and was injured. Held, that the question of negligence on his part was for the jury. Briggs *v.* Union St. R. Co., 148 Mass. 72, 19 N. E. 19, 12 Am. St. Rep. 518.

In an action against a railroad company for personal injuries the evidence showed that plaintiff, a man of sixty-five on a dark and cold night, after waiting in the snow and becoming benumbed, attempted to board a moving train; that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing, and was dragged 150 yards, during which time he held onto the valise. Held, that plaintiff was guilty of such contributory negligence that he could not recover. McMurtry *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

40. Transferring from one car to another.—Richmond, etc., R. Co. *v.* Picklesimer, 85 Va. 798, 10 S. E. 44; Richmond, etc., R. Co. *v.* Picklesimer, 89 Va. 389, 16 S. E. 245.

received after the car had traveled that distance.[41] Where plaintiff, in attempting to get on a moving street car, fell, and was dragged some distance before the car stopped, he would be entitled to recover, even though guilty of negligence in attempting to get on a moving car, if the driver could have avoided the injury by the exercise of reasonable care in stopping the car, after he was notified that plaintiff had fallen, and was being dragged by the car.[42]

§ 2738. Entering Moving Elevator.—Entering an elevator which is apparently at rest and with the door open, and which the passenger has no reason to suppose can be started until the door is closed, is not negligence, though the elevator is moving, which could have been determined by a momentary observation of the car and machinery.[43]

§§ 2739-2784. In Transit—§ 2739. Conduct in General.—Where a passenger, injured by a negligent jerk in the operation of a railway train, by the exercise of ordinary care could have avoided the consequences of the railroad company's negligence, he could not recover.[44] A passenger in a street car is not bound to be constantly on the lookout for danger, but has the right to presume that the company will use the high degree of care for his protection which the law requires.[45] In an action for injuries to a passenger in a collision caused by backing cars against a standing caboose, in which plaintiff was sitting, with the knowledge and consent of the carrier's servants, in order to show plaintiff guilty of contributory negligence, the jury must find that he knew or should have known that the front part of the caboose where he took his seat was not intended for passengers; that it was more dangerous than the rear part; that, under all the circumstances, he failed to exercise ordinary care in taking his seat there, with the knowledge of the flagman and without warning from him; and that his conduct proximately caused or concured in causing the injury.[46]

Where Car Overcrowded.—Intramural carriers of passengers who invite the overcrowding of their cars for purposes of gain to themselves are not to be relieved from the high degree of care the law requires of them, because one of their passengers lightly oversteps the limit of some rule or regulation, or resumes a position which for a temporary accommodation to the carrier he withdraws from, unless he be so warned of its dangers as to make it clear that he knew and assumed the risk.[47]

Use of Appliances.—The carrier has the right to expect that a passenger will not so use contrivances designed for his comfort and convenience as to expose himself to danger. Thus it has the right in moving its cars to presume that the passenger will put the seats to their proper use and not stand upon them in such a way as to expose himself to danger. Where injury results from such an act on the passenger's part the carrier is not liable therefor.[48] But a passen-

41. Where carrier could have avoided injury.—Graefe *v.* St. Louis Transit Co. 123 S. W. 835, 224 Mo. 232.

42. Woodward *v.* West side St. R. Co., 71 Wis. 625, 38 N. W. 347.

Under the doctrine of last clear chance, a street railroad company held required to exercise reasonable care to avoid injury to a passenger negligently placing himself in a position of danger by getting on the step of a moving car while the gate was closed. Norfolk, etc., Terminal Co. *v.* Rotolo, 115 C. C. A. 183, 195 Fed. 231.

43. Entering moving elevator.—Blackwell *v.* O'Gorman Co., 49 Atl. 28, 22 R. I. 638.

44. In Transit.— Southern R. Co *v.* Cunningham, 50 S. E. 979, 123 Ga. 90.

The plaintiff was not chargeable with negligence in remaining upon the car in order that she might complete her journey, but it was her duty to employ such means and avail herself of such resources as were reasonably within her reach, while on the car, to avoid the hurtful effects of the prevailing cold. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

45. Jones *v.* United R., etc., Co., 57 Atl. 620, 99 Md. 64.

46. Miller *v.* Atlanta, etc., R. Co., 57 S. E. 345, 144 N. C. 545.

47. Where car overcrowded.—West Chicago St. R. Co. *v.* Johnson, 77 Ill. App. 142, affirmed in 54 N. E. 334, 180 Ill. 285.

48. Use of appliances.—East Tennessee, etc., R. Co. *v.* Green, 95 Ga. 736, 22 S. E. 658.

ger is not called on to provide against a defective appliance, unless the defect is known to him, or under the circumstances should have been observed.[49] And the fact that a passenger on a street car, injured by a trapdoor in the floor giving way beneath her, knew when she stepped on it that the car had been stopped a short time before because it was out of order, and saw the trapdoor raised, and put back, does not render her guilty of contributory negligence where the evidence shows that she had no knowledge that the door was defective.[50]

Instructing Driver of Carriage.—Where a passenger induces a stage driver to deviate from the accustomed track for his accommodation, and the stage is upset in consequence of such deviation, the passenger cannot recover damages for an injury sustained thereby.[51] In an action against an undertaker who had furnished carriages for a funeral in one of which plaintiff with two others was riding, plaintiff can not recover for injuries resulting from a runaway if the driver of the carriage left it at the invitation or request of plaintiff or of any of the occupants in the presence of and without objection by the plaintiff.[52] But a carrier can not escape liability for an injury caused by driving a team over an unsafe road by showing that the injured passenger directed him to drive over such road.[53] And in an action by a passenger against a carrier for injuries received by the overturning of a coach, it is no defense that the driver went out of the road at the repeated suggestion of the plaintiff, who told him he was too far to one side, and thus caused the upsetting of the vehicle over the bank, it being the duty of defendants to supply a driver who knew the road, and would not be controlled by suggestions from a passenger.[54]

Falling over Obstacle in Car.—A passenger who stumbles over a plainly visible obstacle usual on floors of cars of the kind, namely, a box over a wheel, is guilty of contributory negligence.[55] A passenger, while looking for a seat on the defendant's train, was injured by stumbling over some satchels in the aisle of the car. None of the employees of the defendant was in the car at the time of the accident. The car was lighted. A nonsuit was properly directed, upon evidence merely showing such facts.[56]

Avoiding Danger from Other Cars.—One who is a passenger on a street car, acting in a prudent and careful manner, is not bound to look and listen to avoid danger from other passing or approaching cars.[57]

Failure to Warn of Impending Collision.—When the plaintiff was injured through a collision at a crossing, the fact that plaintiff saw the engine of the other train approaching the crossing, and could have signaled defendant's engineer of the approaching danger by pulling the bell rope in time for him to have stopped the train and avoided the accident, does not relieve the defendant from liability.[58]

Traveling in Violation of Sunday Laws.—A statute forbidding travel on

49. Stappers *v.* Interurban St. R. Co., 106 N. Y. S. 854, 56 Misc. Rep. 337.

50. Washington *v.* Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628.

51. Instructing driver of carriage.—Heighway *v.* Voorhees, 1 O. Dec. 219.

52. Radel Co. *v.* Borches, 147 Ky. 506, 145 S. W. 155, 39 L. R. A., N. S., 227.

53. Budd *v.* United Carriage Co., 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279.

54. Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

55. Falling over obstacle in car.—Farley *v.* Philadelphia Tract. Co., 6 Pa. Co. Ct. Rep. 347.

56. Stimson *v.* Milwaukee, etc., R. Co., 75 Wis. 381, 44 N. W. 748.

57. Avoiding danger from other cars.—Hollingsworth *v.* Cincinnati, etc., R. Co., 21 O. C. C. 536, 12 O. C. D. 100.

58. Failure to warn of impending collision.—Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

A passenger on a street car which has stopped at a railroad crossing to permit a locomotive to pass is not bound to be on the lookout, when the car starts, for other approaching engines; and his failure so to do is not contributory negligence which will prevent his recovery from the steam railroad company for injuries sustained in a collision between the car and another locomotive, though, if he had looked, he might have seen the approaching engine in time to have jumped from the car. O'Toole *v.* Pittsburg, etc., R. Co., 158 Pa. 99, 27 Atl. 737, 38 Am. St. Rep. 830, 22 L. R. A. 606.

Sunday, except for necessity or charity, has been held to bar recovery for injuries received while traveling on Sunday.[59]

Providing against Cold.—A passenger can not recover for illness caused by failure to heat the coach, if his contributory negligence proximately caused the injury, and the passenger's failure to protect himself from unnecessary cold or provide sufficient clothing may or may not be contributory negligence according to the circumstances.[60]

Guarding against Disease.—One who had not enlisted in the State Guards, but who accompanied them on a railroad trip simply at the captain's request to fill out the quota of the company, and who could, without subjecting himself to any military discipline, have left the passenger coach occupied by the company after discovering that it was dirty or gave out offensive odors, or was not sufficiently heated, and taken passage in another coach free from such conditions and did not do so, can not recover because of such conditions.[61]

Riding on Train before Road Open for Transportation.—The act of the plaintiff in riding upon a train against the express wishes of the company, and before the road had been received and transportation of passengers invited or allowed or the sale of tickets permitted, would, under the circumstances, have constituted such contributory negligence on the part of the plaintiff as to prevent his recovery against the defendant for a tort, unless willfully or wantonly committed, even had a right of action existed.[62]

Leaving Train at Intermediate Point.—A passenger is not required to remain aboard the train until he reaches his destination, but may, at regular stopping places, leave the train for refreshment, exercise, or other matters of convenience or necessity.[63] Where the plaintiff, who was injured by a collision on a

59. Traveling on Sunday.—Bucher *v.* Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795, 8 S. Ct. 974, where the supreme court followed the decision of the Massachusetts court in Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216, construing its own statute, though such decision did not meet with the approval of the supreme court.

60. Providing against cold.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

A passenger who had to change cars, once at S. and later at B., and who, from the washing of the waiting room at B. while she was there, caught cold, was not guilty of contributory negligence because not waiting longer at S. and taking a later train from there, which would have enabled her to connect with her train at B. without waiting there so long. Neal *v.* Southern Railway, 75 S. E. 405, 92 S. C. 197.

61. Guarding against disease.—Louisville, etc., R. Co. *v.* Scalf, 110 S. W. 862, 33 Ky. L. Rep. 721.

62. Riding on train before road open for transportation.—Cunningham *v.* International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

63. Leaving train at intermediate point.—St. Louis, etc., R. Co. *v.* Glossup, 88 Ark. 225, 114 S. W. 247.

A passenger is not obliged to remain on the train during the entire trip, but may temporarily alight therefrom at intermediate points, for the time the train remains there, for any purpose not inconsistent with his character as a passenger. Missouri, etc., R. Co. *v.* Overfield, 47 S. W. 684, 19 Tex. Civ. App. 440.

A passenger on a railroad train is not guilty of negligence in leaving the train during a stop of ten or fifteen minutes, and waiting for the signal to get on the train before attempting to do so. Texas, etc., R. Co. *v.* Mayfield, 56 S. W. 942, 23 Tex. Civ. App. 415.

A railway passenger, who alighted at an intermediate station at night for refreshments and walked to the end of a long platform and around a guard rail, to urinate, and fell down an embankment, can not recover from the carrier. Krieg *v.* Lehigh Valley R. Co. (Pa), 4 Walk. 268.

Plaintiff, with the military company of which he was a member, was a passenger on a train of defendant. The train stopped at a point where the sign, "Rockaway Junction," was displayed, and there remained some twenty minutes, to permit a train to pass. No caution was given, nor any announcement made of the object of the stop. The morning was hot, and plaintiff, becoming ill with thirst, sought for water on the train, and, finding none, crossed an intervening track, to what appeared to be a passenger platform, and entered a switch house. As he crossed the track, he looked eastward, and saw no train coming, though he could see nearly two miles. While drinking he heard a bell ring, and, taking it to be the signal for the starting of his train, rushed from the building, and, as he came to a point where he could see if

railroad, had left a train, which was stopped for dinner, and had returned to a proper place therein before the other passengers had returned and boarded the train, it was held not to have been contributory negligence for him to board the train previous to the call for starting.[64] Where the plaintiff, who had been employed as a railroad station agent, telegraph operator, and expressman, was injured while being transported in a freight car with his furniture, testified that he remained in the car at a junction point where the injury occurred for the reason that he did not know when the car would continue the journey, it was not error to refuse to charge that, if he remained in the car while in the yards at the junction on the side tracks, his act in so doing was negligence.[65]

Imputed Negligence of Person Accompanying Child.—A child was sitting in a street car holding on to the guard attached to the seat, and not leaning out or committing any incautious act, when, owing to a plunging of the car caused by a defect in the track, he was thrown off. His mother was facing him on the opposite seat at the time of the accident. It was held, that the child was not guilty of any negligence, and hence no negligence of the mother could be imputed to him.[66]

§§ 2740-2781. Dangerous Position—§ 2740. In General.—If a passenger unnecessarily assumes a position of danger, and is injured in consequence thereof, the carrier is not liable.[67] It is the duty of a passenger, on boarding

a train was coming, was struck by the other train. Defendant's engineer did not state positively that he did not ring the bell of plaintiff's train. There was evidence, which was disputed, that plaintiff's captain ordered that no one should leave the train. Held, that the question as to plaintiff's contributory negligence was for the jury. Wandell *v.* Corbin, 49 Hun 608, 1 N. Y. S. 795, 17 N. Y. St. Rep. 718.

Getting off to meet friend.—When a passenger train stops at a depot, and the passengers are invited to alight, and are in the act of doing so, it is not negligence for a passenger, who has been informed by one of the train officials that the train will stop ten or fifteen minutes, to go temporarily upon the platform of the coach to greet a friend, and bring her into the car. Southern R. Co. *v.* Smith, 28 S. E. 173, 95 Va. 187.

Getting off to look after baggage.—The plaintiff, while riding in a railroad train at night, and while the train was waiting near a way station to allow another train to pass, being wrongly informed by a stranger that it was necessary to look after his baggage, left the cars, and in walking towards the station, and when 100 feet from the platform, fell into an open cattle guard. Held, that the railroad company were not liable in damages therefor. Frost *v.* Grand Trunk R. Co. (Mass.), 10 Allen 387, 87 Am. Dec. 668.

64. Lakin *v.* Oregon Pac. R. Co., 15 Ore. 220, 15 Pac. 641.

65. Texas, etc., R. Co. *v.* Adams, 72 S. W. 81, 32 Tex. Civ. App. 112.

66. Imputed negligence of person accompanying child.—Nashville Railroad *v.* Howard, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

67. Dangerous position.—*United States.*—Railroad Co. *v.* Jones, 95 U. S. 439, 24 L. Ed. 506; Farlow *v.* Kelly, 108 U. S. 288, 2 S. Ct. 555, 27 L. Ed. 726; Mitchell *v.* New York, etc., R. Co., 146 U. S. 513, 36 L. Ed. 1064, 13 S. Ct. 259.

Texas.—Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086; Houston, etc., R. Co. *v.* Clemmons, 55 Tex. 88, 40 Am. Rep. 799; Houston, etc., R. Co. *v.* Richards, 59 Tex. 373, 377; Rucker *v.* Missouri Pac. R. Co., 61 Tex. 499; Gulf, etc., R. Co. *v.* Ryan, 69 Tex. 665, 7 S. W. 83; San Antonio, etc., R. Co. *v.* Wallace, 76 Tex. 636, 13 S. W. 565; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

West Virginia.—Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

Where a passenger on a street car is injured in consequence of his negligence in occupying an unsafe place on the car, he can not recover. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

A person, injured while riding in an exposed position, assumes the risk of injury from such cause. Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 38 L. R. A., N. S., 689.

A passenger who, without any reasonable cause or excuse, rides on the platform or on the steps of a railway car, or in any place not designed for the carriage of passengers, is guilty of negligence which may bar his recovery of damages resulting from the concurring negligence of the railway company. St. Louis, etc., R. Co. *v.* Leftwich, 117 Fed. 127, 54 C. C. A. 1.

A passenger on a street car can not voluntarily place himself in a position of danger, with knowledge of the fact, and then charge dereliction on the street car company in performing its duty, if he could have removed himself from the

a train, to place himself in a safe position thereon, if he is able to find one, and it is no excuse for his placing himself in an unsafe position that the trainmen knew that it was unsafe and did not prevent his occupying it, if his danger was equally well known to him.[68]

Degree of Care.—An instruction offered, that if a passenger on a street car, when injured, was standing in a dangerous position, and one that would have appeared dangerous to a person in the exercise of ordinary care, then she contributed to her injury, was properly modified by inserting the words "if she could by due care have avoided taking such position."[69]

Whether or Not Plaintiff Is Passenger.—In an action against a street-railway company for injuries, it is error to instruct that, if plaintiff was riding on the footboard of a grip car while it was running at its usual speed, he was guilty of contributory negligence unless he was a passenger, since his status as a passenger could not affect the question of his negligence.[70]

Knowledge and Direction of Employee.—A passenger on a train who occupies a dangerous place with the knowledge of the conductor, and without warning from him, is not guilty of contributory negligence.[71] A passenger can not be charged with contributory negligence on account of taking a place on a crowded street car designated by the conductor of the car.[72]

Riding in Place Provided for Passenger.—A railroad company is responsible for the safety of passengers in any place which it provides for their accommodation.[73] Where, at the time of a passenger's injury by the derail-

dangerous position and thus escaped injury. Kleffmann *v.* Dry Dock, etc., R. Co., 93 N. Y. S. 741, 104 App. Div. 416, 16 N. Y. Ann. Cas. 334.

When a passenger voluntarily takes a more hazardous place upon the train to ride than was provided by the carrier for passengers, and such hazard known or might have been known by the use of ordinary care, he thereby assumes the risk of the increased danger of such position. St. Louis, etc., R. Co. *v.* Rice, 9 Tex. Civ. App. 509, 29 S. W. 525; Lovett *v.* Gulf, etc., R. Co., 97 Tex. 436, 79 S. W. 514; Walling *v.* Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417, affirmed, no op.; Runnells *v.* Pecos, etc., R. Co., 49 Tex. Civ. App. 150, 107 S. W. 647; Missouri, etc., R. Co. *v.* Avis, 41 Tex. Civ. App. 72, 91 S. W. 877; St. Louis, etc., R. Co. *v.* Morgan, 44 Tex. Civ. App. 155, 98 S. W. 408.

If a passenger, in the absence of an emergency requiring it, rides in a place of obvious danger which he knows, or by the exercise of ordinary care should know, is not provided for passengers, and such act contributes proximately to his injury, he is guilty of contributory negligence and can not recover. McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 81 S. C. 100, 18 L. R. A., N. S., 763.

Riding on top of train.—At the place from which a free train of fourteen cars was to run, the cars being crowded, a number of persons, with the acquiescence of the conductor, went to the tops of the cars. By the jerking and bumping of the cars, caused by the slack being taken up as the train slowed down on reaching its destination, and without any negligence in its operation, two of such persons were thrown from the train. Held, that this was due simply to a risk they had assumed, so that the carrier was not liable. Patterson *v.* Louisville, etc., R. Co. (Ky.), 128 S. W. 1068.

Riding in dining car.—The fact that plaintiff, a passenger on a cable train, was riding on the dummy when there were seats in the trail car, where she would have been in safety, does not establish contributory negligence. Hawkins *v.* Front St., etc., R. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72.

68. Winters *v.* Baltimore, etc., R. Co., 163 Fed. 106.

69. Degree of care.—Asbury *v.* Charlotte Elect. R., etc., Co., 34 S. E. 654, 125 N. C. 568; Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086.

70. Whether or not plaintiff is passenger.—Raming *v.* Metropolitan St. R. Co., 57 S. W. 268, 157 Mo. 477.

71. Knowledge and direction of employee.—Hanover Junction, etc., R. Co. *v.* Anthony (Pa.), 3 Walk. 210.

72. Boesen *v.* Omaha St. R. Co., 112 N. W. 614, 79 Neb. 381.

A passenger on a street car should take the place on the car assigned to him by the conductor, unless the danger in so doing is so apparent that a reasonably prudent person would not assume it. Mittleman *v.* Philadelphia Rapid Transit Co., 70 Atl. 828, 221 Pa. 485, 18 L. R. A., N. S., 503.

73. Riding in place provided for passengers.—Gable *v.* Delaware, etc., R. Co., Fed. Cas. No. 5,488a, 3 N. J. L. J. 176.

Where a street car from which the intestate was thrown, though an open one,

ment of a street car in which he was riding, he was seated in the car, the question of contributory negligence does not arise.[74] The fact that a passenger chooses to ride in the smoking car, next to the locomotive, which is perhaps not the safest place in the train, is not contributory negligence.[75]

Riding on Train Containing Dynamite.—A passenger taking passage on a special freight train, carrying with his knowledge a car loaded with dynamite, did not take the risk of an explosion of the dynamite proximately caused by the negligence of the carrier, and he was not guilty of contributory negligence precluding a recovery for injuries caused by the derailment of the car through the negligence of the carrier and the explosion of the dynamite thereby.[76]

Where Carrier Fails to Provide Safe Place.—A passenger upon a railroad train is entitled, by the purchase of a ticket, to transportation upon the train; and the fact that there is no room within the cars does not relieve the company of this obligation. The contract to carry is not made to depend upon such a contingency. If the company fails to provide proper and secure places for the passengers it contracts to carry, it is in fault. And although such a failure on the part of the company would not justify the passenger in taking a dangerous position upon the train, or, indeed, in entering and continuing upon the train, if he was fully informed of the condition of the accommodations provided before the cars started, still an allegation in an answer to an action by a passenger for injuries sustained, that he did take such position, with no averment that he was informed, in time to leave the train, that the company had failed to provide proper accommodations, and with no allegation that, as a matter of fact, his position in any manner contributed to the injury, would constitute no good ground of defense.[77]

Riding in Elevator.—An instruction that the owner of an elevator does not insure the safety of a passenger unless he keeps himself and all parts of his body within the elevator proper, and does not owe the passenger any duty to protect him from the consequences of his own carelessness in putting his foot over the edge of the floor, is erroneous, where the passenger was only twelve years old, and the elevator conductor knew it was dangerous to stand near the door of the elevator when it was in motion.[78] Where a passenger on a combined passenger and freight elevator, who was familiar with the construction of the elevator shaft, and knew that the car in its ascent passed within a short distance of the lintel, and that the car was without guard or rail on that side, thoughtlessly stood in such a position that his heel was caught between the car and the lintel as it passed that point, his negligence was such that the court should have instructed for defendant.[79]

Injury Caused by Unusual Accidents.—A passenger, by standing on the front platform of a street car, assumes only such risks as are incident to the ordinary operation of the car, not those arising from causes ab extra.[80]

Injury Caused by Collision.—A passenger boarded a car at night while the car was either standing still or had not moved perceptibly. He was injured by the car being struck by a runaway car from behind, while he was either in the

was provided for the accommodation of passengers and by its arrangement passengers were invited to sit on a rear seat facing the rear of the car, intestate was not guilty of negligence in seating himself in such a seat. Spooner *v.* Old Colony St. R. Co., 76 N. E. 660, 190 Mass. 132.

74. Judgment 79 N. Y. S. 588, 78 App. Div. 101, affirmed in Ramson *v.* Metropolitan St. R. Co., 69 N. E. 1129, 177 N. Y. 578.

75. Goble *v.* Delaware, etc., R. Co., Fed. Cas. No. 5,488a, 3 N. J. L. J. 176.

76. Riding on train containing dynamite.—Roberts *v.* Sierra R. Co., 111 Pac. 519, 14 Cal. App. 180, rehearing denied in 111 Pac. 527.

77. Where carrier fails to provide safe place.—Lafayette, etc., R. Co. *v.* Sims, 27 Ind. 59.

78. Riding in elevator.—Quimby *v.* Bee Bldg. Co., 127 N. W. 118, 87 Neb. 193, 28 L. R. A., N. S., 753.

79. Beidler *v.* Branshaw, 200 Ill. 425, 65 N. E. 1086.

80. Injury caused by unusual accidents.—Brackney *v.* Public Service Corp., 71 Atl. 149, 77 N. J. L. 1.

act of entering or while he had stopped on the platform momentarily with a view to going inside as soon as the car started, or with the intention of remaining on the platform. He was not negligent nor did he assume the risk of the collision by being on the platform after having an opportunity to go inside the car.[81] But where a passenger riding on a platform was injured by a collision but other passengers riding in the cars were not injured, he was guilty of contributory negligence and could not recover.[82]

Defective Tracks.—A passenger on the platform of a street car has the right to presume that the tracks and cars are properly constructed, and that there are no hidden dangers connected with their operation.[83]

Acts of Employees.—Even if it were contributory negligence for a passenger to ride in the vestibule of a coach in a railway train, the reckless jostling of a passenger by a porter, causing the passenger to fall through an opening in the vestibule and off the train, renders the railroad company liable for the resulting damages.[84] The plaintiff was riding on a railroad train, guarding a negro in his custody. On the announcement of the station where they intended to alight, the plaintiff, for the purpose of resuming custody of the negro and of getting off quickly, left his seat in the smoking compartment while the train was in motion, and went forward through the colored compartment to the front door of the car, which he opened, and stood there waiting for the train to slow down, with his right foot on the door sill, his left foot on the platform, and his right hand on the door facing, from which position he was knocked or pushed by the train porter, so that he fell from the car while the train was in rapid motion, and was injured. The plaintiff was guilty of contributory negligence in taking the position he did, and was not entitled to recover, in the absence of proof that the action of the train porter was willful.[85]

Platform Gates Opened.—Where a passenger is allowed to stand on the front platform of a motor car on an interurban railroad, he has the right to assume that, if there is any danger to him requiring the closing of the gates of the platform, they will be closed.[86]

While Train Standing Still.—Where a train was stopped before reaching a wrecked tank containing burning oil, and a safe place was designated for passengers until another train could be brought up on the other side of the wreck, a passenger who voluntarily went nearer to the tank, and was injured by its explosion, can not recover damages.[87] Where a street car on which plaintiff was riding became stalled on a railroad crossing, plaintiff was not bound to assist in moving the car from the track as invited by the motorman, but his failure to leave the car as directed by the conductor until just as it was struck by an engine was material on the issue of plaintiff's negligence.[88]

Children and Invalids.—A child not of an age or discretion to understand the danger in riding on the front platform of a street car can not be charged

81. Injury caused by collision.—United R., etc., Co. *v.* Riley, 71 Atl. 970, 109 Md. 327.

82. An adult person traveling on railroad train, who, several blocks before the train reached a station, and while it was moving at a speed of ten miles an hour, voluntarily and without necessity left the car in which he was seated and stood upon the open platform, and while so riding was killed in a collision with another train standing at the station, no passenger in the cars being seriously injured, was chargeable with contributory negligence which precluded a recovery from the company for his death. Chicago, etc., R. Co. *v.* Mohaupt, 162 Fed. 665, 89 C. C. A. 457, 18 L. R. A., N. S., 760.

83. Defective tracks.—Gage *v.* St. Louis Transit Co., 109 S. W. 13, 211 Mo. 139.

84. Acts of employees.—Chicago, etc., R. Co. *v.* Ferguson, 86 Pac. 471, 74 Kan. 253.

85. Illinois Cent. R. Co. *v.* Warren, 149 Fed. 658, 79 C. C. A. 350.

86. Platform gates opened.—McMahon *v.* New Orleans R., etc., Co., 127 La. 544, 53 So. 857, 32 L. R. A., N. S., 346.

87. While train standing still.—Conroy *v.* Chicago, etc., R. Co., 70 N. W. 486, 96 Wis. 243.

88. Barnes *v.* Danville St. R., etc., Co., 85 N. E. 921, 235 Ill. 566.

with negligence in so doing.[89] A boy fifteen years of age was standing on the lower step of a passenger coach while it was going at a speed of about seven miles an hour. The train was run for the convenience of workingmen, and was full and crowded on the platform. His head and body projected beyond the side of the car, and he was struck by another car on a switch. These facts do not necessarily show negligence.[90] But a child fifteen years old, and of average intelligence is, as a matter of law, guilty of contributory negligence in going upon the lowest step of the car to vomit, while the train is in rapid motion, though there was only standing room in the car.[91] And a boy fifteen years old, who stands on the platform of a moving electric car, there being room inside and he being of sufficient intelligence to ride on the same, in going to and from his work, is guilty of contributory negligence, preventing recovery for injuries received, caused thereby.[92] The plaintiff, being the only passenger in a street car, became suddenly ill, told the conductor she felt sick, and twice requested him to stop the car, so that she might get off. He failed to do so, and, going to the front of the car, began talking to the motorman. The plaintiff, growing worse, and becoming frightened and dazed, rose to her feet, and staggered towards the rear of the car, and there fell, unconscious, through the door. Whether the plaintiff was guilty of negligence was a question for the jury.[93]

§ 2741. Sitting Negligently in Seat.—In an action for injuries to plaintiff while a passenger on defendant's electric car, plaintiff claimed that, while he was sitting in a seat facing towards the front of the car, it suddenly gave a jerk and threw him off. Such evidence was not sufficient to charge defendant with negligence, as the natural result of a sudden start would be, not to throw plaintiff off, unless he was sitting in a careless manner, but to throw him against the back of the seat on which he was sitting.[94]

Sitting by Open Window.—A passenger is not guilty of contributory negligence in riding in a smoking car in front of an open window.[95] A passenger who sits by an open window with knowledge of the fact that sparks and cinders are entering the window can not recover for injuries resulting therefrom, on the ground that the company was negligent in allowing the window to be out of repair, so that it could not be closed, if he knew, or by the exercise of ordinary care could have known, that there were unoccupied seats with protected windows.[96]

Sitting Near Stove.—In an action for injuries sustained by being thrown against a car stove by a jar caused by coupling cars, the fact that plaintiff, then a child three years old, was at the time sitting with her mother by the stove for protection from cold, does not constitute contributory negligence.[97]

Sitting in Chair.—A passenger in a freight car who had been drinking, and who, instead of taking the perfectly safe seats designed for passengers along the sides of the car, sat in the conductor's loose chair tipped up against a box within three inches of the open side door, was thrown out by the jar of the cars running together, because of the trains running at thirty-five miles an hour round sharp curves. He was guilty of contributory negligence.[98] Where a passenger entered the caboose of a freight car, and, knowing that the train

89. Children and invalids.—East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

90. Lake Shore, etc., R. Co. *v.* Kelsey, 76 Ill. App. 613, affirmed in 54 N. E. 608, 180 Ill. 530.

91. Cleveland, etc., R. Co. *v.* Moneyhun, 44 N. E. 1106, 34 L. R. A. 141, 146 Ind. 147.

92. Kirchner *v.* Oil City, etc., R. Co., 59 Atl 270, 210 Pa. 45.

93. Newark, etc., R. Co. *v.* McCann, 58 N. J. L. 642, 34 Atl. 1052, 33 L. R. A. 127.

94. Sitting negligently in seat.—Brennan *v.* Brooklyn Heights R. Co., 12 Misc. Rep. 570, 33 N. Y. S. 852, 67 N. Y. St. Rep. 605.

95. Sitting by open window.—Missouri, etc., R. Co. *v.* Flood, 79 S. W. 1106, 35 Tex. Civ. App. 197.

96. O'Donnell *v.* Louisville, etc., R. Co., 42 S. W. 846, 19 Ky. L. Rep. 1005.

97. Sitting near stove.—Texas Cent. R. Co. *v.* Steuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

98. Sitting in chair.—Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

crew were still engaged in switching, sat down in a chair, instead of in the seats provided for passengers, he was not in the exercise of due care, and could not recover for injuries received by being thrown from his seat by the collision of a car with the caboose.[99] But it has been held that where a railroad company allowed a chair to remain in a caboose, it was not contributory negligence for plaintiff to sit in it, instead of on the stationary seats around the sides of the car.[1]

Sitting on Arm of Seat.—A passenger, who was familiar with the method of a night mixed freight and passenger train, and knew that there was more bumping and jolting in the coupling of such trains than on passenger trains, was sitting on the arm of a seat, when the engine, with the freight car attached, was thrown back with a sudden shock, causing him to be thrown against the corner of the seat in his rear, and injured. The passenger was guilty of contributory negligence.[2]

§ 2742. Standing in Car.—A passenger on an open street car, who voluntarily rides standing between two seats, assumes the manifest inconveniences and risks incident to proper operation of the car; but in so riding he is not guilty of such contributory negligence as prevents recovery for injury resulting from negligent operation of the car.[3] The plaintiff, a passenger on a freight train, while standing up in the caboose, was thrown down, owing to a sudden movement of the train. It appeared that the plaintiff knew of the jerks incident to freight trains; that there was a seat at his disposal; that there had been frequent jerks during the journey, such as are usual in freight trains, and other passengers had kept their seats in consequence. The plaintiff was negligent.[4]

In Violation of Rule of Carrier.—Violation of a rule, notice of which is properly displayed, forbidding passengers to stand in a car, by standing for an unreasonable length of time, constitutes negligence per se.[5]

Where There Were No Vacant Seats.—It is not contributory negligence to stand inside an electric car when the seats are all occupied.[6] In an action for personal injuries there was evidence that plaintiff, while a passenger in defendant's street car, was obliged to stand, as all the seats in the car were occupied; that there were other persons standing in the car; that the car ran off the track, and came to a sudden stop; and that plaintiff was thrown forward, and received certain injuries from the fall, and from other passengers being thrown on her by the sudden stop. It could not be said as a matter of law that plaintiff was guilty of contributory negligence.[7] But where the plaintiff boarded the

99. Freeman *v.* Pere Marquette R. Co., 91 N. W. 1021, 131 Mich. 544, 100 Am. St. Rep. 621.

1. Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523.

2. Sitting on arm of seat.—Smith *v.* Richmond, etc., R. Co., 99 N. C. 241, 5 S. E. 896.

3. Standing in car.—Kebbe *v.* Connecticut Co., 84 Atl. 329, 85 Conn. 641, Ann. Cas. 1915C, 167.

4. Wallace *v.* Western, etc., R. Co., 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346.

5. In violation of rule of carrier.—St. Louis, etc., R. Co. *v.* Harmon, 109 S. W. 295, 85 Ark. 503, 14 Am. & Eng. Ann. Cas. 509.

6. Where there were no vacant seats.—Grotsch *v.* Steinway R. Co., 45 N. Y. S. 1075, 19 App. Div. 130.

7. Griffith *v.* Utica, etc., R. Co., 63 Hun 626, 17 N. Y. S. 692, 43 N. Y. St. Rep. 835.

A passenger on an excursion train entered the last car, and went through seven coaches, looking for a seat, but people were standing in the aisles and on platforms. He testified that the doors were open, and he then stopped and looked forward through the cars ahead, and that every car was crowded, and he then stood in the aisle of the car until the train stopped, when he went to the threshold of the car, and while standing there was injured by the sudden backing of the train. Plaintiff knew that there were about fourteen cars, and that 1,000 people were supposed to go on the train. Defendant's evidence showed that there were 1,102 seats and 952 passengers, and vacant seats in the two front cars. Neither the conductor nor the brakeman informed plaintiff that there were vacant seats in the front coaches. Held, that the failure of the passenger to take a seat was not such negligence as would prevent a recovery for such injury. Farnon *v.* Boston, etc., R. Co., 62 N. E. 254, 180 Mass. 212.

smoking car of a railroad train, and, seeing no vacant seats, stood within three inches of the door, supporting himself with his hands, while the train traveled a distance of three-fourths of a mile, and was thrown through the open door onto the platform and off the train on its crossing a switch, he was guilty of contributory negligence and could not recover for his injuries.[8]

Where Seat Given Another.—It can not be held, as a matter of law, that a passenger in a crowded railroad car, by surrendering his seat to one less able to stand than himself, is guilty of negligence which precludes his recovery for an injury received through the negligence of the carrier, although such injury would not have been received had he retained his seat.[9]

Injury by Starting of Car.—It is the duty of a passenger on a railroad train to exercise ordinary care in obtaining a seat on the coach, and, if the jolting of the train when starting was unavoidable, after it had stopped a reasonable length of time to allow a passenger to be seated, an injury resulting in consequence of unnecessary delay in obtaining a seat will not render the railroad company liable therefor.[10] But it has been held that where an injury to a street car passenger was alleged to have resulted from defendant's negligence in starting the car with a sudden and unusual jerk, plaintiff was not guilty of contributory negligence as a matter of law in failing to take her seat before the car started, though she had time to do so and there were vacant seats.[11] On entering, on invitation of the carrier, a car from which the engine is detached, the passenger has a right to select any seat he chooses, and may presume that he will have time to do so before the engine is backed against the car in such a manner as to endanger him unless he is sitting down.[12]

Injured by Collision.—A passenger who, before he had seated himself in a car, was injured by the negligence of defendant in causing another car to come into violent contact with the former, is not precluded from recovering merely because he did not occupy the first vacant seat he came to, nor because he incumbered himself with bundles or with the care of children, which impeded his movements.[13]

8. Foley *v.* Boston, etc., Railroad, 79 N. E. 765, 193 Mass. 332, 7 L. R. A., N. S., 1076.

9. Where seat given another.—Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

10. Injury by starting of car.—Macon, etc., R. Co. *v.* Moore, 33 S. E. 889, 108 Ga. 84.

A person who enters an elevated railway car at a station, and looks leisurely around without taking a seat, and is thrown down by the inevitable "jerk" of the train in starting, is guilty of contributory negligence, and can not recover for an injury thereby sustained. De Soucey *v.* Manhattan R. Co., 15 N. Y. S. 108, 39 N. Y. St. Rep. 79.

Where the employees having charge of a railway train have stopped it at the station long enough to give passengers reasonable time to enter and become seated, and have given the usual signals upon starting, the company is not liable in damages to one who, having failed to sit down, is thrown and injured by the starting of the train. International, etc., R. Co. *v.* Copeland, 60 Tex. 325.

11. Cutcliff *v.* Birmingham R., etc., Co., 41 So. 873, 148 Ala. 108.

12. Moore *v.* Saginaw, etc., R. Co., 78 N. W. 666, 119 Mich. 613.

In an action against a street railway for injuries to plaintiff's intestate caused by the sudden starting of defendant's car with a jerk, thereby throwing intestate down, the fact that after deceased entered the car she walked up the aisle five or six feet before the car started, did not preclude the jury from finding that in proceeding towards the front of the car decedent was exercising ordinary care, even if she did pass an empty seat which she could have taken. Weeks *v.* Boston Elevated R. Co., 77 N. E. 654, 190 Mass. 563.

13. Injured by collision.—Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

Plaintiff was a passenger on defendant's train, and was sleeping in a car, and just before reaching his station, the conductor woke him, and notified him that they were nearing his destination. Plaintiff got up, and stood in the aisle eight or ten feet from the smoking compartment while the train was still moving at its usual speed. While plaintiff was thus standing, the train struck a freight car, by negligence of defendant's servants, and threw plaintiff against the smoking compartment, and injured him. The freight car had been driven partly onto the main track by a storm. Held,

Duty to Hold to Straps.—A woman in a crowded street car is bound to hold on to the straps suspended from the roof of the car, if with ordinary convenience she can do so.[14]

Standing to Get a Drink.—One standing in the caboose of a moving freight train, which contained, in a prominent position, a warning to passengers against standing while the train was in motion, was guilty of negligence contributory to his injury, and barring a recovery therefor, though he had risen to get a drink, and was waiting for the water to be cooled.[15]

To Attract Attention of Conductor.—The deceased, while a passenger on the defendant's car, rose from his seat to attract the attention of the conductor. The car was in rapid motion and swaying violently. He stood facing the rear of the car with one hand on the back of his seat, until he was thrown to the ground when the motion of the car was checked by the brakes. He knew that the track was uneven, and that the car for that reason was liable to sway. He was not in the exercise of due care, and a verdict for the defendant was properly directed.[16]

While Cars Being Coupled.—Where a passenger negligently stands in a car while it is being coupled to another he is precluded from recovering for an injury so received.[17] But it has been held that where a passenger was injured by the jerking of a freight car, in which he was transported as a passenger, while it was being switched in a junction railroad yard, the fact that he was standing at the time of his injury did not constitute contributory negligence, as a matter of law.[18] A woman sixty-three years old, and crippled by a former dislocation of her hip, traveling in the caboose of a freight train, is negligent in leaving her seat, to get a drink, while the train is switching cars, so as to prevent her recovey for injuries from a fall caused by the jolt in coupling cars; it appearing that the jolt was not greater than is usual in such cases, and she was aware that such jolts necessarily followed in the coupling of cars.[19] The plaintiff was a passenger in a caboose attached to a freight train on de-

that in an action for the injury the court was not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. Gulf, etc., R. Co. *v.* Bell, 57 S. W. 939, 93 Tex. 632.

But in an action for injuries to a woman by falling from an open street car, the evidence for plaintiff was that the car collided with a cart, and passed on rapidly, not being under control, and that after it had gone about 230 feet, and the speed had been slackened, plaintiff fell from the side of the car; there being no evidence of any jerk of the car, or other cause for her fall. For defendant, two passengers testified that, though she had been warned to keep her seat. Held, that a binding instruction for defendant should have been given. Jackson *v.* Philadelphia Tract. Co., 37 Atl. 827, 182 Pa. 104.

14. Duty to hold to straps.—Whipple *v.* West Philadelphia, etc., R. Co. (Pa.), 11 Phila. 345.

15. Standing to get a drink.—Krumm *v.* St. Louis, etc., R. Co., 76 S. W. 1075, 71 Ark. 590.

16. To attract attention of conductor.—Cottrell *v.* Pawtucket St. R. Co., 65 Atl. 269, 27 R. I. 565.

17. While cars being coupled.—Where a passenger, riding in the caboose of a railroad train, knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, but without thinking about the approaching of the cars, and without paying any attention to whether the cars were approaching, left his seat and stood up in the car and was thrown down and injured, when he would not have been had he kept his seat or resumed it before the cars struck, he was guilty of such contributory negligence as barred his recovery against the railroad for the injuries. Harris *v.* Hannibal, etc., R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111.

18. Texas, etc., R. Co. *v.* Adams, 72 S. W. 81, 32 Tex. Civ. App. 112.

The fact that a passenger on a freight train was standing up in the caboose without holding onto anything when he was injured by being thrown to the floor by the shock caused by the backing up of the train to make a coupling did not, as a matter of law, make him guilty of contributory negligence. Chicago, etc., R. Co. *v.* Buie, 73 S. W. 853, 31 Tex. Civ. App. 654.

19. Felton *v.* Horner, 37 S. W. 696, 97 Tenn. 579.

fendant's road. When the train stopped at the station at which he was injured, the car in which he was riding was detached from the other cars which composed the train and was left standing on the track. This was done for the purpose of doing switching at the station. During the switching four empty cars on the end of the train were shoved and then cut loose, and in this detached condition, and subject only to the control of a brakeman, were allowed to roll down against the caboose in which the plaintiff was standing, he having gone to the door to see what was going on, and although he saw the cars coming and braced himself to resist the shock, its force was so great as to dash him violently against the floor of the car, causing the injuries complained of. The fact that the plaintiff was unnecessarily standing up and would not have sustained the injury if he had kept his seat was insufficient to excuse defendant, whether its negligence was gross or willful.[20]

Standing in Closet.—Where plaintiff, while standing in the closet of defendant's passenger car, was thrown against a stepladder, leaning against the wall of the closet, by a sudden lurch of the train, and in consequence of which he fell against the window, breaking the glass, and injuring his eye and face, such facts did not raise the issue of contributory negligence.[21]

Standing in Seat.—Where a passenger, on reaching her destination, without asking the assistance of the servants of the railroad company, stood on the seat in order to reach the bundle basket attached to the side of the car, and was thrown to the floor by the moving of the car, and injured, she could not recover.[22]

Standing in Doorway.—A passenger who stood in the doorway of a crowded passenger car when the adjoining coach was empty could not recover for injuries from being thrown by a jolt.[23] Where the plaintiff, a soldier engaged as guard over prisoners of war who were being transported by rail, was stationed at the door of the car by order of his commanding officer, and while in this position was injured by an accident to the train. He was not chargeable with negligence in riding where he did.[24]

Same—Placing Hand on Door Frame.—It is not necessarily contributory negligence for a passenger to place his hand upon a car door frame at a place where a closing of the door will cause injury.[25] A passenger on a railroad train,

20. Louisville, etc., R. Co. *v.* Yowell, 10 Ky. L. Rep. 721.

21. Standing in closet.—St. Louis, etc., R. Co. *v.* Smith, 38 Tex. Civ. App. 507, 86 S. W. 943.

22. Standing in seat.—East Tennessee, etc., R. Co. *v.* Green, 95 Ga. 736, 22 S. E. 658.

23. Standing in doorway.—Shive *v.* Philadelphia, etc., R. Co., 83 Atl. 707, 235 Pa. 256.

In an action by a passenger against a railroad company to recover for injuries from a collision with a train at a station, there was evidence that he had left his seat, was standing at the door of the car, and was thrown out upon the platform, which was driven into the preceding car. Held, that the question whether he was in the exercise of reasonable care was for the jury. Worthen *v.* Grand Trunk R. Co., 125 Mass. 99.

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that the passenger's negligence precluded his recovery. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

"Mr. Thompson in his work on Carriers of Passengers, p. 264, lays the rule down on this subject as follows: 'A passenger can not be said to be in the exercise of due care who voluntarily and unnecessarily places his hand upon the framework of the door of the carriage so that when the door is closed it must be inevitably crushed.'" Galveston, etc., R. Co. *v.* Davidson, 61 Tex. 204.

24. Truex *v.* Erie R. Co. (N. Y.), 4 Lans. 198.

25. Placing hand on door frame.—Christensen *v.* Oregon, etc., R. Co., 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that the passen-

which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. In an action for such injury, where it was not the brakeman's duty to see that the passenger was taking proper care of himself, the fact that the brakeman could have discovered the passenger's danger was immaterial.[26]

Walking through Car.—The fact that a passenger goes to a wash room for the purpose of washing his hands while the car is in motion, over an uneven road, does not per se render him guilty of contributory negligence in case he is injured while standing before the basin.[27]

§§ 2743-2756. Riding on Platform—§ 2743. In General.—A passenger riding upon the platform of a car assumes the increased risk that may result therefrom in the ordinary course of things, when the car is properly driven or managed.[28] A passenger injured by reason of standing on the plat-

ger's negligence precluded his recovery. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

Plaintiff left his compartment in the front end of defendant's railroad coach on approaching a station, passed through the baggage compartment to the one in the rear, and stood in the door opening thereto, with his hand against the door casing. While he was in such position a brakeman, who had his back toward him and was stooping over to light a lantern, called out, "Shut the door," which some one near the door did, thereby injuring plaintiff's hand. Held, that plaintiff was guilty of such contributory negligence as to preclude his recovery. Brineger *v.* Louisville, etc., R. Co., 72 S. W. 783, 24 Ky. L. Rep. 1973.

Door wilfully shut by employee.—Plaintiff, a passenger on a street car, being unable to see out by reason of frost on the windows, and believing that the next street was the place where he desired to alight, signaled the conductor to stop, and walked toward the door, which the conductor opened. The car was "stopped unusually sudden," and plaintiff, discovering that he had not yet reached his stopping place, so informed the conductor, and placed his hand against the door jamb, in plain sight of the conductor, with his thumb in the slot in which the door ran, to support himself against the sudden starting of the car. The conductor became enraged, and slammed the door on plaintiff's thumb. Held, that the jury was warranted in finding that plaintiff had reason to believe that the car might start forward suddenly, and that there was nothing other than the door jamb which gave him means of steadying himself, and that he was therefore not negligent. Carroll *v.* Boston, etc., R. Co., 71 N. E. 89, 186 Mass. 97.

26. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

27. Walking through car.—Sturdivant *v.* Fort Worth, etc., R. Co. (Tex. Civ. App.), 27 S. W. 170.

28. Riding on platform.—*United States.*—St. Louis, etc., R. Co. *v.* Leftwich. 117 Fed. 127, 54 C. C. A. 1.

Alabama.—Clanton *v.* Southern R. Co., 165 Ala. 485, 51 So. 616, 27 L. R. A., N. S., 253.

District of Columbia.—Harbison *v.* Metropolitan R. Co., 9 App. D. C. 60; Brightwood R. Co. *v.* Carter, 12 App. D. C. 155.

Georgia.—Blodgett *v.* Bartlett, 50 Ga. 353.

Maine.—Watson *v.* Portland, etc., R. Co., 40 Atl. 699, 91 Me. 584, 44 L. R. A. 157, 64 Am. St. Rep. 268.

Massachusetts.—Renaud *v.* New York, etc., R. Co., 97 N. E. 98, 210 Mass. 553, 38 L. R. A., N. S., 689.

Missouri.—Magrane *v.* St. Louis, etc., R. Co., 81 S. W. 1158, 183 Mo. 119.

New Jersey.—Nirk *v.* Jersey City, etc., St. R. Co., 68 Atl. 158, 75 N. J. L. 642.

New York.—Vogler *v.* Central Crosstown R. Co., 82 N. Y. S. 485, 83 App. Div. 101; Kiefer *v.* Brooklyn Heights R. Co., 97 N. Y. S. 841, 111 App. Div. 404; Gregory *v.* Elmira, etc., R. Co., 83 N. E. 32, 190 N. Y. 363, 16 L. R. A., N. S., 335, 13 Am. & Eng. Ann. Cas. 598, reversing order, 95 N. Y. S. 1130, 107 App. Div. 630; Cramer *v.* Brooklyn Heights R. Co., 83 N. E. 35, 190 N. Y. 310, reversing judgment, Kramer *v.* Brooklyn Heights R. Co., 100 N. Y. S. 276, 114 App. Div. 804.

Tennessee.—Meyere *v.* Nashville, etc., Railway, 110 Tenn. 166, 72 S. W. 114.

Texas.—Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; Galveston, etc., R. Co. *v.* Morris, 94 Tex. 505, 61 S. W. 709, affirming 60 S. W. 813; Gaunce *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 33, 48 S. W. 524; Ft. Worth, etc., R. Co. *v.* Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61, affirmed in 94 Tex. 695, no op.; St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879; International, etc., R. Co. *v.* Welsh (Tex. Civ. App.), 24 S. W. 854; Missouri, etc., R. Co. *v.* Brown (Tex. Civ. App.), 39 S. W. 326; Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239.

West Virginia.—Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325; Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

Where plaintiff testified that he was

form because of a crowded car cannot recover for injuries, unless he was free from negligence.[29] It would seem that, prima facie, that every person ought to know that the platform is not a passenger's place, except to pass over.[30] But the mere fact that a passenger was at the time of an accident on the platform of a car, where he should not have been, does not prevent his recovering of the company for his injuries if such injuries did not result from his being upon the platform.[31] The causes which may justify a passenger, without the imputation of fault on his part, as against the carrier, in leaving his seat and going outside the car and occupying temporarily a position on the platform while the cars are standing still, depend on the occasion and circumstances which induce or impel him to do so.[32]

Statutory Provisions.—Under the Code of California, requiring railroads to furnish sufficient accommodations within its cars for all passengers, and relieving railroads, from liability for injuries to a passengers while riding on the platforms of the cars in violation of posted rules, a passenger who in violation of posted rules voluntarily goes on the platform of a car solely to ride there, though accommodations are provided for him in the car, may not recover for an injury received while riding there.[33] A statute, providing that in case any passenger on a railroad train shall be injured while on the platform of a car while in motion, in violation of the printed regulations of the company, posted in a conspicuous place inside of its cars, said company shall not be liable for the injury, does not exempt a railroad company from liability for all injuries sustained by passengers while on the platform of a car in motion, regardless of whether the passenger's being on the platform was the cause of the injury.[34]

Negligence Per Se.—While a passenger assumes the increased risk that may result from his riding on the platform, he is not guilty of contributory negligence.[35] Whether the act of a passenger on a railroad train in leaving

thrown down by the starting of the train when he was on the platform, an instruction that if he was unnecessarily or improperly there, knowing that the train was about to start, and was thrown down by the starting of the engine with no unusual or unnecessary jerk, he could not recover, is sufficiently favorable to plaintiff. Torrey *v.* Boston, etc., R. Co., 147 Mass. 412, 18 N. E. 213.

Under Ga. Civ. Code 1895, § 3830, which provides that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover," a declaration in an action by a passenger against a railroad company to recover for a personal injury does not state a cause of action where it shows that plaintiff was a railroad employee, that while riding as a passenger on defendant's road he went out upon the platform of the car as the train was passing through railroad yards approaching a station and stood near the step with one hand upon the hand rail, and that he was thrown to the ground by a violent jerk of the train, ordinary care requiring him under such circumstances to remain in the car until the train stopped. Shumate *v.* Louisville, etc., R. Co., 158 Fed. 901.

A person riding on the bumper on the rear of a street car, without the knowledge of the conductor is, as a matter of law, guilty of contributory negligence, so as to prevent a recovery for injuries occasioned by the car upon which he was riding being struck from the rear by another car. Bard *v.* Pennsylvania Tract. Co., 176 Pa. 97, 34 Atl. 953, 53 Am. St. Rep. 672.

29. Graham *v.* McNeill, 55 Pac. 631, 20 Wash. 466, 43 L. R. A. 300, 72 Am. St. Rep. 121.

30. Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

31. Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. 382, 91 Am. Dec. 168.

32. Atlantic, etc., R. Co. *v.* Crosby (Fla.), 43 So. 318.

33. Statutory provisions.—Civ. Code, §§ 483, 484; Pruitt *v.* San Pedro, etc., R. Co., 118 Pac. 223, 161 Cal. 29, 36 L. R. A., N. S., 331.

34. Omaha, etc., R. Co. *v.* Chollette, 41 Neb. 578, 59 N. W. 921.

35. Negligence per se.—Alabama.—Highland Ave., etc., R. Co. *v.* Donovan, 94 Ala. 299, 10 So. 139.

Georgia.—Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005; Augusta, etc., R. Co. *v.* Renz, 55 Ga. 126.

Illinois.—Chicago Union Tract. Co. *v.* Lawrence, 113 Ill. App. 269, judgment affirmed in 71 N. E. 1024, 211 Ill. 373.

Iowa.—Sutherland *v.* Standard, etc., Ins. Co., 87 Iowa 505, 54 N. W. 453.

Maine.—Watson *v.* Portland, etc., R. Co., 40 Atl. 699, 91 Me. 584, 44 L. R. A. 157, 64 Am. St. Rep. 268.

Massachusetts.—Mesel *v.* Lynn, etc., R. Co. (Mass.), 8 Allen 234; Maguire *v.*

his seat and going to the door or upon the platform of the coach, while the train is in motion and before it comes to a full stop, is such negligence as would defeat a recovery for an injury resulting from the negligence of the company in operating its train is a question for the jury to determine, from all the facts and circumstances of the particular case under consideration; and in the determination of this question the jury are authorized to take into consideration the age and physical condition of the passenger, the speed of the train, the reason of the passenger for leaving his seat and going to the door or upon the platform, the purpose to be accomplished, and all other attendant facts and circumstances as disclosed by the evidence.[36] There can

Middlesex R. Co., 115 Mass. 239; Beal *v.* Lowell, etc., St. R. Co., 157 Mass. 444, 32 N. E. 653.

Michigan.—Upham *v.* Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129.

Minnesota.—Matz *v.* St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071.

Nebraska.—East Omaha St. R. Co. *v.* Godola, 70 N. W. 491, 50 Neb. 906.

New York.—Pendergast *v.* Union R. Co., 41 N. Y. S. 927, 10 App. Div. 207, 75 N. Y. St. Rep. 1297; Nolan *v.* Brooklyn, etc., R. Co., 87 N. Y. 63, 41 Am. Rep. 345; Hastings *v.* Central Crosstown R. Co., 7 App. Div. 312, 40 N. Y. S. 93.

Ohio.—Shrum *v.* C. & M. Valley R. Co., 8 N. P. 26, 10 O. Dec. 244.

Pennsylvania.—West Philadelphia, etc., R. Co. *v.* Gallagher, 108 Pa. 524.

South Carolina.—Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130.

Texas.—Bonner *v.* Glenn, 79 Tex. 531, 15 S. W. 572; International, etc., R. Co. *v.* Welsh (Tex. Civ. App.), 24 S. W. 854; Gaunce *v.* Gulf, etc., R. Co., 48 S. W. 524, 20 Tex. Civ. App. 33.

Washington.—Halverson *v.* Seattle Elect. Co., 77 Pac. 1058, 35 Wash. 600; Muldoon *v.* Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794.

It is not negligence per se for a passenger on an electric street railway car to ride upon the platform, although there are vacant seats inside the car, and a notice is posted on the car that riding on the platform is dangerous. Capital Tract. Co. *v.* Brown, 29 App. D. C. 473.

Where a car had stopped to allow passengers to get off at a crossing, that a passenger stood on the rear bumper of the car, not knowing that another car was approaching from the rear, is not negligence per se. Chicago City R. Co. *v.* Schmidt, 75 N. E. 383, 217 Ill. 396.

It is error to charge, as matter of law that it is not negligence for a passenger to ride on the steps or platform of a railroad car. That is a question of fact. Illinois Cent. R. Co. *v.* O'Keefe, 154 Ill. 508, 39 N. E. 606.

As matter of law, the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not absolve the company from liability for injuries there received by him. Burns *v.* Bellefontaine R. Co., 50 Mo. 139.

It is not negligence per se for a passenger to stand upon the platform, steps or running board of an electric street car which is crowded; and the weight of authority also supports the rule that it is not contributory negligence, as a matter of law, for a passenger to stand upon the platform of a car or running board, whether there be vacant seats or not in the inside of the car. And whether the passenger be standing upon the platform, running board, or steps, the question of negligence and contributory negligence is held to be, in the majority of cases, questions for the jury to determine. San Antonio, etc., Co. *v.* Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015, affirmed in 97 Tex. 646, no op.

But it has been held that to stand on the platform of an electric car in motion, when there is room inside, is negligence per se. Kirchner *v.* Oil City, etc., R. Co., 59 Atl. 270, 210 Pa. 45; Thayne *v.* Scranton Tract. Co., 8 Pa. Super. Ct. 446.

Where not in violation of rule.—It is not contributory negligence, per se, for a passenger on a cable car to ride on the rear platform, where others do it without objection, and there is no rule against so doing. Order 79 Ill. App. 121, affirmed in North Chicago St. R. Co. *v.* Baur, 53 N. E. 568, 179 Ill. 126, 45 L. R. A. 108.

Preparatory to getting off.—It is not negligence per se for a passenger to ride on the platform of an electric car, nor to get up and go there from inside the car before the car has stopped, to await an opportunity to alight. Judgment 43 Atl. 1060, 63 N. J. L. 407, affirmed in Scott *v.* Bergen County Tract. Co., 48 Atl. 1118, 64 N. J. L. 326.

36. Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005; Cotchett *v.* Savannah, etc., R. Co., 84 Ga. 687, 11 S. E. 553. See also, Parris *v.* Atlanta, etc., R. Co., 128 Ga. 434, 57 S. E. 692; Central, etc., R. Co. *v.* Forehand, 128 Ga. 547, 58 S. E. 44.

"The question of negligence, as to a passenger upon the platform of a moving train, is as much a question of fact to be determined by the jury as any other phase of the subject which may be pre-

be no difference in the rule as affecting one who intends to board a train and as to one who intends to alight therefrom, where the passenger is attempting to do something either toward taking passage upon a car or disembarking therefrom.[37] In some cases however the conduct of a passenger in leaving his seat in a car and going upon an open platform, while the train was running at a high speed, without legitimate reason therefor, has been so palpably negligent as to be dealt with as a matter of law.[38]

Proximate Cause of Injury.—In order to defeat a recovery the passenger's negligence must have been the proximate cause of his injury.[39] Though a passenger was standing on the front platform of the defendant's car prior to the time she attempted to alight because of the derailing of the car by the horses attached to it, this fact will not defeat her right to recover for injuries caused by a kick from one of the horses, where it appears that such standing was not the proximate cause of the injury.[40] Where a person who has been riding on the platform of a railroad car, in violation of the company's rule, is injured by the backing of the car after he has gotten off, there is no such casual connection between his violation of such rule and the injury suffered as will preclude him from bringing an action against the railroad company for negligence.[41]

Degree of Care of Passengers.—If a passenger voluntarily chooses to ride on the rear platform of a street car, he is to be held to the exercise of a high degree of care to avoid the dangers known, or to be reasonably apprehended.[42] In an action against a railroad company for injuries to a passenger riding on the platform of a car, an instruction that the plaintiff, as a passenger, was not required to exercise extraordinary care, or manifest the highest degree of prudence, is not obnoxious to the objection that it relieves the plaintiff of the duty of exercising care proportioned to his extrahazardous position.[43] Whether going upon the platform while the train is in motion is such negligence as to defeat a recovery by one who is injured, depends upon the speed of the train, the age and physical condition of the party, and other circumstances. Where the train is moving at a rapid rate of speed, it would be negligence.[44]

Negligence of Carrier.—Though a passenger assumes the risks that are incident to a proper and ordinary operation of a train when he goes upon the

sented in any action for personal injuries. It is true that in reaching this conclusion we are confronted with two lines of decisions, apparently conflicting; but we think the proper rule was laid down in Suber *v.* Georgia, etc., R. Co., 96 Ga. 42, 23 S. E. 387, and Turley *v.* Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748, 8 L. R. A., N. S., 695." Myrick *v.* Macon R., etc., Co., 6 Ga. App. 38, 64 S. E. 296.

37. Myrick *v.* Macon R., etc., Co., 6 Ga. App. 38, 64 S. E. 296.

38. Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

39. Proximate cause of injury.—In an action for injuries to a passenger, some witnesses testified that, when the street car had slowed up nearly to a standstill, the passenger attempted to alight, and by a sudden jerk of the car was thrown down. Other witnesses testified that the passenger was thrown from the platform after the car had started, and while it was going six or eight miles an hour. It was admitted that the passenger was negligently riding on the steps or platform in violation of the rules. Held, that a charge that such negligence, alone, would not defeat a recovery, unless it proximately contributed to the injury, was proper. Birmingham R., etc., Co. *v.* James, 25 So. 847, 121 Ala. 120.

An instruction, in an action for injury to a passenger thrown from the platform of a car, that the carrier is not liable if the injury to the passenger was due "in part" to the fact that he was on the platform voluntarily and unnecessarily, is erroneous. To exculpate the company from liability, the passenger's negligence must have been such as materially contributed to the accident. Yazoo, etc., R. Co. *v.* Byrd, 42 So. 286, 89 Miss. 308.

40. Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126.

41. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 12 So. 439.

42. Degree of care.—Blair *v.* Lewiston, etc., St. Railway, 85 Atl. 792, 110 Me. 235.

43. Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406, affirming 38 Ill. App. 33.

44. Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005.

platform of a car before reaching the station, he does not thereby assume the risk of a danger created by a careless, unexpected and negligent act.[45] An instruction that a carrier is not liable for injury to a passenger if he was thrown from the train while unnecessarily standing on the car platform, while the train was passing from a straight track to a curve, is erroneous, in not adding the condition that the train was being run around the curve with "all due care."[46] Where a passenger on a street car was authorized to assume that the car would stop before rounding a curve, the fact that he had parcels in one hand, and was attempting to grasp the hand rail with the other, when he was thrown from the car and injured, while the car rounded the curve at a high rate of speed, was not necessarily a contributing cause of the injury.[47] But a request for a ruling that passengers may assume that a car will be operated in view of the fact that some of the passengers may be standing in the car or on the platform was properly refused, where the car was almost empty, making it unnecessary for a passenger to stand, and where there was no showing that the motorman knew the passenger was on the platform with the conductor's consent.[48]

Before Train Starts.—In an action against a carrier by a passenger because the declaration alleges that plaintiff was on the platform of a passenger car while it was standing still waiting at a regular station for the arrival of another train, it is not necessarily implied that plaintiff had selected such position to ride on when the train was ready to start.[49]

§ 2744. Rules and Regulations of Carrier.—A passenger standing on the platform of a railroad car in violation of the known rules of the railroad can not recover for injuries received by being thrown therefrom.[50] In a street car passenger's action for injuries, a request to charge that if plaintiff knew, or by exercising ordinary care might have known, that the rules forbade pas-

45. Negligence of carrier.—Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239.

A passenger standing on the platform of an electric street railway car has a right to assume that the car in rounding a curve will not be run at an unlawful speed. Capital Tract. Co. *v.* Brown, 29 App. D. C. 473.

46. Yazoo, etc., R. Co. *v.* Byrd, 42 So. 286, 89 Miss. 308.

47. Babcock *v.* Los Angeles Tract. Co., 60 Pac. 780, 128 Cal. 173.

48. Zamore *v.* Boston Elevated R. Co., 84 N. E. 858, 198 Mass. 594.

49. Before train starts.—Atlantic, etc., R. Co. *v.* Crosby (Fla.), 43 So. 318.

50. Rules and regulations of carrier.—Malcom *v.* Richmond, etc., R. Co., 106 N. C. 63, 11 S. E. 187.

A person injured by falling from the platform of a railroad train, where, in opposition to a rule of the road, he had been standing while the train was in motion, is guilty of contributory negligence. Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403.

One who boards a crowded street car, knowing of a rule of the carrier that persons riding on the platforms do so "at their own risk," must be held to assume the risk of injury resulting from his attempting to again board the car after leaving it to enable others to alight, though the carrier's servants were negligent in starting the car. Tompkins *v.* Boston Elevated R. Co., 87 N. E. 488, 201 Mass. 114, 20 L. R. A., N. S., 1063.

A passenger on defendant's train went upon the platform of the car, in anticipation of the train's stopping at a regular stopping place, and stood on the steps of the car in violation of defendant's rule (known to him) forbidding passengers to go on the platform while the train was in motion. The train ran by the regular stopping place. There was no evidence that the conductor was on the platform, or knew or had any cause to think that plaintiff was there, or invited him to go there. A sudden jerk of the train threw plaintiff off, and he was injured. The speed of the train was about eight or ten miles an hour when he fell. Held, that plaintiff was properly nonsuited. Denny *v.* North Carolina R. Co., 43 S. E. 847, 132 N. C. 340.

Where a carrier establishes a rule either prohibiting passengers from riding on the front platform of its cars, or stating that if passengers ride on the front platform they do so at their own risk, a passenger, who with knowledge of the first rule, intentionally violates it, or with knowledge of the second rule chooses to take the risk, can not recover for an injury thereby received. McDonough *v.* Boston, etc., R. Co., 78 N. E. 141, 191 Mass. 509.

sengers from riding on the platform, he could not recover, was properly refused; plaintiff not being bound to use diligence to ascertain the company's rules.[51] That rules of a street railroad company provide that passengers may stand on the platform only when there are no seats in the car will not preclude a passenger from recovering damages for negligence of the car crew because there were seats in the car, and the passenger was riding on the platform with the sanction of the employees of the company.[52] In an action for personal injuries sustained by a passenger while riding on the platform of a car, it being shown that the plaintiff was in such position in accordance with the regulations of the railway company in regard to smoking on its cars, it was held, that the mere fact of plaintiff riding on the platform did not constitute contributory negligence per se.[53]

Statutory Provision.—A statute providing that if a passenger is injured while on the platform of a car in violation of the printed regulations of the company posted up at the time in conspicuous place inside its passenger cars then in the train, the company shall not be liable, provided it furnished sufficient room inside its cars, applies only to steam railroads, and has no application to street railroads using horse power.[54]

Reasonableness of Rules.—A regulation of a railroad company forbidding passengers to stand on the platform while the car is in motion is reasonable and proper, and a passenger who violates the rule with knowledge of it does so at his peril.[55]

Printed and Posted.—There were on all the cars printed placards warning passengers not to ride on the front platform, which the plaintiff testified he had never seen, though he had used the line frequently, and could read. At the time of the accident there was room inside. The plaintiff was injured by falling off the front platform. The plaintiff was guilty of contributory negligence in not observing the reasonable regulations of the company, of which it was his duty to be aware.[56]

Rule Forbidding Smoking.—A rule of a street-railroad company that "smoking on closed cars is prohibited, except on the front platform," modifies a notice, placed in the car, prohibiting passengers from standing on the platforms, and operates as a waiver of any immunity from liability for injury to one while smoking on such platform conferred by Act 1850 (General Railroad Act) § 46.[57]

Operation and Effect of Rule.—A rule that passengers must keep off the platform of moving cars is not inflexible, as a passenger may be compelled to be there.[58]

Waiver or Suspension of Rule.—A railroad company may waive a rule forbidding passengers to ride on the platform of a car.[59] Where a street rail-

51. Coburn *v.* Moline, etc., R. Co., 90 N. E. 741, 243 Ill. 448.

52. McMahon *v.* New Orleans R., etc., Co., 53 So. 857, 127 La. 544, 32 L. R. A., N. S., 346.

53. Salmon *v.* City Elect. R. Co., 124 Ga. 1056, 53 S. E. 575.

54. Statutory provision.—Vail *v.* Broadway R. Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626, affirming 6 Misc. Rep. 20, 26 N. Y. S. 59, 31 Abb. N. C. 56.

55. Reasonableness of rules.—McCauley *v.* Tennessee, etc., R. Co., 93 Ala. 356, 9 So. 611, following Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403.

Where plaintiff was injured while riding on the front platform of a street car in violation of a notice on the car, it was proper to charge that such a rule was a reasonable regulation, and that if plaintiff intentionally violated it he could not recover. Sweetland *v.* Lynn, etc., R. Co., 59 N. E. 443, 177 Mass. 574, 51 L. R. A. 783; Burns *v.* Boston Elevated R. Co., 66 N. E. 418, 183 Mass. 96.

56. Printed and posted.—Baltimore, etc., Turnpike Road *v.* Cason, 72 Md. 377, 20 Atl. 113.

57. Rule forbidding smoking.—Vail *v.* Broadway R. Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626, affirming 6 Misc. Rep. 20, 26 N. Y. S. 59, 31 Abb. N. C. 56.

58. Operation and effect of rule.—Brice *v.* Southern Railway, 67 S. E. 243, 85 S. C. 216, 27 L. R. A., N. S., 768.

59. Waiver or suspension of rule.—Where the conductor sees a passenger standing on the platform of a crowded car, and collects his fare without objec-

way has established a custom of hauling passengers on the platforms of its cars, it cannot escape liability for accidents to passengers riding thereon by posting a notice on the cars that it is dangerous to ride on the platforms.[60] Even though a carrier have a rule forbidding passengers from riding in the vestibules of its cars and even though notices prohibiting passengers from riding in such vestibules be posted in such cars, yet such facts will not preclude a recovery by the passenger for injuries sustained while riding in such a vestibule if it appears from the evidence that such rule was abrogated by the carrier, and such notice was not seen by the passenger.[61] But the fact that a street railway company regularly permitted passengers to ride on the front platform of its cars, did not show a waiver on its part of a rule providing that if passengers chose to ride on the front platform, they did so at their own risk.[62] And the fact that there were passengers on the platform of a street car when plaintiff entered thereon did not show that the rule that passengers riding there assumed the risk of any injury had been waived by the street car company or was not in force.[63] If rules prohibiting passengers from riding on freight cars were properly posted, the mere acquiescence of the conductor in a person's riding on a freight car, where he was injured, would not, unless the conductor knew such person could not read, and was ignorant of the rules, withdraw the carrier from the protection of the statute providing that it should not be liable to a passenger injured while on a freight car in violation of the printed regulations of the company forbidding it, and posted up at the time conspicuously within its passenger cars then on the train.[64]

§ 2745. Direction or Request of Employee.—A passenger, in riding upon the front platform of a crowded street car with the consent of the conductor, is not guilty of contributory negligence per se.[65] It is not negligence per se for a passenger on a motor car to stand on the front platform, holding on with both hands to the iron rod behind him, while the car is going rapidly over a road with curves in it; he having been directed by the conductor to stand there while smoking.[66] A passenger who, by direction of the conductor, stands on the rear platform of an electric car, near the steps, holding to the rail be-

tion, the company can not attribute its occupancy as negligence in an action against it for injuries received by the passenger in alighting from the platform. Olivier *v.* Louisville, etc., R. Co., 43 La. Ann. 804, 9 So. 431.

Plaintiff was the servant of one who had contracted with a railroad company to erect fences along the right of way, the contract requiring the railroad to transport the contractor's servants. When the road was sufficiently completed the railroad put on a train consisting of a water tank car, some freight cars, and a passenger coach. When the conductor and crew of such train were preparing to take the locomotive and tank car to a certain place, the contractor requested the conductor to carry plaintiff there on the tank car, and while riding thereon plaintiff was injured owing to the derailment of the train. There was a rule of the company forbidding freight conductors to allow passengers on freight cars, but it appeared that it was customary for the contractor's servants when being carried, in the performance of their duty, to ride on flat cars, etc., and that plaintiff had no knowledge of the rule in question. Held, that he was not guilty of contributory negligence. Gray *v.* Columbia River, etc., R. Co., 88 Pac. 297, 49 Ore. 18.

60. Hart *v.* Capital Tract. Co., 35 App. D. C. 502.

61. Coburn *v.* Moline, etc., R. Co., 143 Ill. App. 132, judgment affirmed in 90 N. E. 741.

62. McDonough *v.* Boston, etc., R. Co., 78 N. E. 141, 191 Mass. 509.

63. Burns *v.* Boston Elevated R. Co., 66 N. E. 418, 183 Mass. 96.

64. Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

65. Direction or request of employee.—Germantown Pass. R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796.

Where a passenger, in getting off a railway train, attempts by direction of the conductor, to go across a plank from a car to the platform, and the plank slips, causing him to fall, it can not be imputed to him as contributory negligence that he made the attempt, though both the plank and the platform were wet and slippery. Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

66. Francisco *v.* Troy, etc., R. Co., 34 N. Y. S. 859, 88 Hun 464, 68 N. Y. St. Rep. 792.

hind him with one hand, there being no room in the car, is not negligent as a matter of law, though the car is nearing a sharp curve, as he knows, at a high rate of speed.[67] But the fact that the conductor permits a passenger to ride upon the platform when there is no necessity for his doing so does not render the company liable for injuries received by him. No person can charge another with the consequences of his own negligence simply because such other person permitted him to do the act.[68]

Against Direction of Employee.—A passenger who remains on the platform of a car at the rear end of a long train of freight cars, after warning to leave it, assumes the risk of injury caused by the jerk with which the train starts.[69] Where a passenger stands on the vestibule of a car while in motion, and there are vacant seats in the car, and on request of the brakeman he refuses to go inside, and when the doors are open on approaching a station he falls out and is killed, the railroad campany is not liable.[70]

§ 2746. Custom and Usage.—A street railway company can not create and permit a custom of hauling passengers on the platforms of its cars, and escape liability for accidents occurring through the operation of its cars with relation to such passengers.[71] But the customary violation of the rule against passengers riding on the platforms of cars can not avail a passenger who was requested by the conductor and porter to enter the car, and not stand on the platform.[72]

§§ 2747-2750. Causes Justifying Riding on Platform—§ 2747. Interior Crowded.—A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there.[73] It is not contributory negligence, as a matter of law, for a passenger to stand on the platform, where the cars are full, in a position in which a person exercising

67. Reber *v.* Pittsburg, etc., Tract. Co., 36 Atl. 245, 179 Pa. 339, 57 Am. St. Rep. 599.

68. Meyere *v.* Nashville, etc., Railway, 110 Tenn. 166, 72 S. W. 114.

69. Against direction of employee.—Louisville, etc., R. Co. *v.* Bisch, 120 Ind. 549, 22 N. E. 662.

It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train, when there is standing room inside; and if, by reason of his refusal to do so, and by going onto the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance, by reason of a lurch of the car in rounding a curve, and falls overboard and is injured, he is guilty of contributory negligence such as will preclude his recovery for such injury Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69.

70. Rager *v.* Pennsylvania R. Co., 78 Atl. 827, 229 Pa. 335.

71. Custom and usage.—Hart *v.* Capital Tract. Co., 35 App. D. C. 502.

The plaintiff received personal injuries while standing upon the platform of one of the cars of a train on the defendant's railroad. There was evidence of a custom to uncouple the engine and smoking car from the rest of the train on coming into the station where the accident occurred, in order to switch them off upon a side track, and that passengers in the smoking car were accustomed to come out of that car just before it was uncoupled, and go upon the platform of the forward passenger car, and ride into the station in that position; that this was done with the knowledge and consent and by the permission of the conductor and brakeman; and that the practice was known to the superintendent and directors of the road. The plaintiff had passed from the smoking car, in accordance with this practice, and was standing on the platform of the passenger car behind, when a collision took place between the smoking car and the passenger car through the negligence of a switchman, causing the injury for which the action was brought. Held, that the plaintiff was guilty of negligence, and could not recover. Hickey *v.* Boston, etc., R. Co. (Mass.), 14 Allen 429.

72. Houston, etc., R. Co. *v.* Bryant, 72 S. W. 885, 31 Tex. Civ. App. 483.

73. Causes justifying riding on platform.—Meyere *v.* Nashville, etc., Railway, 110 Tenn. 166, 72 S. W. 114.

ordinary care would be safe if the train was run in a careful manner.[74] A passenger is not guilty of contributory negligence as matter of law because he is riding on the car platform; the cars being so overcrowded with passengers as to make it impossible to obtain a seat in a safe place.[75] As a matter of law, it is not negligence for a person, having a return ticket good only on a certain train, to get upon the platform of a car, where he did not know, when he came to take the train, that it was so crowded that he could not get inside the car.[76] A recovery for an injury to a passenger is not precluded by his using the platform of a vestibuled train to go to the next car to obtain a seat.[77] There being no seats in the car in which he was, plaintiff went on the platform of another car, and was looking through the window for a seat, when he was injured by a collision caused by the negligence of the railroad servants. There was not want of ordinary care on plaintiff's part so far as any injury from collision was to be apprehended, and plaintiff's conduct did

74. *United States.*—Trumbull *v.* Erickson, 97 Fed. 891, 38 C. C. A. 536.

Georgia.—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

Michigan.—Archer *v.* Fort Wayne, etc., R. Co., 49 N. W. 488, 87 Mich. 101.

New York.—Ginna *v.* Second Ave. R. Co., 67 N. Y. 596, affirming 8 Hun 494.

Pennsylvania.—Walling *v.* Railway Co. (Pa.), 12 Phila. 309.

Washington.—Graham *v.* McNeill, 55 Pac. 631, 20 Wash. 466, 43 L. R. A. 300, 72 Am. St. Rep. 121.

It is not contributory negligence for a passenger on a street car to remain on the platform when there is no room inside. Marion St. R. Co. *v.* Shaffer, 9 Ind. App. 486, 36 N. E. 861.

Whether a passenger on a crowded horse car is guilty of negligence in riding on the front platform is a question of fact for the jury. Upham *v.* Detroit City R. Co., 85 Mich. 12, 48 N. W. 199, 12 L. R. A. 129; Archer *v.* Fort Wayne, etc., R. Co., 87 Mich. 101, 49 N. W. 488.

The fact that a passenger was thrown from a street car while he was on a platform does not show that he was guilty of such negligence as precludes a recovery if the inside of the car was full. Ginna *v.* Second Ave. R. Co., 8 Hun 494, affirmed in 67 N. Y. 596.

Plaintiff was riding on the front platform of a street car, and, while passing around a curve, was thrown from the car. He testified that the rear platform was crowded, and he had to get on the front; that he had to stay there because the car seemed full. There was evidence for defendant that there was ample room to stand inside the car. Held, that an instruction was proper which authorized the jury to find plaintiff free from negligence in riding on the front platform if there was a reasonable necessity, real or apparent, for his doing so. Highland Ave., etc., R. Co. *v.* Donovan, 94 Ala. 299, 10 So. 139.

It is not, as a matter of law, contributory negligence for a passenger to ride upon the platform of a street car, where it appears that the railway company stopped the car when crowded for plaintiff to get on, in accordance with its common practice, and there is no evidence to show that the conductor was ignorant of the condition of the car when it stopped, and that plaintiff would be compelled to stand upon the platform until other passengers should alight. Metropolitan R. Co. *v.* Snashall, 3 App. D. C. 420, 22 Wash. L. Rep. 377.

In an action against a railroad company for injuries received by a passenger, the evidence showed that plaintiff was injured while standing on the platform of a moving car; that the cars were crowded; that, when he got on the train, he first attempted to enter another car, but was unable to do so; that, at a station between the one where he took the car and the one where the accident occurred, seventy-five or more of the passengers left the train; and that plaintiff did not, after their departure, attempt to enter another car. The testimony did not show that the plaintiff could have entered any car if he had tried to do so. Held, that it was proper to submit the question of contributory negligence to the jury. Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406, affirming 38 Ill. App. 33.

Injured while rounding curve.—S., while voluntarily riding upon the platform of one of defendant's horse cars, she being unable to enter the car owing to its crowded state, was thrown from the car whilst it was rounding at full speed a curve, the existence of which she was unaware. Held, that plaintiff was not negligent per se, though in the case of steam railways the rule might be different. Snashall *v.* Metropolitan R. Co., 8 Mackey (19 D. C.) 399, 10 L. R. A. 746.

75. Yazoo, etc., R. Co. *v.* Byrd, 42 So. 286, 89 Miss. 308.

76. Chicago, etc., R. Co. *v.* Dumser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93.

77. Rivers *v.* Pennsylvania R. Co., 83 Atl. 883, 83 N. J. L. 513, reversing judgment 76 Atl. 455, 80 N. J. L. 217.

not contribute to bring about the collision, nor the injury.[78] Under a statute providing that if a passenger is injured while on the platform of a car, in violation of the regulations of a railroad company, the latter shall not be liable if the injury was occasioned by his being improperly on such platform, provided room and seats inside were sufficient for the accommodation of passengers, where all seats were occupied, and a passenger became faint from conditions existing as a result of the company's negligence, and, as he could not get to a window to relieve his faintness, sought to get fresh air on the platform, he was not guilty of contributory negligence as a matter of law.[79] Where plaintiff boarded a crowded street car, and was permitted to take a seat in a box on the front platform, being unaware that an electrical explosion might occur in close proximity to her, she was not guilty of contributory negligence barring recovery for injury received in leaping from the car when an explosion occurred.[80] But it has been held that where a passenger was injured while riding on the rear bumper of a crowded car, he assumed the risk incident to that position, although his fare was accepted.[81]

Negligence Per Se.—It is not negligence per se for a passenger to ride on the platform of a car on a steam train, when he can not find a seat.[82] For a passenger to stand on the front steps of a crowded street car, while in motion, is not such negligence as will per se prevent a recovery for injuries received through negligence of persons in charge thereof.[83] Where suit was brought for an injury resulting to a passenger on a railroad train by being thrown therefrom while riding upon a platform of a car, because it was claimed that the car was so crowded that he could not obtain entrance to it, and where it was contended that the company was negligent in not providing room for the passenger, thus causing the injury, there was no error in giving in charge the principle embodied in a statute, as to the presumption of negligence arising against a railroad company if it is shown that a person is injured by the running of a train, or by acts of the employees of the company in connection therewith.[84]

In Violation of Rule of Carrier.—A railroad passenger, standing on the platform of a car in motion containing no vacant seats, is not thereby guilty of negligence, even admitting that the company's printed notice to the contrary had been seen by him.[85]

Invited to Ride by Carrier.—Riding on the front platform of a cable car, especially if the car is crowded, with the express or implied consent of the company's servants, is not negligence per se.[86] In an action for injuries sustained by plaintiff while riding on the step of the defendant's street car proof that the car was full, and the platform full so that he could only ride on the steps, and that the car in this condition was stopped for him to get on, and that the con-

78. Dewire *v.* Boston, etc., R. Co., 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166.

79. Morgan *v.* Lake Shore, etc., R. Co., 101 N. W. 836, 138 Mich. 626, 70 L. R. A. 609.

80. Williamson *v.* St. Louis Transit Co., 100 S. W. 1072, 202 Mo. 345.

81. Feldheim *v.* Brooklyn, etc., R. Co., 107 N. Y. S. 413, 122 App. Div. 883.

82. Negligence per se.—Werle *v.* Long Island R. Co., 98 N. Y. 650; Hourney *v.* Brooklyn City R. Co., 7 N. Y. S. 602, 27 N. Y. St. Rep. 49.

83. Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

84. Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

85. In violation of rule of carrier.—Willis *v.* Long Island R. Co., 34 N. Y. 670, affirming 32 Barb. 398.

A passenger was permitted to get and remain on the front platform or steps of a street car, and his fare was collected from him while there, the car being so crowded that he could not get any safer place. A notice was posted on the inside of the car to the effect that "all passengers must get on and off the rear platform, and must not get on or off when the car is in motion, or stand on the steps of the car." Held that, whether the passenger knew of this notice or not, he was not, as matter of law, guilty of negligence in being where he was, and might recover from the company for any injuries sustained by him through their fault or neglect while there. Hadencamp *v.* Second Ave. R. Co., 31 N. Y. Super. Ct. 490.

86. Invited to ride by carrier.—Adams *v.* Washington, etc., R. Co., 9 App. D. C. 26.

ductor called for and received his fare while riding in this place, is sufficient to rebut the presumption that the plaintiff was guilty of negligence in riding on the steps.[87]

Standing Room in Interior.—The fact that there are no seats in a railroad car does not justify a person in riding on the platform, if he can find standing room by reasonable effort on the inside.[88] If there is standing room inside a street car, with pendent straps for holding on, it is negligence to ride on the platform.[89]

Seats in Another Car.—Where a passenger voluntarily and unnecessarily rides on a platform when there are seats in another car is guilty of contributory negligence.[90] Where a train stops for so short a time at a station that a passenger entering has only time to go into one car before the train starts, he is not bound to look through the train while it is in motion for a seat, but may, if there is no seat ready for him, stand on the platform; and the railroad company, in case of an injury to him, is not then protected by a statute providing that a railroad company shall not be liable to passengers injured while on the platform, if it at the time furnished proper accommodations within the car.[91] The plaintiff is, it seems, bound to look through the train for seats if the cars stop long enough for him so to do.[92] A negro passenger is not guilty of contributory negligence in riding on the platform of a railroad car, when there is no room to sit or stand in the coaches, in which alone such passengers are allowed to ride, though there may be such room in the other coaches.[93]

87. Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495, 34 How. Prac. 315, affirming 32 Barb. 657.

If the train is so crowded that one can not reasonably enter a car, it is not negligent to ride on the platform when the carrier acquiesces in the use of such accommodations by collecting fare for the same or some other indicative act. Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325.

88. Standing room in interior.—Rolette *v.* Great Northern R. Co., 97 N. W. 431, 91 Minn. 16; Meyere *v.* Nashville, etc., Railway, 110 Tenn. 166, 72 S. W. 114.

A person who, while hanging on the platform of a "dummy" car, when he might have pushed into the car itself, is injured by striking against a post lawfully planted near the track, of whose existence he was well aware, is guilty of contributory negligence, and can not recover. Aikin *v.* Frankford, etc., R. Co., 142 Pa. 47, 21 Atl. 781.

Where one of a funeral party that had unexpectedly crowded a car to go twelve miles, while voluntarily standing upon the platform of a car in which there was abundant standing room, and attempting to regain money blown from his hand in paying his fare, lost his foothold, and was thrown off, and killed, held, that no recovery could be had for the injury. His negligence was greater than that of the railroad company, although it was the duty of the conductor to advise him to step inside. Quinn *v.* Illinois Cent. R. Co., 51 Ill. 495.

Injury from collision.—Plaintiff was riding as a passenger on the front platform of the street car and was injured in attempting to pass through the door into the car when apprehensive of a collision with another car. There were vacant seats in the car at the time of the accident. Held, that an instruction that if plaintiff rode on the platform because there was no other place that he could stand, he could recover, but that, if there was room inside the car where he could have stood, he could not recover, was proper. McDade *v.* Philadelphia Rapid Transit Co., 64 Atl. 327, 215 Pa. 105.

89. Andrews *v.* Capitol, etc., R. Co., 2 Mackey (13 D. C.) 137, 47 Am. Rep. 266.

90. Seats in another car.—A declaration for injuries to a passenger, alleging that he took passage on the rear coach of defendant's train, and not being able to secure a seat in that coach, because of its crowded condition, stood on the rear platform thereof, and was thrown from the train while it was passing around a curve at a rapid speed, but failing to allege that plaintiff attempted to gain a seat in any other coach of the train, or requested any of the trainmen to procure a seat for him, or that there was no standing room inside the rear coach, was demurrable; it not appearing therefrom that plaintiff was not voluntarily and unnecessarily riding on such platform. Meyere *v.* Nashville, etc., Railway, 72 S. W. 114, 110 Tenn. 166.

91. Willis *v.* Long Island R. Co., 32 Barb. 398, affirmed in 34 N. Y. 670.

"Proper accommodation" means seats, not standing room. Willis *v.* Long Island R. Co., 32 Barb. 398, affirmed in 34 N. Y. 670.

92. Willis *v.* Long Island R. Co., 32 Barb. 398.

93. International, etc., R. Co. *v.* Williams, 50 S. W. 732, 20 Tex. Civ. App. 587.

Where Seat Relinquished to Another.—It is not negligence per se for a passenger to give his seat to another and take a position on the platform.[94] But it has been held that where a passenger on defendant's excursion train secures a seat for himself, but afterwards resigns it to a lady, and, after remaining in the aisle of the car for a time, goes out on the platform, intending to enter another car, but, finding that full, remains on the platform, from which he falls or is thrown off, he is guilty of contributory negligence, since he was not compelled to stand on the platform.[95]

On Excursion Train.—Where a railroad company invites and accepts passengers on an excursion train, and because of the cheap rate the cars are crowded, inside and out, the mere fact that a passenger is riding on the platform is not negligence per se.[96]

Injured by Another Car.—A passenger, riding on the rear platform of a crowded street car, who leaned his back against the dasher, and was struck and injured by the pole of a following car, was not negligent.[97]

§ 2748. Interior Uncomfortable.—Damages are not recoverable for injury to a passenger who, while standing on the platform of a car, was thrown therefrom by a lurch of the train in rounding a curve, although he was not warned of the danger of his position, his ticket was taken while he was standing there, and the day was hot, and the cars dusty and uncomfortably crowded.[98]

§ 2749. Door to Interior Closed.—Where plaintiff boarded one of defendant's street cars at the front platform, and stood there because, according to his testimony, he could not open the door, and when the car ran on a curve he was thrown off and injured, an instruction that it was the duty of the plaintiff to get on the car by the rear platform, and seat himself if he could by reasonable effort, and that his failure to do so was negligence, was erroneous; there being no notice forbidding entrance at the front platform, or apparent danger in so doing, though he apparently might have entered by the rear door.[99]

§ 2750. Escaping Danger.—Where a passenger train stops at a junction station, and is overturned by cars on the intersecting track, it is not necessarily contributory negligence in a passenger who was killed that he was standing upon the car platform, or that he had left the car, since he may have been trying to escape impending danger.[2] In an action against a railroad company for injuries to a passenger, where plaintiff was on the platform of the car when he was injured, and testifies that he went there because he feared that some accident would result from the unusual speed of the train, and intended in that event to jump into the sand on the side of the road, it is a question for the jury whether his ac-

94. Where seat relinquished to another.—Plaintiff, a passenger on a crowded horse car, gave up his seat to his wife, who by reason of an injury was unable to stand, and took a position on the front platform. Held, in an action for injuries sustained by being crowded off the platform, that it could not be said as a matter of law that plaintiff was guilty of contributory negligence. Lehr *v.* Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889.

95. Worthington *v.* Central Vermont R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326.

96. On excursion train.—Chesapeake, etc., R. Co. *v.* Lang, 100 Ky 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271, 19 Ky. L. Rep. 65.

Excursionists have the right to return home on the train by which they were taken out, and, if from its crowded condition they can secure no safer place than the platforms, it is not negligence to ride thereon. Jackson *v.* Natchez, etc., R. Co., 38 So. 701, 114 La. 981, 70 L. R. A. 294, 108 Am. St. Rep. 366.

97. Injured by another car.—Thirteenth, etc., R. Co. *v.* Boudrou, 92 Pa. 475, 37 Am. Rep. 707.

98. Interior uncomfortable.—Goodwin *v.* Boston, etc., Railroad, 84 Me. 203, 24 Atl. 816.

99. Door to interior closed.—Townsend *v.* Binghamton R. Co., 68 N. Y. S. 121, 57 App. Div. 234.

2. Escaping danger.—Kellow *v.* Central, etc., R. Co., 68 Iowa 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858.

tion was that of a person of ordinary care and prudence.[3] But although a passenger is upon the platform of the cars attempting to escape, at the time he was injured, he is not standing or riding upon the platform in such a sense as to excuse the company under the regulation prohibiting passengers from standing or riding on the platform when the cars are in motion.[4] In an action against a street railroad for injuries to a passenger who was riding on the front platform, and, becoming frightened, jumped from the car, it was proper to submit to the jury the question of the passenger's contributory negligence in taking a position on the front platform.[5] Where a passenger went on the platform when the train was leaving his station, moved down the steps, discovered a telegraph post near the track, and saw it would strike him if he attempted to get back onto the platform, and jumped, he was not entitled to recover from the railroad for the injuries received.[6]

§ 2751. Injury from Particular Causes.—Usual Operation of Car.—Though a passenger assumes the risks that are incident to a proper and ordinary operation of a train when he goes upon the platform of a car before reaching the station, he does not thereby assume the risk of a danger created by a careless, unexpected, and negligent act.[7] An instruction that a carrier is not liable for injury to a passenger thrown from the platform of a car, if the injury occurred to him while he was voluntarily on the platform, if there was no necessity for his being there, if the injury happened by reason of the "usual and ordinary operation and running of the train," is erroneous, as the operation of the train must also have been reasonably safe.[8]

Defective Platform.—A boy passenger riding on the platform and a defective step of a railway car assumed the risk of injury through such steps, and the swaying of the train caused by defective track and roadbed, if he knew the step was defective and that the car was swaying, unless he was insufficiently intelligent to be able to understand the danger of so riding.[9]

Defective Track.—A passenger on a street car was injured by being thrown from the car by a sudden lurch. The passenger at the time was standing on the front platform of the car. Prior to the accident he had experienced lurches at the place of the accident, but the shock at the time of the accident was more severe. He also knew of the defective condition of the track at the place of the accident. The passenger did not voluntarily expose himself to danger by standing on the platform; he having a right to rely on the implied contract of safe carriage.[10]

Derailment of Car.—Where defendant's car, while moving rapidly, entered an open switch, left the track, and threw plaintiff's intestate from the front platform, on which he was riding, and thereby caused his death, the question of intestate's negligence is for the jury.[11]

3. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

4. Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271.

"There are cases in which a recovery has been allowed where the passenger rushed to the platform to escape some other danger. Such was the case of Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, where an express messenger became alarmed at the rate of speed of the train while descending a steep grade, and fearing a derailment he rushed to the platform intending to jump off into the sand. It was held that he could not be held to any particular course of conduct while attempting to avert a present threatened danger." Cincinnati, etc., R. Co. *v.* Lohe, 68 O. St. 101, 67 N. E. 161, 67 L. R. A. 637.

5. Moore *v.* Northern Texas Tract. Co., 95 S. W. 652, 41 Tex. Civ. App. 583.

6. Lindsay *v.* Southern R. Co., 41 S. E. 46, 114 Ga. 896.

7. Injury from particular causes.—Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239.

8. Yazoo, etc., R. Co. *v.* Byrd, 89 Miss. 308, 42 So. 286.

9. Defective platform.—Walling *v.* Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417.

10. Defective track.—Welmeyer *v.* St. Louis Transit Co., 95 S. W. 925, 198 Mo. 527.

11. Derailment of car.—Taft *v.* Brooklyn Heights R. Co., 14 Misc. Rep. 390, 35 N. Y. S. 1042, 70 N. Y. St. Rep. 750.

Collision with Another Car.—It is a question for the jury whether a passenger is guilty of contributory negligence in remaining on a platform while another train is aproaching from the rear and which collided with his train and injured him.[12]

Sudden Acceleration of Speed.—In an action for injuries received by a passenger who was thrown from a moving car by a sudden jerk, the passenger cannot recover if he was standing on the platform when there was room for him to sit or stand in the car, and the negligence of the motorman would not have caused the injury if the passenger had been inside.[13] Where a train, which was slowing up as it neared a street crossing, suddenly, with a jerk, increased its speed, so as to throw off a passenger attempting to alight at such street, who had gone on the platform steps preparatory to alighting, the passenger's want of ordinary care in standing on such steps does not bar his recovery, if it did not contribute to the accident.[14] A passenger, who was standing on the platform of a moving train for the purpose of alighting therefrom at a point other than a regular station, can not recover for injuries received by a sudden jerk of the train, as the injury complained of was due to his own fault or negligence and not that of the carrier.[15] The jerking of a train incident to the increase of its speed after the speed has been slackened in crossing a bridge was not negligence, as to a passenger standing on the platform of a car, when there was at least standing room inside the car; and the fact that a station had been announced does not render the carrier liable for an injury to the passenger from being thus thrown from the platform, as the passenger had no right to assume, from such an announcement, that the station had been reached.[16]

Sudden Stopping of Train.—The fact that plaintiff was standing on the platform, where he had gone without fault to get off the train at the station does

12. Collision with another car.—In an action by a passenger against a railway company for personal injuries, it appeared that, while the train stopped to fix something about the engine, plaintiff left the coach, to see what was the matter; that the engineer, hearing a freight train, which had been signaled to stop, rapidly approaching from behind, immediately started the train; that plaintiff, after jumping on the platform of a coach, instead of immediately entering turned to another passenger, and advised him to get on; that before he entered the coach the approaching freight struck his train, whereby plaintiff was injured; and that neither the passengers in the coaches, nor those who remained on the ground, were injured. Plaintiff testified that he did not expect a collision. Held, that it was a question for the jury whether plaintiff was negligent in not having remained on the ground, or in not having immediately entered the coach after getting on. Gulf, etc., R. Co. *v.* Downman (Tex. Civ. App.), 28 S. W. 922.

13. Sudden acceleration of speed.—McDonald *v.* Montgomery St. Railway, 110 Ala. 161, 20 So. 317.

Where a passenger is injured by falling from the front platform, he can not recover damages merely on proof that the driver whipped his horses, and they made a sudden plunge, causing the car to jerk. Cassidy *v.* Atlantic Ave. R. Co., 9 Misc. Rep. 275, 29 N. Y. S. 724, 61 N. Y. St. Rep. 149.

A passenger in a street car, who, instead of taking a seat, stood on the front platform, was guilty of negligence which contributed to death caused by his being hurled over the front of the car by a sudden jerk. Bradley *v.* Second Ave. R. Co., 90 Hun 419, 35 N. Y. S. 918, 70 N. Y. St. Rep. 622.

In an action for personal injuries occasioned to the plaintiff by being thrown off a car propelled by electricity, it appeared in evidence that the plaintiff was standing on the front platform smoking and talking with another passenger, and that when the car was approaching an alleged defective switch the motorman suddenly turned on the whole electric power, and the plaintiff was thrown off and injured. The judge instructed the jury that, "if standing upon the platform as above described would be an act of carelessness, or a failure to exercise such a degree of care as men of ordinary prudence would exercise under the same circumstances, and the plaintiff was thereby hurt, he can not recover." Held, that there was no error in the rule of law. Beal *v.* Lowell, etc., St. R. Co., 157 Mass. 444, 32 N. E. 653.

14. Watkins *v.* Birmingham R., etc., Co., 24 So. 392, 120 Ala. 147, 43 L. R. A. 297.

15. Paterson *v.* Central R., etc., Co., 85 Ga. 653, 11 S. E. 872.

16. Louisville, etc., R. Co. *v.* Morris, 62 S. W. 1012, 23 Ky. L. Rep. 443.

not show such contributory negligence as to preclude him from recovering for injuries sustained by the sudden and violent stopping of the train, the same having passed the station.[17]

§ 2752. Particular Acts of Negligence.—Getting on Crowded Platform.—A passenger who got on the front platform of a street car when it was already so crowded that he could not keep on without holding to the railing with both hands, was negligent, and hence could not recover of the company for injuries received from having been pushed off the car by the crowd.[18] But where a person boards a closely crowded train, but is able to stand on an apparently dangerous position, his contributory negligence is for the jury.[19] A passenger on a street car is not chargeable with contributory negligence as a matter of law because he stood on the platform of the car with knowledge of its overcrowded condition, where there was no evidence that he was ever on a street car before, or that he knew of any fact, other than the crowded condition of the platform, which would expose him to danger.[20]

Failure to Hold to Car.—It is not negligence, as a matter of law, for a passenger on a street-car platform to omit to take hold of the iron railing to prevent being thrown from the platform.[21] But where a passenger prior to being thrown from the platform of a crowded street car as it was rounding a curve, had knowledge of his situation, and that he was in a position that exposed him-

17. Sudden stopping of train.—Mack *v.* Savannah, etc., R. Co., 118 Ga. 629, 45 S. E. 509.

18. Particular acts of negligence.—Tregear *v.* Dry Dock, etc., R. Co. (N. Y.), 14 Abb. Prac., N. S., 49.

Plaintiff got on an elevated railroad car, which was so crowded that he could just get standing room on the platform. When the car reached the next station, plaintiff got off; but, before the car started, he went on the platform again, though it was as much crowded as before, and was injured in consequence of its crowded condition. Held, that plaintiff was chargeable with contributory negligence. Graham *v.* Manhattan R. Co., 8 Misc. Rep. 305, 28 N. Y. S. 739, reversed in 149 N. Y. 336, 43 N. E. 917.

19. Merwin *v.* Manhattan R. Co., 48 Hun 608, 1 N. Y. S. 267.

According to the allegations of the petition, the plaintiff attempted to board a passenger train of the defendant company at a station in the state of Tennessee, near the Georgia line. The platform of the car was crowded with passengers, and the train started while he was still on the steps and before he had a reasonable opportunity to enter the car. In this position he was carried several hundred feet. The train was running with rapidly increasing speed, and he was trying all the time to mount the steps and enter the car, but before he could succeed, a sudden, quick jerk and swing of the train caused another passenger "to fall and shove against petitioner, causing petitioner to lose his balance and fall from the train," and he was severely injured, having his foot crushed by the wheels of the train. At this time the train had passed from the state of Tennessee into Fannin county, Georgia. Held, that it was error to sustain a demurrer upon the ground that the superior court of Fannin county "had no jurisdiction of the matter of complaint," because there was no act of negligence alleged against the defendant as having occurred in said county that would authorize any recovery against the defendant. Parris *v.* Atlanta, etc., R. Co., 128 Ga. 434, 57 S. E. 692.

20. Judgment 73 N. Y. 1134, 67 App. Div. 615, affirmed in Cattano *v.* Metropolitan St. R. Co., 66 N. E. 563, 173 N. Y. 565.

21. Failure to hold to car.—Kean *v.* West Chicago, etc., R. Co., 75 Ill. App. 38; North Chicago St. R. Co. *v.* Baur, 79 Ill. App. 121, affirmed in 53 N. E. 568, 179 Ill. 126, 45 L. R. A. 108; Ginna *v.* Second Ave. R. Co., 67 N. Y. 596.

The fact that a passenger, while standing on the platform of a street car, leaned against the rear dashboard without taking any hold upon it for support, does not operate per se to make his conduct negligent. North Chicago St. R. Co. *v.* Baur, 79 Ill. App. 121, affirmed in 53 N. E. 568, 179 Ill. 126, 45 L. R. A. 108.

A passenger started to leave a crowded railway train during its stop at a station, but when she reached the platform, holding a valise in one hand and the train of her dress in the other, the train had started; and the brakeman, on being informed that she desired to alight, pulled the bell rope, and the train stopped suddenly, throwing the passenger off and injuring her. Held, that she was not guilty of contributory negligence, as a matter of law, in not returning to the car or holding to the railing, but that the question was for the jury. Smalley *v.* Detroit, etc., R. Co., 91 N. W. 1027, 131 Mich. 560.

self to the danger of being thrown by any jolting or swaying of the car, but did nothing to protect himself, and did not even look to see whether there was anything from which he could obtain support, he was guilty of contributory negligence.[22] A railroad company is not liable for injuries sustained by a passenger who goes on the platform of the car, contrary to a posted notice warning him not to do so, and, while standing there without holding to the railing, is thrown off by the starting of the train.[23] In an action against a street-railway company, where it appears that intestate was riding on the rear platform of one of defendant's cars, and fell off, and was killed, it was a question for the jury whether intestate was negligent in riding on the platform without laying hold of the car for the purpose of supporting himself.[24]

Going on Platform While Train Standing at Station.—Where a passenger, who has been informed that the train will stop at the station for ten or fifteen minutes, goes upon the platform of the coach to greet a friend while the train stops, it is not negligence.[25]

Going on Platform While Cars Being Coupled.—A passenger, notified that the car he was on was to be cut from the train, started forward, and as he was crossing to the next car the separation took place, and as he took hold of the doornob of this car the brakeman called out, "Look out! Look out!" whereupon he, acting on a sudden impulse that there was danger in front, stepped back, and fell between the cars. Neither the want of time to get to the forward car nor the giving of the signal to "look out" was the proximate cause of the accident, but the plaintiff's own act in stepping back from a position of safety; and hence he could not recover.[26] In an action to recover for a personal injury caused by the plaintiff being thrown from the platform of a coach by the jar of the impact between the coach and a train which the defendant company was coupling therewith, the defense was that the plaintiff had himself caused the injury by stepping out upon the platform at the instant of the impact, an instruction based upon the doctrine of the last clear chance is erroneous where the evidence shows that the defendant had no opportunity after the plaintiff's act to avoid the injury.[27] Where it was the custom to permit passengers to stand on the rear platform of cars which were closed with gates apparently securely closed and fastened, it was not the duty of a passenger so riding to critically examine the fastenings, but only to exercise reasonable care to protect himself from injury, and where he was thrown off and injured by reason of the giving way of the gates he is not chargeable with negligence because he did not take the additional precaution to see and use a handhold.[28]

Going on Platform after Station Announced.—The only act attributed

22. Kiefer *v.* Brooklyn Heights R. Co., 97 N. Y. S. 841, 111 App. Div. 404.

While a passenger standing on the front platform of a street car is not guilty of negligence by such fact alone, he nevertheless owes to the carrier some precaution, either by the manner of standing or by grasping some support, to guard against losing his balance by any sudden motion of the car. Depew *v.* New York City R. Co., 98 N. Y. S. 276, 112 App. Div. 260.

A passenger of a street railroad car who stood upon the very edge of the platform, without holding on to anything, and with knowledge of the bad condition of the street car track, caused by accumulation of ice and snow, and he maintained the position after an opportunity had been given him to exchange it for a place of comparative safety, till thrown off by a jerk of the car occasioned by said bad condition of the street, was guilty of such contributory negligence as precludes a recovery. Ward *v.* Central Park, etc., R. Co., 33 N. Y. Super. Ct. 392, 42 How. Prac. 289, 11 Abb. Prac., N. S., 411.

23. Malcom *v.* Richmond, etc., R. Co., 106 N. C. 63, 11 S. E. 187.

24. Matz *v.* St. Paul City R. Co., 52 Minn. 159, 53 N. W. 1071.

25. While train standing at station.—Southern R. Co. *v.* Smith, 95 Va. 187, 28 S. E. 173.

26. While cars being coupled.—Butts *v.* Cleveland, etc., R. Co., 110 Fed. 329, 49 C. C. A. 69.

27. Baltimore, etc., R. Co. *v.* Lee, 106 Va. 32, 55 S. E. 1.

28. Cincinnati Tract. Co. *v.* Leach, 169 Fed. 549, 95 C. C. A. 47.

to the carrier being the announcement by its conductor, as the train approached a station, of the name of the station, and that change of cars was to be made, there is no negligence on its part, and no liability for injury to the passenger, who, going onto the steps of the car while it was in motion, fell therefrom, even though she was careful.[29] There can be no recovery in an action by a passenger for personal injuries where it appears that upon the announcement of his station by the conductor when the train was within three or four hundred yards thereof, the passenger attempted to follow the conductor upon the platform of the next car while the train was moving rapidly and, in trying to catch the railing, was thrown from the platform by the motion of the car, as his injury was caused by his own negligence and could have been avoided, even though there was negligence on the part of the company's agents, by the exercise of ordinary car and diligence on the part of the passenger. In such a case the mere announcement of the station which the train was approaching, can not be construed as an act of negligence on the part of the company but was merely a customary warning to the passengers.[30]

Assuming Dangerous Position on Platform.—A passenger who rides on the rail of the front platform of a street car, though at the driver's invitation, is guilty of contributory negligence.[31] A passenger on a street car, who, when there is plenty of room inside, without any invitation, goes on the platform, and there occupies the driver's stool, which is high, and without arms or other protection, is negligent; so that recovery can not be had for his death, occasioned by his being thrown off the car when it was driven rapidly onto a switch.[32] A passenger on an excursion train, who seats himself on the rear end of an open car, on a railing with his feet elevated by being placed on the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt of the car, when he might have found a safe seat in an adjoining car or stood up in the car in question, is guilty of contributory negligence as a matter of law; and, in an action for his death, caused by falling from his seat while the train was in motion, it is error to submit the question of contributory negligence to the jury.[33] In an action against a street railroad for personal injuries received by a passenger from being struck on the arm by the brake handle while riding on the front platform of a car, the measurement of the platform showed that plaintiff had ample room to keep out of the way of the brake handle. He knew the handle was there, that the signal had been given for the car to start, and knew the brake handle would immediately begin to revolve, but placed his arm within its radius. It was held that plaintiff was injured through his own negligence by having placed his arm in a place of known danger.[34]

Sitting on Platform.—A passenger, while sitting upon the platform of a street-railway car, with his feet on the step, against the remonstrance of the driver, who told him that his position was unsafe and against the rules of the company, notices to that effect also being posted up within view of plaintiff, fell, and sustained injuries, has no cause of action against the company.[35]

Limb or Other Part of Body Protruding from Platform.—Whether a passenger on an open electric street car, who, leaving his seat, went to the platform where the conductor was standing, and, for the purpose of observing a fire, projected his head beyond the side of the car, so that he was struck by a

29. Going on platform after station announced.—Payne *v.* Nashville, etc., R. Co., 106 Tenn. 167, 61 S. W. 86.

30. Blitch *v.* Central Railroad, 76 Ga. 333.

31. Assuming dangerous position on platform.—Downey *v.* Hendrie, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177.

32. Mann *v.* Philadelphia Tract. Co., 175 Pa. 122, 34 Atl. 572.

33. Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331.

34. Brewer *v.* St. Louis Transit Co., 105 Mo. App. 503, 79 S. W. 1021.

35. Sitting on platform.—Wills *v.* Lynn, etc., R. Co., 129 Mass. 351.

tree, was guilty of contributory negligence, is a question for the jury.[36] Where a person stands on the front platform of a street car moving four miles an hour, with one foot on the lower step and his hands on the rails of the car and dasher, facing the platform, a momentary or casual leaning out, such as would be incident to an effort to secure a safer or a more comfortable position, will not, as a matter of law, preclude him from recovery for an injury caused by striking his head against a post standing within three feet of the track.[37]

§ 2753. Platform of Particular Car.—Platform of Railroad Train.—A traveler by railroad can not maintain an action against a railroad company to recover damages for a personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car, while the train is in motion.[38] A passenger is not guilty of contributory negligence as matter of law in merely riding on a platform of a vestibuled train; but whether he was guilty of contributory negligence is for the jury, there being evidence that as the train approached a city, at midnight, the porter for his own convenience placed a box on the car platform just to the side of the passageway between two cars, opened the trapdoor over the steps, and threw open the vestibuled door, and that the passenger, not knowing thereof, went on the platform and stumbled over the box, out of the vestibuled door.[39]

Platform of Passenger Train.—One who remains on the platform of a train about to move or which is in motion, although it is a regular passenger train, is, in the absence of explanatory circumstances, guilty of such negligence as will bar a recovery.[39a]

Platform of Express Car.—A person who goes upon the front platform of an express car, knowing that it is under the exclusive control of the express company, assumes the hazards incident to the ordinary operation of the train.[40]

Platform of Street Car.—The law of negligence, or rather of contributory negligence, of one riding upon a platform of a street railroad car, is not the same as of one riding upon the platform of a steam railroad car.[41]

Platform of Interurban Car.—While interurban electric railroads are subject to the same regulation as street railroads, the law of negligence governing the standing on a platform of a moving street car in a city is not applicable in the case of one standing on such platform of a moving interurban car in the country.[42] The law of negligence governing the standing on a platform of an interurban car outside of a city is the same as in the case of steam cars, and where a rule prohibits passengers from standing on the platform, and on request they refuse to enter the car, there being vacant seats, they remain on the platform at their own risk.[43] The platform of an interurban electric car is not obviously designed as a place for passengers in transit and a passenger injured by a falling trolley pole while standing on the back platform of a car in the open country is guilty of contributory negligence. The injury is the result of a peril peculiarily incident to the exposed position.[44]

§ 2754. Where Riding in Interior Would Have Avoided Injury.—Where a passenger rode on the front platform of an electric car, though he knew there was a sign on the car notifying passengers that if they rode on the platform

36. Limb or other part of body protruding from platform.—Sias *v.* Rochester R. Co., 92 Hun 140, 36 N. Y. S. 378, 71 N. Y. St. Rep. 148.

37. Cummings *v.* Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126.

38. Platform of particular car.—Cincinnati, etc., R. Co. *v.* Lohe, 6 O. C. C., N. S., 144, 17-27 O. C. D. 138, affirmed in 73 O. St. 342, 78 N. E. 1121.

39. Johnson *v.* Yazoo, etc., R. Co. (Miss.), 47 So. 785.

39a. Platform of passenger train.—Louisville, etc., R. Co. *v.* Bisch, 22 N. E. 662, 120 Ind. 549.

40. Platform of express car.—Ohio, etc., R. Co. *v.* Allender, 47 Ill. App. 484.

41. Platform of street car.—Cincinnati, etc., R. Co. *v.* Lohe, 68 O. St. 101, 67 N. E. 161, 67 L. R. A. 637.

42. Platform of interurban car.—Cincinnati, etc., R. Co. *v.* Lohe, 67 N. E. 161, 68 O. St. 101, 67 L. R. A. 637.

43. Cincinnati, etc., R. Co. *v.* Lohe, 67 N. E. 161, 68 O. St. 101, 67 L. R. A. 637.

44. Eller *v.* Dayton, etc., Tract. Co., 15 O. D. N. P. 208.

they did so at their own risk, and though there was room in the car, he is not entitled to recover for injuries which would not have occurred if he had ridden in the car, though his fare was collected and he was not warned of the danger.[45] Where intestate, at the time the train on which he was a passenger ran into a washout, was riding from his own choice on a car platform which was not vestibuled, and there was ample opportunity for him to have occupied a seat in the car, and it was in the nighttime, and a severe rainstorm was either in progress or had very recently occurred, and the train was running very fast, and no one inside the car was killed, he was not, as a matter of law, guilty of want of ordinary care contributory to his own death.[46] The deceased was ordered into the car by the conductor, and requested to go in by the assistant conductor; there were vacant seats inside; a sign was up, "Passengers Not Allowed on the Platform;" and yet he remained on the platform because he wanted to smoke a cigar. He remained there at his peril; and even though the company may have been negligent in not preventing the derailment, he was also negligent in standing upon the platform. Those inside the car escaped without injury, and if he had gone inside when ordered to do so, the presumption is that he, too, would have escaped. It is a case where it required the negligence of both himself and the company to bring about the disaster; and where the injury is brought about by the combined negligence of both, both are without remedy.[47] One who is injured in railroad accident is not chargeable with contributory negligence because he was, at the time, riding on the platform of a car, if he would have been equally injured had he been inside the car.[48] But it has been held that it is negligence per se for a passenger to remain on the platform of a moving trolley car, where there are vacant seats inside the car, though the injury to the passenger was caused by a collision, and he might have been injured had he been inside the car.[49] Where two passengers left their seats and stood on the platform of the car smoking, although warned of the danger, the train broke through a trestle, and these two passengers and a man in the baggage car were alone injured out of a hundred passengers; they could not recover from the company.[50]

§ 2755. Where Carrier Could Have Avoided Injury.—Even though a passenger was guilty of contributory negligence in riding upon the platform of a street-railway car, yet where the railway company could have, by exercise of ordinary care, prevented injury to her, it is liable for failure to use such care.[51] In an action for damages against a horse-railway company for an in-

45. Where riding in interior would have avoided injury.—Pike *v.* Boston Elevated R. Co., 78 N. E. 497, 192 Mass. 426.

46. Miller *v.* Chicago, etc., R. Co., 115 N. W. 794, 135 Wis. 247, 17 L. R. A., N. S., 158.

47. Coal Co. *v.* Estievenard, 53 O. St. 43, 40 N. E. 725, and cases there cited. Cincinnati, etc., R. Co. *v.* Lohe, 68 O. St. 101, 67 N. E. 161, 67 L. R. A. 637.

48. Kansas, etc., R. Co. *v.* White, 67 Fed. 481, 14 C. C. A. 483; Cincinnati, etc., R. Co. *v.* Lohe, 6 O. C. C., N. S., 144, 17-27 O. C. D. 138.

49. Thane *v.* Scranton Tract. Co., 43 Atl. 136, 191 Pa. 249, 71 Am. St. Rep. 767.

Notwithstanding there were plenty of vacant seats in defendant's cars, plaintiff's intestate, a passenger on the train, was riding either upon the steps of the forward passenger car or upon the coping or footboard at the rear end of the tender of the engine, when he was killed in a slight collision. No other persons were injured or thrown down. Held, that he was guilty of negligence defeating a recovery. Chicago, etc., R. Co. *v.* Rielly, 40 Ill. App. 416.

50. Memphis, etc., R. Co. *v.* Salinger, 46 Ark. 528.

51. Where carrier could have avoided injury.—Metropolitan R. Co. *v.* Snashall, 3 App. D. C. 420, 22 Wash. L. Rep. 377.

Plaintiff occupied a seat in defendant's horse car. The car became full, plaintiff gave up his seat to a woman, and went upon the front platform, which was guarded by a railing three feet high. The car ran off the track. The driver asked those upon the front platform to get off, and assist him in getting it on again. Plaintiff got off accordingly, and in trying to climb over the railing to get on again the driver suddenly started his car, throwing plaintiff to the ground, and in-

jury caused to a passenger by falling from the platform of the car, and the passing of the wheel over his leg, an instruction to the jury that, "although the plaintiff was guilty of such carelessness or negligence as contributed to and brought about the injury by falling off, yet if the car was stopped, and afterwards the driver negligently, unskillfully, or recklessly started the car, and ran over the plaintiff's leg, when, but for such starting, he might have been rescued without further injury, then the company was liable for such injury," is correct.[52]

§ 2756. Children and Intoxicated Persons.—If a boy passenger on a railway train had intelligence enough to understand that it was more dangerous to ride on a car platform than inside the car, no duty devolved upon the company to prevent him from so riding.[53] A boy nine years old was prima facie negligent in riding seated on the front platform of a street car.[54] Though a street railway company is not liable to a person of suitable age and discretion, who, on being warned of the danger of riding on the front platform of the car did so, yet, in case of a child lacking such discretion and to whom negligence can not be imputed, it is the duty of the officers of the company not to stop with a warning, but to compel the child to occupy a proper place in the car.[55] Where an intoxicated passenger refused to go into the car after being requested to do so by the conductor, but remains on the platform, from which he afterwards falls, he can not recover for the injury.[56] Where a carrier failed to warn an intoxicated passenger of the danger incident to his going onto the platform of the car while the train was in motion, though the carrier's servant had knowledge of the passenger's intention to do so, the carrier could not defend an action for injuries sustained by the passenger falling from such platform on the ground of his contributory negligence.[57] In an action against a street-railroad company for personal injuries occasioned by plaintiff's being thrown from a car, the evidence was that plaintiff at the time was drunk; that he had no recollection of boarding the car, or of any of the facts connected with the accident; and that he first came to a realization of his injuries at the hospital. Shortly before the accident he was standing on the front platform, with his hands on the guard rial, and his body swaying back and forth. The rate of speed was moderate, and, although the up and down motion of the car was such at the time the plaintiff was thrown off as to throw another passenger towards the driver, there was no evidence of any defect in the rails or the roadbed. The court properly directed a verdict for defendant.[58]

§§ 2757-2763. Riding on Step or Footboard—§ 2757. In General.—A passenger who rides on the running board of a summer car, when there is room for him to stand within the body of the car, is guilty of contributory

juring him. Notices were posted on the car forbidding passengers to ride upon the front platform. Held that defendant was liable if the driver, by the use of proper care, might have seen plaintiff's position, and thereby have avoided the injury. People's Pass. R. Co. *v.* Green, 56 Md. 84.

52. McKeon *v.* Citizens' R. Co., 42 Mo. 79.

53. Children and intoxicated persons.—Walling *v.* Trinity, etc., R. Co., 106 S. W. 417, 48 Tex. Civ. App. 35.

54. Solomon *v.* Central Park, etc., R. Co., 31 N. Y. Super. Ct. 298.

In an action for injuries to a boy ten years of age, allowed to ride on the front platform of defendant's street car, whether plaintiff was of such immature years and so wanting in intelligence that he could not appreciate the danger of riding on the front platform was for the jury. Denison, etc., R. Co. *v.* Carter (Tex. Civ. App.), 79 S. W. 320, judgment reversed in 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

55. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

56. Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758.

57. Fox *v.* Michigan Cent. R. Co., 101 N. W. 624, 138 Mich. 433, 68 L. R. A. 336.

58. Holland *v.* West End, etc., R. Co., 155 Mass. 387, 29 N. E. 622.

negligence.[59] One riding on the running board of a summer car, outside of a lowered bar is negligent per se, and can not recover for injuries received whether he could have got a safer position or not.[60] Where a passenger on a crowded electric car sat on the floor between the seats with his feet on the running board and fell off while the car was rounding a curve, it was not error to direct a verdict for defendant.[61] In an action against a street railway company by a passenger to recover damages for personal injuries, it appeared from the plaintiff's own testimony that he stepped down upon the alighting step of a summer car, and, with his cane in his left hand, grasped the stanchion of the car in order to steady himself upon the step. He turned himself about to catch the stanchion with his right hand in order to give himself support in re-entering the car, which had not stopped as he had expected. Instead of catching the stanchion he caught hold of his cane, which gave him no support, and he was precipitated into the street and injured. A nonsuit was properly entered.[62]

Negligence Per Se.—The question of the negligence of a passenger on an electric street car in leaving his seat and stepping onto the footboard while the car was still in motion was one of fact for the jury.[63]

59. Riding on step or footboard.—*New York.*—Ward *v.* International R. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914a, 1170.

Pennsylvania.—Ramsay *v.* Pottstown & R. St. R. Co., 35 Pa. Super. Ct. 598; Rice *v.* Philadelphia Rapid Transit Co., 63 Atl. 419, 214 Pa. 147, 112 Am. St. Rep. 738; Burns *v.* Johnstown Pass. R. Co., 62 Atl. 564, 213 Pa. 143, 2 L. R. A., N. S., 1191; Bainbridge *v.* Union Tract. Co., 55 Atl. 836, 206 Pa. 71.

West Virginia.—Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288, 29 L. R. A., N. S., 325.

If standing on the footboard of a street car is an act of carelessness on the part of a passenger, or there is a failure to exercise such care as persons of ordinary prudence would exercise in the same position, the passenger can not recover for injuries. Math *v.* Chicago City R. Co., 90 N. E. 235, 243 Ill. 114.

A passenger who rides on a side step of a summer car when it is reasonably practicable for him to go inside the car assumes all the risks of his position, and in all cases he assumes the risk incident to the usual swaying and jolting of the car and from collision with passing vehicles and obstructions of whatever nature which unexpectedly appear. These are dangers which can not be guarded against by the careful and prudent management of the car. Wood *v.* Chester Tract. Co., 36 Pa. Super. Ct. 483.

A street car passenger riding upon the running board must exercise a care reasonable and commensurate with the danger of his position to shield himself from the results even of exceptional risks. Ward *v.* International R. Co., 99 N. E. 262, 266 N. Y. 83, Ann. Cas. 1914A, 1170.

While rounding curve.—Where the speed of a street car, running at ten or twelve miles an hour as it struck a curve in the track, did not endanger the safety of passengers remaining in the seats provided for them, the act of a passenger in getting on the running board, when the car maintained that speed before and as it struck the curve, the existence of which he knew, was negligence as a matter of law, precluding a recovery for his injuries by being thrown from the car. Maercker *v.* Brooklyn Heights R. Co., 122 N. Y. S. 87, 137 App. Div. 49.

Injury to employee.—Where plaintiff had been employed by the defendant as a conductor, and was familiar with the conditions of a narrow street, through which the cars ran, it was negligence for him to stand upon the running board of the car in such a manner that he could be struck by the pole of a cart standing between the curb and the track. Heshion *v.* Boston Elevated R. Co., 94 N. E. 390, 208 Mass. 117.

60. Harding *v.* Philadelphia Rapid Transit Co., 66 Atl. 151, 217 Pa. 69, 10 L. R. A., N. S., 352.

61. Wenzel *v.* City, etc., R. Co., 64 W. Va. 310, 61 S. E. 1001.

A passenger seated on the platform of a car with one foot on the bottom step and the other leg straight out, there being seats in the car, is negligent as a matter of law. Wagner *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 171.

62. Kracker *v.* Philadelphia Rapid Transit Co., 34 Pa. Super. Ct. 10.

63. Negligence per se.—Denver Tramway Co. *v.* Reid, 22 Colo. 349, 45 Pac. 378.

It is not negligence per se for a passenger on a street car to stand on the step of the car, outside of a gate placed between the step and the platform, at the express or implied invitation of the driver; the danger not being so obvious that it can be said that a reasonable man would disobey the invitation. Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

The defendant's sleigh was provided with wide footboards on the sides, upon

Rules of Carrier.—A street car conductor can not waive a rule prohibiting persons from riding on a running board.[64] Where a passenger on a street car, while riding on the running board, was injured by being struck by another car passing on another track, in an action by him for the injuries an instruction that if plaintiff's injuries were due to his violation of the rules of the defendant, and if a guard rail was placed on the car, so that passengers were warned not to stand on the running board, and plaintiff ignored the presence of the guard rail, he could not recover, even though the conductor permitted him to stand on the running board, was properly refused, in that it omitted to inform the jury that notice of the existence of the rules must be shown before plaintiff could be bound by them.[65]

With Consent of Employee.—Where a passenger rides on the step of the front platform of a crowded street car, with the assent of the conductor, he is obliged to exercise only ordinary and reasonable care for his safety,[66] and may assume that reasonable precaution will be taken for his protection.[67]

§ 2758. Where Car Crowded.—It is not negligence for a passenger to ride on the running board of a street car, where the car is full, and he can not get inside.[68]

which passengers usually rode when the seats were occupied. They were received to ride thus, and their fares collected without objection. No seat being accessible to plaintiff, while riding on the footboard he was injured by a collision with another sleigh, and brought an action to recover damages therefor. Held, that his riding in such a manner was not negligence in itself, but that the question of contributory negligence was one of fact for a jury. Spooner *v.* Brooklyn City R. Co., 54 N. Y. 230, 13 Am. Rep. 570, reversing 31 Barb. 419, 36 Barb. 217.

64. Rules of carrier.—Twiss *v.* Boston Elevated R. Co., 208 Mass. 108, 94 N. E. 253, 32 L. R. A., N. S., 728.

65. Ft. Wayne Tract. Co. *v.* Hardendorf, 72 N. E. 593, 164 Ind. 403.

66. With consent of employee.—Germantown Pass. R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796.

67. One received as a passenger on an open electric street car, when it is so full he can not go inside or on the platform, and who stands on the side step with the knowledge and assent of the conductor, may assume that reasonable precautions will be taken to protect him from dangers that can be readily seen and guarded against. Bumbear *v.* United Tract. Co., 47 Atl. 961, 198 Pa. 198.

In an action against a street railway company for personal injuries it appeared that the plaintiff boarded one of the defendant's cars, and was standing upon the step of the front platform, when he was struck by a horse and cart, receiving the injury complained of. The car and platform were full of passengers, but had stopped to take on plaintiff, and the conductor had called for and received his fare. Held, that the facts warranted the jury in finding that the plaintiff had been invited by those in charge of the car to ride where he did, with the implied assurance that it was a safe and suitable place. Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 34 How. Prac. 315, 93 Am. Dec. 495, affirming 32 Barb. 657.

68. Where car crowded.— *California.*—Babcock *v.* Los Angeles Tract. Co., 60 Pac. 780, 128 Cal. 173.

Illinois.—Math *v.* Chicago City R. Co., 90 N. E. 235, 243 Ill. 114.

Michigan.—Pomaski *v.* Grant, 78 N. W. 891, 119 Mich. 675.

New York.—Brainard *v.* Nassau Elect. R. Co., 61 N. Y. S. 74, 44 App. Div. 613; Sheeron *v.* Coney Island, etc., R. Co., 79 N. Y. S. 752, 78 App. Div. 476; Bruno *v.* Brooklyn City R. Co., 5 Misc. Rep. 327, 25 N. Y. S. 507, 55 N. Y. St. Rep. 215; Horan *v.* Rockwell, 96 N. Y. S. 973, 110 App. Div. 522.

Oregon.—Anderson *v.* City, etc., R. Co., 71 Pac. 659, 42 Ore. 505.

Rhode Island.—Verrone *v.* Rhode Island Suburban R. Co., 27 R. I. 370, 62 Atl. 512, 114 Am. St. Rep. 41.

It is not negligence as matter of law for a passenger to stand on the running board of a street car, the seats being filled. Indianapolis, etc., R. Co. *v.* Haverstick, 74 N. E. 34, 35 Ind. App. 281, 111 Am. St. Rep. 163.

It is not contributory negligence, as a matter of law, for a passenger to ride on the steps of a street car, where it was so crowded that he could not get into the car or on the platform, and the conductor permitted him to ride on the steps. McGrath *v.* Brooklyn, etc., R. Co., 87 Hun 310, 34 N. Y. S. 365, 68 N. Y. St. Rep. 444.

A passenger on a crowded street car, who stands on the running board and supports himself by the guard bar, does not, as a matter of law, fail to exercise such ordinary care as the circumstances require, especially when the representa-

Negligence Per Se.—It is not negligence per se for a passenger on a street car to stand on the running board, and hold the post or handle affixed thereto, where the car is so filled that there is no room inside.[69]

Custom or Usage.—Where it is customary in a busy season to allow passengers on street cars to ride on the side steps of an open car, there being no seats vacant, in the absence of any warning or objection, from the conductor, a passenger injured while so riding is not guilty of contributory negligence, though he was a cripple.[70]

Thrown Off by Usual Motion of Car.—Where plaintiff elected to ride on the step of a crowded street car, and was thrown off by the oscillation or "greyhound motion" of the car as it was running at the usual rate of speed maintained on that portion of its route, and there was no evidence of any unusual or abnormal motion due to any unusual condition of the car, rails, roadbed, or management, plaintiff assumed the risk of an injury so occasioned[71]

Where There Are Seats in Interior.—It is contributory negligence for a passenger to ride on the steps of a motor car, where there is abundance of room in the body of the car to seat all passengers.[72] Where a passenger on a street car, inside which there is plenty of room, voluntarily leaves his seat and stands on the car platform, and, while the car is running rapidly, attempts to return to his seat by way of the running board of the car, on a side where he knows there are trolley posts, instead of going down the aisle he thereby assumes all the risks arising from the position taken by him.[73]

Where Seat Surrendered to Another.—A man who surrenders his seat on a crowded street car to a woman, and stands on the running board of the car, is not as matter of law, negligent.[74]

Where There Is Standing Room in Interior.—A passenger who boards an open street car, where the seats are filled, but where there is standing room in the space between the seats, though uncomfortable and inconvenient, is not guilty of negligence per se in standing on the running board.[75]

§ 2759. Where Running Board Crowded.—A passenger, having boarded a street car, was thrown from the footboard and injured by a sudden jerk of the

tive of the carrier, charged with the duty of seating and directing the passengers, expressly authorizes him to stand there. Ft. Wayne Tract. Co. *v.* Hardendorf, 72 N. E. 593, 164 Ind. 403.

Ordinarily it is negligence for a passenger to stand upon an open platform of a rapidly moving railroad car, and if one voluntarily and unnecessarily takes such position and is injured he can not recover damages, but if the train is so crowded that one can not reasonably enter a car it is not negligence to ride on the platform, nor if the carrier acquiesce in the use of such accommodations by collecting fare for the same, or by some other indicative act. Norvell *v.* Kanawha, etc., R. Co., 68 S. E. 288, 67 W. Va. 467, 29 L. R. A., N. S., 325.

A street car passenger is not chargeable with contributory negligence in remaining on the steps from which he is thrown by the negligent operation of the car, where he is compelled by the crowded condition of the car to either ride there or shove his way to the platform. South Covington, etc., St. R. Co. *v.* Hardy, 153 S. W. 474, 152 Ky. 374, 44 L. R. A., N. S., 32.

69. Negligence per se.—Verrone *v.* Rhode Island Suburban R. Co., 62 Atl. 512, 27 R. I. 370, 114 Am. St. Rep. 41.

70. Custom or usage.—Topeka City R. Co. *v.* Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754.

Plaintiff's standing on the footboard along the side of the car, there being no room inside, and this being customary and not objected to, can not be considered contributory negligence. Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411.

71. Thrown off by usual motion of car.—Judgment, 85 N. Y. S. 960, 89 App. Div. 425, affirmed in Moskowitz *v.* Brooklyn Heights R. Co., 76 N. E. 1101, 183 N. Y. 521.

72. Where there are seats in interior.—Francisco *v.* Troy, etc., R. Co., 78 Hun 13, 29 N. Y. S. 247, 60 N. Y. St. Rep. 797.

73. Bridges *v.* Jackson Elect R., etc., Co., 38 So. 788, 86 Miss. 584.

74. Where seat surrendered to another.—Brainard *v.* Nassau Elect. R. Co., 61 N. Y. S. 74, 44 App. Div. 613.

75. Where there is standing room in interior.—Hassen *v.* Nassau Elect. R. Co., 53 N. Y. S. 1069, 34 App. Div. 71.

car, before it came to its next stop. His failure to enter the car was due to the crowd thereon, through which he could not pass, rather than to the fact that the cars were in motion. He was guilty of contributory negligence in boarding the car.[76] Evidence that the street car on the rear step of which plaintiff was standing at the time he was injured was so crowded that he could have stood on the platform only by crowding other passengers, that the conductor made no objections to his riding on the steps, and that the accident was caused by the motorman suddenly increasing the speed while passing over a curve, was sufficient to warrant submitting to the jury the question whether plaintiff had exercised due care.[77]

§ 2760. Injury from Particular Causes.—Negligence of Carrier.—While a passenger riding on the footboard of a street car assumes the ordinary dangers of riding in that position, he does not assume any risk caused by operating the car in a negligent manner.[78] Where, while a street car was standing, a passenger stepped onto the step of the car, and while there it moved suddenly forward, owing to the negligence of the conductor, whereby the passenger was injured, she was not guilty of contributory negligence, unless an ordinarily prudent person would not so have done.[79]

Unusual Accident.—A passenger on a street car, who stands on the running board of the car, assumes only the risk of the ordinary motion of the car.[80]

Sudden Jerking of Car.—Where a passenger riding on the back platform on a street car gets on to the step while the car is in motion, and is thrown off by a sudden jerk, he is guilty of contributory negligence barring recovery.[81] Where the evidence in an action for injuries to a passenger on an open electric street car showed that he left his seat, and stepped onto the running board of the car, holding on with his left hand, a bag of tools in the other hand, and was thrown off when the car stopped with a sudden jerk, his contributory negligence barred recovery for the injuries received.[82]

Injury from Collision.—A passenger, who, without negligence, stands upon the running board of a street car assumes the ordinary risks, but not exceptional risks, arising from collisions.[83]

Defective Handlebar.—An instruction in an action by a passenger against a street railway company that the passenger was guilty of contributory negligence precluding recovery for a fall received while riding on the footboard of the car, caused by the handlebar, to which he was holding, pulling away from the post to which it was screwed, if such handlebar was constructed merely to aid passengers in boarding and leaving the car, and was firm enough for that purpose, but was wrenched from its fastenings by the passenger's act in

76. Where runningboard crowded.—Mullane *v.* New York City R. Co., 99 N. Y. S. 798, 51 Misc. Rep. 24.

77. Wilde *v.* Lynn, etc., R. Co., 163 Mass. 533, 40 N. E. 851.

78. Injury from negligence of carrier.—Oliver *v.* Fort Smith, etc., Tract. Co., 116 S. W. 204, 89 Ark. 222.

That plaintiff was riding on the running board of a street car when negligently injured does not necessarily preclude recovery by him. Twiss *v.* Boston Elevated R. Co., 94 N. E. 253, 208 Mass. 108, 32 L. R. A., N. S., 728.

79. Joyce *v.* Los Angeles R. Co., 82 Pac. 204, 147 Cal. 274.

80. Injury from unusual accident.—Verrone *v.* Rhode Island Suburban R. Co., 62 Atl. 512, 27 R. I. 370, 114 Am. St. Rep. 41.

81. Injured by sudden jerking of car.—Gaffney *v.* Union Tract. Co., 60 Atl. 488, 211 Pa. 91.

At crossing.—A passenger on an open street car stood on the outside of the car, with one foot on the running board and the other on the body of the car, in anticipation of the car stopping on the near side of the street. The car failed to stop and the passenger was thrown from it by a sudden jerk while the car was crossing the street. Held, that the railroad was not liable. Rice *v.* Philadelphia Rapid Transit Co., 63 Atl. 419, 214 Pa. 147, 112 Am. St. Rep. 738.

82. Bainbridge *v.* Union Tract. Co., 206 Pa. 71, 55 Atl. 836.

83. Injury from collision.—Ward *v.* International R. Co., 99 N. E. 262, 206 N. Y. 83, Ann. Cas. 1914A, 1170, reversing judgment 125 N. Y. S. 1149, 140 App. Div. 938.

swinging outward from the car, if supported by the evidence, is sufficient.[84]

Passing Vehicles.—A passenger riding on the running board of a car has the right to assume that during transit the carrier will not expose him to the peril of injury from passing vehicles, if by the exercise of reasonable diligence the movements of the car can be so controlled as to avoid collision with them.[85] Where a passenger stepped upon the running board of a street car, and before he could leave the running board was struck by the footboard of a wagon standing near, the passenger was not guilty of contributory negligence.[86] A passenger injured while getting on a car by a truck which he saw as he got on the running board is guilty of contributory negligence.[87] A passenger on a street car, who, because it is crowded, stands on the running board, is guilty of contributory negligence; he having ridden on such board for several blocks without looking ahead, and being struck by the shaft of a wagon standing near the track, which the other passengers on the running board avoided by standing close to the car or getting between the seats.[88]

Objects Passed.—A passenger standing on the side steps of an open street car, when there is room inside, assumes the risk, so that there can be no recovery for his being struck by a pole supporting the electric wires.[89] But a passenger on a crowded street car is not guilty of contributory negligence, in standing on the foot board, which will preclude him from recovering for an injury caused by his striking a permanent obstruction within a few inches of which the car passed, and of which he had no knowledge or notice.[90] Where plaintiff was injured by having his feet caught between the step of a street car, on which they were resting, and an embankment, the fact that he might have saved himself by stepping up on the platform does not show contributory

84. Injury from defective handlebar.—Brightwood R. Co. *v.* Carter, 12 App. D. C. 155.

85. Injury from passing vehicles.—Eldredge *v.* Boston Elevated R. Co., 89 N. E. 1041, 203 Mass. 582.

Plaintiff, while waiting for a surface car, saw that there were vehicles standing not far up the avenue. He boarded an open car going up town, and, though he might without difficulty have walked into the car, he remained standing on the footboard, which ran along lengthwise, and he was struck by the hub of one of the vehicles he had seen, and was injured. Held, that plaintiff did not show freedom from contributory negligence. Casper & Co. *v.* Dry Dock, etc., R. Co., 47 N. Y. S. 961, 22 App. Div. 156.

A passenger on a side step of an open street car, who was injured by contact with a passing truck on the street, was not guilty of contributory negligence, as a matter of law, where he attempted to enter the nearest cross aisle in the car as soon as he realized his peril, although he did not get off the step as quickly as his companion in front, whom he warned of the danger. Faris *v.* Brooklyn, etc., R. Co., 61 N. Y. S. 670, 46 App. Div. 231.

86. Where passenger had no time to enter car.—Walsh *v.* Interurban St. R. Co., 98 N. Y. S. 656, 50 Misc. Rep. 637.

87. Duty of lookout.—While defendant's open street car was standing still, plaintiff approached it from the rear, and, without signaling, stepped on the side foot rail, when the car, without warning, started ahead; and as plaintiff "was going up on the step to see for a place," and within five seconds after he stepped on the rail, he was dashed against a truck, which he had seen as he approached the car, fifteen feet in front thereof. It was not shown that the driver or conductor saw either plaintiff or the truck. Held, that a nonsuit was proper. Littmann *v.* Dry Dock, etc., R. Co., 6 Misc. Rep. 34, 25 N. Y. S. 1002, 55 N. Y. St. Rep. 514.

88. Rosen *v.* Dry Dock, etc., R. Co., 91 N. Y. S. 333.

89. Injured by objects passed.—Woodroffe *v.* Roxborough, etc., R. Co., 51 Atl. 324, 201 Pa. 521, 88 Am. St. Rep. 827.

90. West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185, affirmed in 55 N. E. 67, 182 Ill. 15.

A street car being so crowded that there were no vacant seats, a passenger rode on the outside running board, and as the car went upon a curve his head was thrown back so that it struck a trolley pole dangerously near the track. Held, that no contributory negligence was shown. Hesse *v.* Meriden, etc., Tramway Co., 54 Atl. 299, 75 Conn. 571.

A passenger in an open street car, being crowded, moved forward by way of the step on the side, and struck his head against an iron column near the track. Held, that he was not negligent in misjudging the distance of the column, or in going forward while the car was in motion. Coleman *v.* Second Ave. R. Co., 41 Hun 380, 1 N. Y. St. Rep. 580.

negligence, where he had very little time in which to act.[91] A person who stands on the lower steps of a street car moving four miles an hour, with one hand on the dasher rail and the other on the body rail, facing towards the street, and intentionally leans beyond the car in order to look in the direction from which the car came, can not recover for injury caused by striking his head against a post standing within three feet of the track, and visible from the car for a quarter of a mile.[92] Where a passenger, with knowledge that the running board of a summer car was in close proximity to the poles near the track, stood thereon after warning other passengers of the danger, and was subsequently hit by a pole and killed, he was guilty of contributory negligence;[93] but, where he did not know the distance of the poles from the car, the question of his negligence is for the jury.[94] Where a passenger is injured by a derrick, the position of which was known to him, the question of his negligence is for the jury.[95]

§ 2761. Injury from Particular Acts of Negligence.—One who unnecessarily stands on the inside footboard of a double-track street railroad, and in a place known to him to be dangerous, is guilty of contributory negligence precluding a recovery for injuries resulting from his being struck by a car on the other track, though the company was also negligent.[96] A street car passenger taking a dangerous position by standing on the car steps, outside of the gate, and on the side of the adjacent track, on which cars run in the opposite direction, is required to exercise that degree of care for his own safety which prudent persons under like circumstances would observe.[97] But riding on a street car on the outside the fender or chain on the side towards the parallel track is not negligence as a matter of law.[98] While they were vacant

91. Where passenger had no time to avoid injury.—Denver, etc., Transit Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106.

92. Where object easily seen.—Cummings *v.* Worcester, etc., St. R. Co., 166 Mass. 220, 44 N. E. 126.

93. Where object known to passenger.—Burns *v.* Johnstown Pass. R. Co., 62 Atl. 564, 213 Pa. 143, 2 L. R. A., N. S., 1191.

94. In an action against an electric street railway company for personal injuries, plaintiff's evidence showed that he was riding on the footboard of the motor car; that, in reaching into his pocket for change, he was knocked from the car by contact with a trolley pole, and was run over by the trailer; that the distance from the footboard to the trolley pole was only ten and one-half inches; that he had passed eight poles safely, but did not know of the proximity of the poles, as his back was turned towards them, and as he had never before ridden over the line. Held, that it was a question for the jury whether plaintiff was guilty of contributory negligence. Elliott *v.* Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 23 L. R. A. 208.

95. Plaintiff, while riding on the step of defendant's street car, was knocked off by a derrick standing near the track, and injured. It appeared that plaintiff knew that a derrick was being used at that point for the construction of a sewer, and that defendant had moved its tracks nearer the derrick during the day. Held, that the question as to whether plaintiff was negligent in failing to see the derrick was for the jury. Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

96. Schoenfeld *v.* Milwaukee City R. Co., 74 Wis. 433, 43 N. W. 162.

Plaintiff boarded a summer horse car, but, finding no room inside, he stood outside, on the footboard, holding to one of the posts. After passing several closed cars they met a summer car which was being driven rapidly down grade, and plaintiff was struck on the shoulder. The distance between the posts of the two cars, when not in motion, was twenty-five inches. Held, that findings of the jury that plaintiff used ordinary care, and had no notice of the danger, and that defendant knew of the danger and was guilty of negligence, are within its province, and can not be disturbed. Geitz *v.* Milwaukee City R. Co., 72 Wis. 307, 39 N. W. 866.

97. Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

98. Negligence per se.—If a passenger, while there, is struck by his car running off the track into a passing car, it is error to nonsuit, although he would not have been struck if inside the chain, and the question of contributory negligence must go to the jury. Schwartz *v.* Cincinnati, etc., St. R. Co., 8 O. C. C. 484, 4 O. C. D. 272.

Where other track unknown to passenger.—Plaintiff entered a horse car, whose seats and platform were filled with passengers, and stood, with other passengers, on the footboard. There was

seats in a street car at the place where plaintiff boarded it, he passed along the outside running board on the side next to another track, while the car was in motion, and was struck by a passenger car. It was held that plaintiff had assumed the risk.[99] Where a boy, being unable to get on an open electric car, stands upon the side of the car, on which strips extend to prevent the egress or ingress of passenger, placing his foot on the boxing of the axle, and rides thereon for some distance without paying a fare or offering to do so, and without being asked for his fare, he not being seen by any employee of the railroad company, though he had money in his pocket with which to pay such fare, if asked for it, and falls off and is run over by the wheels of the trailer, the railroad company is not liable for injuries received, the place where the boy was riding being very dangerous.[1] In an action against a street railway for the death of a passenger, caused by the train on which he was riding being thrown by a switch to the other parallel track, where it was struck by another car, the mere fact that he was riding on the car steps, across which there was a chain, and on the side towards the other track, is not negligence as a question of law.[2]

Failure to Hold to Support.—A passenger who goes upon the lowest step of a street car running over seven miles an hour, without steadying himself by grasping the hand rail or otherwise, is negligent.[3] Where plaintiff boarded a crowded street car, and stood on the steps of the platform thereof while the same was running rapidly and approaching a sharp curve, of whose existence plaintiff had knowledge, it was contributory negligence on his part to release, for the purpose of paying his fare, his hold on the handhold, precluding him from maintaining an action for injuries received through being thrown from the platform as the car rounded the curve.[4]

Failure to Look and Listen for Passing Cars.—A passenger on a street car, acting in a prudent and careful manner, either while seated, standing, or going to a seat, is not bound to look and listen to avoid dangers from passing or approaching cars. Therefore, when it appears that the plaintiff, in an action against a street railway company for personal injuries, while standing upon the running board of one of its cars in a proper manner and attempting to find a seat, was struck by a car running in an opposite direction on another track, he is not charged with contributory negligence as a matter of law, and it would be improper to direct a verdict on that ground.[5]

Where Guard Rail Up.—The fact that the guard rail or bar which plaintiff knew was ordinarily kept down along the side of the car nearest the posts, as protection against the same, was up, did not relieve him of contributory negligence in exposing himself to an obvious danger.[6]

Passing from Seat to Seat.—It is not negligence per se to ride on the side step of a street car, where the car is so crowded that the passenger can not obtain a place inside.[7]

but a single track where he entered, but further on it was double, and plaintiff was injured by contact with a passenger on the footboard of a car passing on the other track. A person might safely stand on the footboard of one car while passing, if the footboard of the other were unoccupied. Plaintiff was unfamiliar with the management of the road, and did not know that the track was double. Held, that contributory negligence was not so clearly shown as to warrant the court in withdrawing the case from the jury. City R. Co. *v.* Lee, 50 N. J. L. 435, 14 Atl. 883, 7 Am. St. Rep. 798.

99. Moody *v.* Springfield St. R. Co., 65 N. E. 29, 182 Mass. 158.

1. Udell *v.* Citizens' St. R. Co., 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336.

2. Injury by collision.—Schwartz *v.* Cincinnati, etc., St. R. Co., 8 O. C. C. 484, 4 O. C. D. 272.

3. Failure to hold to support.—Saiko *v.* St. Paul City R. Co., 67 Minn. 8, 69 N. W. 473.

4. South Covington, etc., St. R. Co. *v.* Physioc, 124 Ky. 153, 92 S. W. 305, 29 Ky. L. Rep. 14.

5. Failure to look and listen for passing cars.—Hollingsworth *v.* Cincinnati, etc., R. Co., 21 O. C. C. 536, 12 O. C. D. 100.

6. Where guard rail up.—Bridges *v.* Jackson Elect. R., etc., Co., 38 So. 788, 86 Miss. 584.

7. Passing from seat to seat.—Wood

§ 2762. Step of Particular Car.—Railroad Car.—One is not justified in riding on the steps of a passenger car, outside of the vestibule door, even though he has a ticket for passage on that particular train, and is unable to secure admission to the coach; and if one voluntarily assumes such risk, and is accidentally thrown from the train while it is running, he is not entitled to damages for personal injuries received thereby.[8]

Elevated Railway Car.—Where a passenger boarded an elevated steam-railway car in motion by getting on the sheetiron covering of the steps of the last platform on the train, and maintained himself in that position by holding to the iron gate that barred entrance there until struck by a structure near the track, and knocked into the street below. He was negligent as a matter of law.[9]

§ 2763. Children.—For a boy nine years of age to occupy the step of the front platform of a street car is presumptive evidence of negligence on his part, and the burden is upon him to rebut the presumption.[10] A boy passenger riding on the platform and a defective step of a railway car assumed the risk of injury through such step and the swaying of the train caused by defective track and roadbed, if he knew the step was defective and that the car was swagging, unless he was insufficiently intelligent to be able to understand the danger of so riding.[11]

§ 2764-2771. Limb or Other Part of Person Protruding from Car —§ 2764. In General.—Where a passenger on a railroad car extends his person through the window of a rapidly moving train in which he is riding, he is chargeable with such gross negligence as will prevent recovery for an injury to which such act contributed.[12]

Where Plaintiff's Negligence Is Slight.—The slight exposure of a passenger's hand, arm, or head outside of a car window or doorway is not necessarily an act of negligence.[13] Where a person traveling on a railroad car

v. Brooklyn City R. Co., 5 App. Div. 492, 38 N. Y. S. 1077.

8. Railroad car.—Sanders *v.* Chicago, etc., R. Co., 10 Okla. 325, 61 Pac. 1075.

9. Elevated railway.—Carroll *v.* Interstate Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

10. Children.—Solomon *v.* Central Park, etc., R. Co., 31 N. Y. Super. Ct. 298.

The question whether a boy ten years old, who fell from the steps of a street car after the driver had suddenly whipped up the horses, was guilty of contributory negligence in attempting to reach the front platform, at the direction of the driver, is for the jury. Maher *v.* Central Park, etc., R. Co., 67 N. Y. 52, affirming 39 N. Y. Super. Ct. 155.

11. Walling *v.* Trinity, etc., R. Co., 106 S. W. 417, 48 Tex. Civ. App. 35.

A boy, riding on the running board of a street car, putting one foot on the ground, and jerking it up again for amusement, was guilty of contributory negligence, if of sufficient discretion to understand the danger. El Paso, etc., R. Co. *v.* Kitt (Tex. Civ. App.), 90 S. W. 678, judgment affirmed in 91 S. W. 598.

12. Limb or other part of person protruding from car.—Union Pac. R. Co. *v.* Roeser, 69 Neb. 62, 95 N. W. 68.

13. Where plaintiff's negligence is slight.—La Barge Union Elect. Co., 138 Iowa 691, 116 N. W. 816, 19 L. R. A., N. S., 213; Summers *v.* Crescent City R. Co., 34 La. Ann. 139, 44 Am. Rep. 419.

That a street car passenger, sitting beside an open window reading, with his arm resting on the sill, extended his arm not more than three inches outside the car, did not constitute contributory negligence as a matter of law, precluding recovery for an injury to such arm caused by another car passing on a switch. Judgment 65 N. Y. S. 989, 53 App. Div. 571, affirmed in Tucker *v.* Buffalo R. Co., 62 N. E. 1101, 169 N. Y. 589.

The front of defendant's car was used for passenger service only; the rear part being used for baggage. Parallel with the sides of such rear part were seats with upright slats extending from the floor to the roof, between the back of the seats and the sides of the car. Plaintiff entered the forward compartment, but subsequently entered the rear compartment. While sitting there his arm rested on the back of the seat and without noticing it extended his elbow between two of the upright slats. While in such position the door of the baggage compartment was slid back passing between the slats and the sides of the car and striking plaintiff's elbow. Held, that the result which would naturally follow from the opening of the door was not so obvious as to charge plaintiff, as a

permits his arm to rest on the base of the window, and slightly project outside, and thereby has his arm broken in passing a freight train, the negligence of such person is slight, compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and a recovery may be had for the injury sustained.[14] But it has been held the slightest voluntary projection of the limbs of a passenger from the window of a moving car constitutes contributory negligence preventing a recovery on his part in case of injury, without regard to the question of negligence in the carrier in failing to take precautions against such accidents.[15]

Where Car Crowded.—Where a carrier permits its cars to be overcrowded, and requires its passengers to ride on the platforms, it is not liable, if the passenger, while riding on the platform, negligently extends his person beyond the car line from curiosity and is injured thereby.[16]

Passenger Riding on Footboard.—One injured while riding on the footboard of an open car by coming in contact with the strut of a bridge over which the car was passing was not guilty of contributory negligence, though he leaned back in returning his money to his pocket, or in looking to see what a friend, also on the footboard, was doing.[17]

Injury to Child.—A boy sixteen years of age, traveling alone, is not, on account of his immature years, incapable of exercising sufficient discretion to avoid the risk of a voluntary exposure of his person beyond the line of the car.[18]

Injury from Collision.—When an overcrowded street car ran off the track, and jolted on cobble stones for two blocks, without an effort at replacement by the driver, and in turning collided with a freight car standing on a switch four or five feet from its track, the question whether negligence can be imputed to a seated passenger whose hand, clasping the window post, was crushed by the freight car, is for the jury, in view of conflicting evidence, whether he had all the while had his hand outside the window, or caught the post to hold himself in place, after the car left the track.[19]

§ 2765. Hand or Arm on Window Sill.—It is not contributory negligence for a passenger to ride with his hand or arm on the sill of an open window.[20]

matter of law, with contributory negligence for not taking notice of the situation and for sitting with his elbow through the slats. Wood *v.* New York, etc., R. Co., 96 N. Y. S. 419, 109 App. Div. 770.

14. Chicago, etc., R. Co. *v.* Pondrom, 51 Ill. 333, 2 Am. Rep. 306.

15. Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; Dun *v.* Seaboard, etc., R. Co., 78 Va. 645, 49 Am. Rep. 388; Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

16. Where car crowded.—Benedict *v.* Minneapolis, etc., R. Co., 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345.

17. Passenger riding on footboard.—Anderson *v.* City, etc., R. Co., 71 Pac. 659, 42 Ore. 505.

18. Injury to child.—Benedict *v.* Minneapolis, etc., R. Co., 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345.

19. Injury from collision.—North Baltimore Pass. R. Co. *v.* Kaskell, 78 Md. 517, 28 Atl. 410, distinguishing Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

20. Hand or arm on window sill.—Farlow *v.* Kelly, 108 U. S. 288, 27 L. Ed. 726, 2 S. Ct. 555; Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

W., a passenger, while riding on defendants railroad, had his arm broken, and became permanently disabled, by the train's coming in contact with a wrecked train of freight cars which the railroad company had negligently suffered to remain upon the side of the track. W., at the time of the accident, was sitting in one of the cars, with his elbow on the window sill, and resting his head on his arm. Held, that there was no negligence on the part of W., and that he was entitled to recover damages against the company. Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468.

It is not negligence per se for a passenger in a street railway car operated by electricity according to the "trolley" system to rest her arm upon the sill of an open window. Schneider *v.* New Orleans, etc., Railroad, 54 Fed. 466.

Leaning one's arm on the window seat of a street car, within the car, is not negligence per se. Germantown Pass. R. Co. *v.* Brophy, 105 Pa. 38.

It is perhaps not too strong a statement, that no person ever traveled on a railway train without at some time resting his arm on the window sill at least, if not permitting it to protrude slightly. Conduct which is universal is necessarily that of persons reasonably prudent.[21] A passenger in a railroad car, who, while riding with his elbow on the sill of an open window, is so jarred by a collision that his arm is thrown outside the car, and, coming in contact with another car, is crushed, is not guilty of contributory negligence.[22]

Injured by Object Unknown to Passenger.—A passenger in a street car, while in the act of taking his seat, rested his hand on and partially over the base of an open window, and his hand was immediately struck and he was injured by upright planks, placed in close proximity to the car for the purpose of protecting an excavation for a sewer. It did not appear that he had any notice of the obstruction. The question of contributory negligence on his part was for the jury.[23]

Falling Window.—It is not contributory negligence for a passenger on entering a railroad car while it is running over a rough roadbed to rest his arm in an open window to steady himself without first examining the window to see if it is secure against falling on account of the jolting of the train.[24] In an action against an elevated street-railroad company for injuries caused by a window of a car falling on plaintiff's finger while he was a passenger, he can not recover, in the absence of proof, that the window was raised to the proper height to be held by the catch if in proper order, at the time he placed his hand in the window, and that the catch was defective.[25]

Injured by Stick of Timber Falling in Window.—Where a passenger was riding on a car with his elbow resting on the window sill, and slightly projecting out of the window, but his hand and wrist were inside, and a stick of cordwood fell from the pile stacked near the track, through the open window at which he sat, striking in the palm of the hand, catching in the mouth of the coat sleeve, and jammed the arm backward, and injured it, the facts were not such as the court could decide to be negligence in law, but were for the jury.[26]

§ 2766. Hand or Arm Out of Window.—Passenger on Railroad.—For a passenger on a rapidly moving railway train to permit his hand to protrude from a window of the car in which he is sitting is such contributory negligence as to prevent his recovering damages for injuries received by its striking some object outside.[27] A passenger in a railroad train, who leans his arms out of

21. Thompson Carr. Passengers, p. 258; Interurban R., etc., Co. *v.* Hancock, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

22. Farlow *v.* Kelly, 108 U. S. 288, 2 S. Ct. 555, 27 L. Ed. 726.

23. Injured by object unknown to passenger.—Dahlberg *v.* Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

24. Falling window.—Gulf, etc., R. Co. *v.* Killebrew (Tex. Civ. App.), 20 S. W. 182.

25. Voorhees *v.* Kings County, etc., R. Co., 3 Misc. Rep. 18, 21 N. Y. S. 775, 50 N. Y. St. Rep. 569.

26. Injury by stick of timber falling in window.—Moakler *v.* Willamette Val. R. Co., 18 Ore. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717.

27. Hand or arm out of window.—*Kentucky.*—Favre *v.* Louisville, etc., R. Co., 91 Ky. 541, 13 Ky. L. Rep. 116, 16 S. W. 370.

Maryland.—Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568, cited in Interurban R., etc., Co. *v.* Hancock, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

Nebraska.—Union Pac. R. Co. *v.* Roeser, 69 Neb. 62, 95 N. W. 68.

West Virginia.—Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

A traveler in a railroad car can not recover damages against the railroad company for a personal injury sustained wholly or in part by reason of allowing his arm or elbow to be outside the window. Todd *v.* Old Colony, etc., R. Co. (Mass.), 3 Allen 18, 80 Am. Dec. 49.

Where a passenger of a railroad train allows his hand or arm to protrude out of a window beyond the outer surface of the car, it is negligence per se, and will defeat a recovery for personal injuries. Kentucky Cent. R. Co. *v.* Jacoby, 14 Ky. L. Rep. 763.

If a sane person of mature years vol-

window, in consequence of which a portion of a car standing upon a switch, but close to the main track, strikes against his arm, and breaks it, is chargeable with negligence contributing to the injury, and is not entitled to recover damages against the company, unless perhaps where some gross negligence is chargeable to them.[28]

Passenger on Street Car.—A passenger of a street car, who had his arm outside the car window, where it was struck by a loose upright rail of a bridge, was not guilty of contributory negligence as a matter of law.[29] A passenger while riding in a street car, sat with his elbow a few inches out of the window, and, while the car was on a curve, he was struck by another car, belonging to the same company, coming the other way on the other track. He was guilty of contributory negligence, and the company was liable for the injury.[30]

Passenger on Interurban Car.—In a suit against an interurban electric railway company for injury to a passenger by reason of his arm being struck by a car passing upon an adjoining track, it is not error for the court to instruct the jury that if they find that there were four iron bars extending horizontally across the window of the car, equally distant from each other, the top one approximately twelve inches from the window sill, and that plaintiff while sitting in the car permitted his arm or any part thereof to extend or project out beyond or over the rods, and that said act directly contributed to the accident, the plaintiff would be guilty of contributory negligence and can not recover.[31]

Negligence Per Se.—Where a traveler puts his elbow or an arm out of a car window voluntarily, without any qualifying circumstances impelling him to do it, it must be regarded as negligence per se; and, when that is the state of the evidence, it is the duty of the court to declare the act negligence in law.[32]

untarily or inattentively protrudes his elbow from the window of a railway carriage in which he is a passenger, and the elbow is smashed in consequence of such protrusion, such passenger is guilty of contributory negligence which defeats his right of recovery, as matter of law. Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

A passenger on a train in swift motion, who, while holding his arm out of an open window, was struck by wood piled near the track, held guilty of such contributory negligence as prevented recovery, unless the railroad company, noticing his dangerous position, neglected to warn him. Dun *v.* Seaboard, etc., R. Co., 78 Va. 645, 49 Am. Rep. 388.

A complaint alleging that plaintiff's intestate, while a passenger on defendant's railroad, inadvertently extended his elbow through the window of the car, when it struck against a post in the tunnel through which the train was passing, shows contributory negligence. Clark *v.* Louisville, etc., R. Co., 101 Ky. 34, 39 S. W. 840, 18 Ky. L. Rep. 1082, 36 L. R. A. 123.

28. Louisville, etc., R. Co. *v.* Sickings (Ky.), 5 Bush. 1, 96 Am. Dec. 320.

29. Passenger on street car.—Francis *v.* New York Steam Co., 13 Daly 510, affirmed in 114 N. Y. 380, 21 N. E. 988.

30. Summers *v.* Crescent City R. Co., 34 La. Ann. 139, 44 Am. Rep. 419.

31. Passenger on interurban car.—Interurban R., etc., Co. *v.* Hancock, 75 O. St. 88, 78 N. E. 964, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

32. Negligence per se.—*Alabama.*—Georgia Pac. R. Co. *v.* Underwood, 90 Ala. 49, 8 So. 116, 24 Am. St. Rep. 756.

Indiana.—Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

Ohio.—Interurban R., etc., Co. *v.* Hancock, 78 N. E. 964, 75 O. St. 88, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

Pennsylvania.—Pittsburg, etc., R. Co. *v.* McClurg, 56 Pa. 294.

Where there were iron bars extending horizontally across the windows of an electric car, equally distant from each other, and plaintiff while sitting in the car permitted his arm or any part thereof to extend beyond the rods and such act directly contributed to an accident by reason of his arm being struck by a car on an adjoining track, he was guilty of contributory negligence barring recovery. Interurban R., etc., Co. *v.* Hancock, 78 N. E. 964, 75 O. St. 88, 6 L. R. A., N. S., 997, 8 Am. & Eng. Ann. Cas. 1036.

In an action against an electric railway company by a passenger whose hand, which she had extended out of the open window of the car, was struck by a trolley pole, it is not error for the trial court to refuse an instruction asked by plaintiff to the effect that the failure of defendant to give notice to its passengers of the proximity of the pole was such negligence as to preclude contributory negligence on the part of the plaintiff in so extending her hand outside of the car. Chapman *v.* Capital Tract. Co., 37 App. D. C. 479.

But it is proper to refuse to charge that if plaintiff was sitting with his elbow out the car window, whereby he was injured, he was guilty of contributory negligence, that being a question for the jury.[33]

Warning of Danger.—Contributory negligence of a street-railway passenger in projecting his arm out of the car window, whereby it was struck by a bridge, will not prevent recovery, where the conductor neglected to give warning, though seeing his danger in time.[34]

Injury from Unfastened Door of Another Car.—If, in an action brought by a passenger in a railroad car against the railroad company to recover damages for a personal injury from the swinging of an unfastened door of another car standing upon a track parallel to that over which he is riding, it appears from the plaintiff's own testimony that his elbow extended through the open window, beyond the place where the sash would have been if the window had been shut, it is the duty of the court to rule that this is such carelessness as will prevent a recovery of damages by him, and to withdraw the case from the jury.[35]

Beyond Dead Line.—The mere fact that a passenger has his arm extended beyond the dead line of the window sill of a moving car does not bar a recovery for an injury from being struck by an external object.[36]

Arm Jarred Out by Collision.—In an action by a passenger against a street-car company for injuries received in a collision with the street car of another line, it appeared that at the point where the accident occurred the tracks of the defendant company approach so closely those of another company that the projecting roofs of the car touch each other in the passing of the cars, which run in opposite directions, and that the passenger had his arm on the inside of the window, so that it was thrown out by shock, and broken by the collision. The question whether the passenger was guilty of contributory negligence in having his arm in such position was a question for the jury.[37]

Negligence of Carrier.—Plaintiff, while riding in defendant's train near an open window, had his arm broken by the car coming in contact with a loaded wagon standing by the side of the track. An instruction that if the jury believe from the evidence that at the time the injury happened plaintiff's arm was, by the inadvertence of plaintiff, protruded out of the window of the car, and that, but for said arm being thus out of the window, plaintiff would not have received the injury, the verdict should be for defendant, was properly refused, since it assumed that the protrusion of plaintiff's arm from the car window was of itself negligence which must defeat the action irrespective of the fact whether there was negligence on the part of the defendant or not.[38]

33. Quinn *v.* South Carolina R. Co., 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682; Gulf, etc., R. Co. *v.* Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295.

In an action against a railroad company for personal injuries to a passenger, it appeared that he was injured by having his arm or elbow outside the car window. Held, that it was properly left to the jury to determine, under all the circumstances of the case, whether plaintiff was guilty of negligence in respect to the position of his arm. Spencer *v.* Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758.

In an action against a railroad company for damages done the plaintiff, while riding, as a passenger, in one of its cars, and alleged to have resulted from the defendant's negligence, it was not error for the circuit court to refuse to instruct the jury that, if the plaintiff was sitting with his elbow or arm projecting out of the window, and sustained the injury complained of by reason of that fact, he could not recover. Spencer *v.* Milwaukee, etc., R. Co., 17 Wis. 487, 84 Am. Dec. 758.

34. Warning of danger.—South Covington, etc., St. R. Co. *v.* McCleave, 38 S. W. 1055, 18 Ky. L. Rep. 1036.

35. Injury from unfastened door of another car.—Todd *v.* Old Colony, etc., R. Co. (Mass.), 7 Allen 207, 83 Am. Dec. 679.

36. Beyond dead line.—McCord *v.* Atlanta, etc., R. Co., 45 S. E. 1031, 134 N. C. 53.

37. Arm jarred out by collision.—People's Pass. R. Co. *v.* Lauderbach (Pa.), 3 Atl. 672, 2 Sad. 187.

38. Negligence of carrier.—Barton *v.* St. Louis, etc., R. Co., 52 Mo. 253, 14 Am. Rep. 418.

Duty of Carrier to Avoid Injury.—Where a passenger in an open street car was killed by a passenger car, where it appeared that the space between the passing cars was about three inches wide, and the decedent had his arm projecting beyond the side of the car, and that the motorman of the approaching car which struck him saw him and warned him to take his arm off the rail, it was erroneous to charge that even if the decedent was guilty of negligence, if the defendant's servants saw him in position of apparent danger, it was their duty, notwithstanding his negligence, to do all they could to prevent the accident, and if they failed to do so the defendant was liable.[39]

Injury from Overturning Car.—Where a passenger in a stage coach has his arm broken by the overturning of the coach, he is not chargeable with contributory negligence in having his arm, at the time of the overturning, partly outside the coach window.[40]

§ 2767. Hand on Railing of Platform.—The fact that plaintiff was standing on the rear platform of a street car with his right hand on the railing when it was injured as the result of a collision between defendant's dray and the street car as the dray passed the rear of the car is not, as a matter of law, such negligence as contributed to the injury.[41]

§ 2768. Arm Around Post.—A passenger, who was riding on an open grip car, sat with his arm around a post supporting the roof, and at the end of the seat, so that both his arm and right foot extended beyond the side of the car. In an action to recover for injuries resulting from striking his arm and foot against a passing wagon. It was held that, since the construction of the car invited plaintiff to assume the position which he did, he was not guilty of contributory negligence precluding a recovery.[42] When an overcrowded street car ran off the track, and jolted on cobble stones for two blocks, without an effort at replacement by the driver, and in turning collided with a freight car standing on a switch four or five feet from its track, the question whether negligence can be imputed to a seated passenger whose hand, clasping the window post, was crushed by the freight car, is for the jury, in view of conflicting evidence, whether he had all the while had his hand outside the window, or caught the post to hold himself in place after the car left the track.[43]

§ 2769. Head Out of Window or Door.—A passenger injured while leaning his head out of a car to signal the conductor to stop can not recover.[44] A passenger on a street car, fearing that he had taken the wrong car, put his head out of the window to ascertain its color and identify it, and while so doing his head came in contact with an electric light pole. He then sued the electric light company for the resulting injuries. He was guilty of contributory negligence, and could not recover.[45]

39. Duty of carrier to avoid injury.—Georgetown, etc., R. Co. *v.* Smith, 25 App. D. C. 259, 5 L. R. A., N. S., 274.

40. Injury from overturning car.—Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

41. Hand on railing of platform.—Seigel *v.* Eisen, 41 Cal. 109.

42. Arm around post.—Chicago City R. Co. *v.* Rood, 62 Ill. App. 550.

43. North Baltimore Pass. R. Co. *v.* Kaskell, 78 Md. 517, 28 Atl. 410, distinguishing Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

44. Head out of window or door.—In an action by a passenger against a street railroad company for injuries sustained, there was evidence from which the jury might infer that plaintiff, a passenger on a trolley car, had notified the conductor of his desire to alight; that the car had slowed down; that the passenger had got upon the running board in preparation to alight; that the car then increased its speed; that the passenger, in endeavoring to again signal the conductor, leaned over so far that his head was brought in contact with the handle of the door of a milk wagon proceeding in the same direction with the car; and that he thus received the injuries for which he brought suit. Held to show contributory negligence, defeating recovery. Flynn *v.* Consolidated Tract. Co., 52 Atl. 369, 67 N. J. L. 546; S. C., 45 Atl. 799, 64 N. J. L. 375.

45. Moore *v.* Edison Elect. Illuminating Co., 43 La. Ann. 792, 9 So. 433.

Mail Clerk in Pursuance of Duty.—In an action by a mail agent for injuries caused by his head coming in contact with a box car negligently left too near the main line on a switch, it appeared that the box car was about four hundred yards from the station; that it was customary for mail agents to put their heads out of the window on approaching the station; that the whistle was sounded as usual for the station, but, some stock being too near the track, it was sounded a second time, and the train slacked up to avoid running into them; and that the agent probably could not have seen anything on the outside without opening the door. A charge that if the jury believed it was necessary for the agent, in the discharge of his duty, to project his head from the car at the station, the fact that he put his head out before it was actually necessary, on account of the distance of the train from the passenger platform, would not prevent his recovery, if the jury believed that the acts of defendant's servants in charge of the train were such as would reasonably induce the agent, situated as he was, to believe that he was at the usual place for projecting his head in performance of his duty, was not erroneous.[46]

Passenger Who Is Ill.—A passenger in a street car who, on account of a sudden illness, extended her head through a window, above a screen which covered the lower half of the window, and was injured by striking against a trolley pole beside the track, being obliged in order to so reach the window to stand up or kneel upon the seat, was chargeable with contributory negligence, as matter of law, which precludes a recovery against the company for the injury.[47] A complaint alleging that a passenger became violently ill when the train was passing through a tunnel, and, while in great pain, and in a half-fainting condition, put his head out through a window in order to vomit, and was struck and killed by an upright timber in the tunnel, but not stating who opened the window, or that the train employees, by the use of due care, could have known of his illness, or of the perilous position he had taken, does not state a cause of action.[48]

Children.—Where a boy of sixteen years was a passenger on a crowded train, whereby he was compelled to stand on the platform, and leaned out slightly, when his head came in contact with iron posts, and he was killed, he was guilty of such contributory negligence as to prevent his recovery.[49]

Leaning Out to Spit.—A passenger on an electric train was thrown from his seat and out of the car as it rounded a curve, and there was evidence that plaintiff said after the accident that he was leaning out of the car to spit when the car struck the curve. The court charged that the plaintiff must show that he did not contribute by his negligence to the accident, and that if the jury believed that the injury to plaintiff happened to him by mere accident, and without fault on the part of the defendant, the plaintiff could not recover. It was not error for the court to refuse to charge that if the plaintiff was sitting next to an open space, without any barrier to protect him, and carelessly leaned out to spit, and, by reason of such leaning, fell out, such leaning was the proximate cause of the injury, and that plaintiff could not recover.[50]

Injury from Sudden Jerking of Train.—A passenger in the caboose of a freight train who starts to look out on the sounding of a whistle, indicating the approach to a station, is not thereby guilty of contributory negligence defeating a recovery for injuries sustained, while in such act, by the sudden jerking of the train, in the absence of evidence that the jerking was so usual that it ought to have been anticipated.[51]

46. Mail clerk in pursuance of duty.—Houston, etc., R. Co. *v.* Hampton, 64 Tex. 427.

47. Passenger who is ill.—Christensen *v.* Metropolitan St. R. Co., 137 Fed. 708, 70 C. C. A. 657.

48. Shelton *v.* Louisville, etc., R. Co., 39 S. W. 842, 19 Ky. L. Rep. 215.

49. Children.—Benedict *v.* Minneapolis, etc., R. Co., 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345.

50. Leaning out to spit.—Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

51. Injury from sudden jerking of train.—Lusby *v.* Atchison, etc., R. Co., 41 Fed. 181.

§ 2770. Body Protruding from Train.—It is contributory negligence for a passenger to ride with his body leaning from a car.[52] Though a carrier of passengers must provide a safe place within its cars for its passengers to ride, yet, when such duty has been performed, a passenger has no right to extend his person beyond the line of the car or ride on the platform thereof.[53] Where a passenger refused a seat provided for him in the car and remained on the platform, and when the train approached a station, instead of waiting for it to stop, swung his body out from the steps, intending to alight and go to the smoking car, but was struck by a cattle guard which he did not see in the darkness, he could not recover for the injuries received.[54] But a verdict for a passenger who, while standing on the lower step of a car, with his body projecting outside the line of the car, was struck by another car and injured, will be sustained, though the jury were unable to determine from the evidence whether there was standing room in the aisles of the coach, or whether there were vacant seats in other coaches.[55]

§ 2771. Feet and Legs Protruding.—In an action against a street-railway company for personal injuries it appeared that plaintiff, a boy of thirteen, a passenger on a crowded car, sat on the front platform, with his feet on the step, and his knees projecting several inches beyond the side of the car, and was struck on the knees, and knocked under the car, by a mortar box which builders had placed in the street only a few inches from passing cars. Held, that a compulsory nonsuit was properly ordered because of contributory negligence on the part of plaintiff and absence of negligence on defendant's part.[56]

§§ 2772-2781. Riding in Car Not Intended for Passengers—§ 2772. In General.—Invited by Employee.—A person is not guilty of contributory negligence as a matter of law in riding on a portion of the car not intended or adapted for the carrying of passengers and to which he had not been invited by the defendant or its agents.[57] But it has been held that where a passenger, without the consent of the carrier, selects a place to ride which is obviously not intended for that purpose, and is hurt by reason of hazards peculiar to that position, he has no cause of action.[58]

Injury from Negligence of Employee.—The liability of a carrier to a passenger for damages resulting from negligence of its employees is the same, whether he be in one car or another, so he has a lawful right to be in the car he occupies.[59]

52. Body protruding from train.—Where a passenger on a street car, while standing on the platform, leaned over a railing for the purpose of seeing where certain smoke came from, to such an extent that he was struck by a trolley pole located from fourteen to seventeen inches from the side of the car, and from nineteen to twenty-four inches from the railing, he was guilty of contributory negligence, as a matter of law. Huber *v.* Cedar Rapids, etc., R. Co., 100 N. W. 478, 124 Iowa 556.

A passenger is guilty of contributory negligence where he deliberately swings out from the step of the rear platform of a car, into the darkness of the night, while the car is moving and about from 150 to 200 feet distant from a station without any necessity for so doing, and merely for the purpose of going to the smoking car, which was next in front of the car on the rear platform of which he was standing. Hewes *v.* Chicago, etc., R. Co., 119 Ill. App. 393, judgment affirmed in 75 N. E. 515, 217 Ill. 500.

53. Benedict *v.* Minneapolis, etc., R. Co., 90 N. W. 360, 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345.

54. Hewes *v.* Chicago, etc., R. Co., 75 N. E. 515, 217 Ill. 500, affirming judgment in 119 Ill. App. 393.

55. Judgment 76 Ill. App. 613, affirmed in Lake Shore, etc., R. Co. *v.* Kelsey, 54 N. E. 608, 180 Ill. 530.

56. Feet and legs protruding.—Butler *v.* Pittsburgh, etc., R. Co., 139 Pa. 195, 21 Atl. 500.

57. Riding in car not intended for passengers.—Chicago City R. Co. *v.* Schmidt, 117 Ill. App. 213, judgment affirmed in 75 N. E. 383, 217 Ill. 396.

58. Carroll *v.* Interstate Rapid Transit Co., 107 Mo. 653, 17 S. W. 889.

59. Injury from negligence of employee.—Cleveland, etc., R. Co. *v.* Ketcham, 33 N. E. 116, 133 Ind. 346, 19 L. R. A. 339, 36 Am. St. Rep. 550.

§ 2773. Riding on Engine.—The railroad engine is at all times the most exposed and perilous portion of the train, and persons not in the performance of any duty there, including by express adjudication passengers and baggage masters, riding on the engine, can claim nothing than protection from injury by the willful, wanton, or intentional act of the carrier and its employees.[60] Though an engine drawing a stock train is not the place provided for shippers traveling on a drover's pass in which to ride and a caboose is provided in which they are to ride, it is not negligence as a matter of law for a shipper to ride on the engine.[61] A passenger, who, in a fancied emergency, mounts the engine to prevent his being left behind by the train, loses his right to that high degree of care that the law accords to passengers riding in the coaches, and can claim nothing more than protection from injury by the willful, wanton, or intentional act of the carrier and its employees.[62]

Rules and Regulations.—The fact that a passenger was ignorant of a rule prohibiting any one except the engineer and fireman from riding on an engine, and the fact that such rule was habitually violated, do not exonerate him from negligence in riding on an engine.[63]

Invited by Engineer.—Where a person took passage on the engine of a freight train, which carried passengers, at the direction of the engineer, and was injured by the derailment of the engine, which injury would not have occurred if he had taken passage in the caboose provided for passengers, plaintiff, though regarded as a passenger, was guilty of contributory negligence, as a matter of law, in riding on the engine, and was therefore not entitled to recover.[64] A passenger who rides on the engine, with a view to gaining information to secure his promotion in the service of the road; and who knows, or should know, that it is more unsafe to ride on the engine than on the cars, assumes the risk of such increased danger, and can not recover for injuries proximately caused thereby, though he was on the engine by invitation of the engineer, with knowledge of the conductor.[65] But it has been held not to be contributory negligence per se for a passenger to ride in the cab of the locomotive with the permission of the engineer.[66] Where a passenger left his place on the car where it was customary for persons having passes to ride, and, at the request of the fireman, stepped on the engine, and was at work cleaning the headlight when the injury was received, it was for the jury to say whether plaintiff's negligence proximately contributed

60. Riding on engine.—Kansas City, etc., R. Co. *v.* Williford, 115 Tenn. 108, 88 S. W. 178.

A passenger in charge of stock left the caboose, where he was assigned to ride, and got on the engine without permission or direction of any one in charge of the train, and, in dismounting therefrom, was injured. Held, that he could not recover, unless the injury was the result of wanton wrong of the company or its employees. Mobile, etc., R. Co. *v.* Bogle, 101 Tenn. (17 Pickle) 40, 46 S. W. 760.

61. Missouri, etc., R. Co. *v.* Avis, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed in 100 Tex. 33, 93 S. W. 424.

62. Railroad *v.* Bogle, 101 Tenn. (17 Pickle) 40, 46 S. W. 760.

63. Rules and regulations.—Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086.

64. Invited by engineer.—Radley *v.* Columbia Southern R. Co., 75 Pac. 212, 44 Ore. 332.

The engineer of a train has no authority to give permission to any one to ride upon the engine against the rules of the company. Chicago, etc., R. Co. *v.* Michie, 83 Ill. 427.

One who is injured while attempting to board a freight locomotive on a railroad used exclusively for freight, for the purpose of riding thereon, though at the invitation of the conductor of the train, can not recover from the railroad company for such injury, and it is immaterial that he has previously, on the conductor's invitation, ridden, and seen others (railroad employees) ride, on such locomotive, as such an invitation is not within the scope of the conductor's authority. Files *v.* Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411.

A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances. Illinois Cent. R. Co. *v.* Jennings, 82 N. E. 403, 229 Ill. 608.

65. Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App. 205, 24 S. W. 1086.

66. Hanson *v.* Mansfield, R., etc., Co., 38 La. Ann. 111, 58 Am. Rep. 162.

to his injury, and whether, if it did, his negligence was overcome by the wanton negligence of defendant's servants; and a charge which ignores the inquiry whether plaintiff's contributory negligence was overcome was properly refused.[67] Where a passenger who was directed to ride on the footboard of an engine by a brakeman to whom he had paid an amount less than the fare, was injured while attempting to climb over the tender at the alleged invitation of the engineer causing a violent and sudden jerk of the engine, plaintiff was not guilty of contributory negligence as a matter of law.[68]

Riding on Pilot.—Where an injury to a passenger on a construction train is due to his riding on the pilot or bumper of the engine, the carrier is not liable.[69] However, where a railroad company is in the habit of carrying its shopmen to and from their work as a matter of accommodation and without any agreement or compensation therefor, if its train is so crowded, that one of said shopmen can not get a seat in the cars, that fact will not justify him in sitting on the pilot of the engine; and if he does improperly do so, it is his duty to leave the pilot and go into the cars at his first opportunity.[70]

Riding on Tender.—For a person to ride by choice upon an improper and dangerous part of a train—as, upon the tender, instead of in the car appropriated for persons of his class—is contributive negligence.[71]

§ 2774. Riding in Car in Front of Engine.—Where the defendant railway company agreed to carry a lumber company's employees to and from work, an employee, by riding on a car which was being pushed in front of the engine, was not guilty of contributory negligence.[72]

§ 2775. Riding in Freight Car.—Where the presence of a passenger upon a freight train was not with the consent of the railway company, and contributed to his injury he can not recover for such injury, where there is no evidence of gross negligence on the part of the railway company.[73] One who, without the request of the carrier, placed himself on its car for the purpose of riding to his work on the road, riding dangerously near to the engine, and on cars heavily loaded with iron rails and wooden ties, can not recover for injuries received from the derailment of defendant's train.[74] Where a passenger was injured while riding in a freight car, he assumed the risks incident to the movement of such trains carefully managed, including the necessary bumping and coupling, but did not assume the risk of any unnecessary bumping, particularly when resulting from the negligence of train operatives; the carrier being required to exercise the utmost care consistent with the prudent ordinary operation of such trains.[75] Where a passenger was injured by being in a freight car when

67. Brown *v.* Scarboro, 97 Ala. 316, 12 So. 289.

68. Claiborne *v.* Missouri, etc., R. Co., 53 S. W. 837, 57 S. W. 336, 21 Tex. Civ. App. 648.

69. Riding on pilot.—A. was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box car was assigned to their use. Although on several occasions forbidden to do so, and warned of the danger, A., on returning from work one evening, rode on the pilot or bumper of the locomotive, when the train, in passing through a tunnel, collided with cars standing on the track, and he was injured. There was ample room for him in the box car. All in it were unhurt. Held, that, as A. would not have been injured had he used ordinary care and caution, he is not entitled to recover against the company. That the knowledge, assent, or direction of the agents of the company as to what he did at the time in question, is immaterial. The company, although bound to a high degree of care, did not insure his safety. Railroad Co. *v.* Jones, 95 U. S. 439, 24 L. Ed. 506.

70. Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

71. Riding on tender.—Doggett *v.* Illinois Cent. R. Co., 34 Iowa 284.

72. Riding in car in front of engine.—Trinity Valley R. Co. *v.* Stewart (Tex. Civ. App.), 62 S. W. 1085.

73. Riding in freight car.—Gulf, etc., R. Co. *v.* Campbell, 76 Tex. 174, 13 S. W. 19.

74. Moss *v.* Johnson, 22 Ill. 633.

75. Louisville, etc., R. Co. *v.* Campbell (Ky. App.), 122 S. W. 848.

it was being switched, the fact that he was traveling on the train under a contract that he would not be in any freight car while switching was being done would not bar a recovery, unless his negligence in not being aware that switching was being done contributed to the accident.[76] A passenger purchased a ticket to his destination, but, after traveling a part of the distance, stopped over, giving up his ticket, and receiving a check in exchange. He afterwards got on a freight train, and continued his journey in a caboose used for transporting trainmen and occasional passengers. His fare was at first demanded and paid, but afterwards the conductor repaid him the money, and allowed him to ride on his check. In an action to recover for injuries, the carrier could not claim in defense that the passenger was negligent in leaving the passenger train and riding on the freight train.[77]

Negligence Per Se.—The court is not justified in holding a passenger on a freight train guilty as a matter of law of negligence contributing to injuries received by him from the shunting of cars against the one in which he was riding, on the ground that he failed to guard against the danger, unless it clearly appears that he did not take the precautions usually exercised by ordinarily prudent men under the same circumstances.[78]

Against Direction of Employee.—A passenger, who was injured in the wreck of a train, caused by its leaving the track, was not guilty of contributory negligence by reason of his sitting out on a flat car, though the conductor had told him he would rather he would go into a box car next behind, as it was more comfortable, safer, and better there.[79]

Contract to Ride on Caboose.—A passenger of a freight train, who voluntarily rides in a box car, instead of in the caboose, can not recover for an injury sustained while occupying that position, which would not have been sustained otherwise.[80] The carrier is liable to a person who was a passenger on a freight train and was injured while riding on a freight car instead of the caboose, if it was not shown that the regulations prohibiting passengers from riding elsewhere than in a caboose were conspicuously posted, as required by the statute providing that, in case any passenger shall be injured while on the platform of a car or on any freight car in violation of the printed regulations posted at the time in a conspicuous place inside of its passenger cars, the company shall not be liable.[81]

Logging Train.—One riding on the logging train of a logging company, with its implied consent, does not assume the risk of collision, through its negligence, with another of its trains.[82]

76. Hardin *v.* Fort Worth, etc., R. Co. (Tex. Civ. App.), 100 S. W. 995.

77. Edgerton *v.* New York, etc., R. Co., 35 Barb. 193, affirmed in 39 N. Y. 227.

78. Negligence per se.—Moore *v.* Saginaw, etc., R. Co., 72 N. W. 1112, 115 Mich. 103.

Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box and several flat cars. Deceased and others were riding on a flat car next the engine, to the knowledge of the conductor and brakemen, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car, but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured except those on the flat car. Held, that the questions of negligence, and absence of contributory negligence, were for the jury. Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Zuendt *v.* Missouri Pac. R. Co. (Mo.), 10 S. W. 491.

79. Against direction of employee.—Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

80. Contract to ride on caboose.—Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641.

81. Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

82. Logging train.—Harvey *v.* Deep River Logging Co. (Ore.), 90 Pac. 501.

Persons were allowed to ride on a logging train without charge, for which purpose a flat car was provided. A person while so riding took his seat on a chain box on the rear of the tender, where a notice was posted warning persons against riding. He was also notified by a brakeman to leave, and take a position

Riding in Caboose.—In an action against a railroad company for injuries caused by defendant's negligence, while plaintiff, with the permission of the conductor, was riding in a caboose attached to the train, the fact that the train was a mixed passenger and freight train, and that plaintiff was in a car not intended for the use of passengers, raises no legal presumption of negligence on his part.[83] A passenger in a freight car who had been drinking, and who, instead of taking a perfectly safe seat designed for passengers, along the sides of the car, sat in the conductor's loose chair tipped up against a box within three inches of the open side door, was thrown out by the jar of the cars running together, because of the train running at thirty-five miles an hour around sharp curves. It was held, that he was guilty of contributory negligence.[84]

Riding on Top of Car.—A passenger's negligence in improperly riding on the top of a car can not preclude his recovery for injuries sustained in a collision, where it was occasioned by the reckless and willful misconduct of defendant's servants in setting out such car on a switch track having a down grade without any brakes applied, leaving it to freely move down the incline and collide with a train moving on the main track in the direction the set-out car was bound to take.[85]

§ 2776. Riding in Baggage, Express or Mail Car.—A passenger who, without the knowledge or consent of the conductor of the train, rides in the baggage, mail, or express car, can not maintain an action against the railroad company for injuries sustained which would not have happened to him had he been in a passenger car; nor can he be heard to contend that the conductor ought to have discovered and ordered him out.[86] Where a passenger would not have been injured by the wrecking of the train if he had not been in the express car in violation of the known regulations of the company, he can not recover for his injuries, notwithstanding the passenger's negligence did not contribute to the wrecking of the train.[87] Where a passenger was injured because of his

on the flat car, which he did, but afterwards returned to the chain box, and was there killed in an accident. Persons riding on the flat car escaped uninjured, by jumping at the time of the accident. An action was commenced for damages for the death of deceased. Held, that a nonsuit was properly granted. White *v.* Peninsular R. Co., 54 Pac. 999, 20 Wash. 132.

83. Riding in caboose.—Creed *v.* Pennsylvania R. Co., 86 Pa. 139, 27 Am. Rep. 693.

In an action by a passenger on a freight train for injuries from a collision while he was occupying the caboose cupola, where it appeared that others not occupying the cupola were also injured, a charge that, if his act in occupying the cupola contributed "in any way whatsoever" to the injury, he could not recover, though defendant was grossly negligent, etc., was erroneous, since it was only such negligence of plaintiff as contributed proximately to produce the injury that would bar his recovery. Reid *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

84. In Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

85. Illinois Cent. R. Co. *v.* Brown, 28 So. 949, 77 Miss. 338.

86. Riding in baggage, express or mail car.—Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

If a passenger on a train, without the direction of the company, leaves his seat in a passenger coach, and goes into the baggage car, where he is killed by its being overturned, he will be guilty of such a high degree of negligence as to defeat a recovery by his personal representative against the company, unless the latter is guilty of wanton or reckless misconduct on its part. Peoria, etc., R. Co. *v.* Lane, 83 Ill. 448.

Going to baggage car to get water.—A passenger on a railway train went into the baggage car to get water, none being provided elsewhere for the passengers, and had been there five minutes when the accident occurred. Held, that he was guilty of contributory negligence. Houston, etc., R. Co. *v.* Clemmons, 55 Tex. 88, 40 Am. Rep. 799.

In order to relieve a passenger from the presumption of contributory negligence ordinarily arising when one is injured by a collision when riding in the baggage car instead of in a passenger car, it is not necessary he should be there by an express invitation or direction from the conductor. If he has usually been permitted, for reasons, to ride there, that is enough. O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. 239, 98 Am. Dec. 336.

87. Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

position in an express car without the knowledge or consent of the conductor, he can not excuse himself from contributory negligence on the ground that the conductor should have discovered and ordered him out.[88] But the fact that a passenger went into the baggage car, where passengers were not allowed to go, does not show negligence, though it appeared from his own admission that he knew that the rear end of the train was the safest.[89]

Proximate Cause.—Unless a passenger's going into the express car was the proximate cause of injuries received by him, or increased his risk, his doing so is not a defense to an action for the injuries.[90]

Rules and Regulations.—The fact that a passenger on a railroad is, when injured, in a baggage car, in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury.[91]

Custom and Usage.—In an action for injuries to a passenger, while riding in the baggage compartment of a railroad train, evidence that it was customary for passengers between certain stations to ride in the baggage compartment of the car and to have their tickets punched and taken up by the conductor while there was properly excluded.[92]

Passenger Cars Crowded.—A carrier of passengers is not allowed to overcrowd its vehicles or cars, and a passenger who goes on a train for passage is not negligent in occupying a position in the baggage compartment of a combination car where there are no occupied seats in the passenger compartments or coaches.[93]

Baggage Car Used as Smoking Car.—A charge in an action for damages for personal injuries, which instructs that if the injured party was riding in a baggage car which was used by the railroad as a smoking car he may recover, but that if at the time of the accident he was occupying a position of obvious danger he could not recover, is not contradictory.[94]

Invited by Employee.—A passenger who, knowing of a rule of a railroad company forbidding him to ride in any other than passenger cars, rode in an express car, and received injuries which he would not have sustained had he been in any other car, was guilty of contributory negligence, regardless of the knowledge of the conductor that he occupied such position, and his failure to warn him of his danger or to enforce the rule.[95] In an action against a railroad company for wrongful death, the fact that intestate, a soldier, was riding in the baggage car, did not affect defendant's liability; intestate being there under orders from his commanding officers, and with the consent of the employees in charge of the train.[96] Where plaintiff left the passenger compartment of a roilroad car and went into the baggage car, where he was when he was injured in the collision, the fact that the conductor received and punched his ticket while he was in the baggage car did not constitute an acquiescence on the part of the

88. Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208.

89. Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843.

90. Proximate cause.—Fremont, etc., R. Co. *v.* Root, 69 N. W. 397, 49 Neb. 900.

91. Rules and regulations.—Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444.

A passenger, while riding in the baggage car of a passenger train, received injuries from a collision. He had knowledge of the fact that a rule of the company forbade the riding of passengers in the baggage car. He was there, however, with the implied consent of the conductor of the train. Had he been in any other car of the train he would not have been injured. Held, that he could not recover damages. Pennsylvania R. Co. *v.* Langdon, 92 Pa. 21, 37 Am. Rep. 651.

92. Custom and usage.—Bromley *v.* New York, etc., R. Co., 79 N. E. 775, 193 Mass. 453, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

93. Passenger cars crowded.—Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

94. Baggage car used as smoking car.—East Line, etc., R. Co. *v.* Smith, 65 Tex. 167.

95. Invited by employee.—Florida, etc., R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 32 Am. St. Rep. 17, 16 L. R. A. 631.

96. Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64.

carrier to his riding in an exposed position in such car.[97]

Mail Clerk.—Where the plaintiff, who was the United States mail agent, who was riding in the proper place in his car, the fact that such car was more dangerous to ride in than other cars in no way affects the right of recovery.[98] A postal clerk of the railway mail service, holding a photographic commission entitling him to ride as a passenger on a railroad train while on duty and in returning home, who, with the conductor's permission, rides, while off duty, on his way home, in the postal car, is not per se guilty of contributory negligence so as to defeat an action for his death, caused by a collision, though the postal car was subject to greater risks than the cars intended for passengers, and, if he had remained in the smoking car, in which he commenced his journey, he would probably have escaped injury.[99]

Intoxicated Person.—Where a railroad accepts an intoxicated person as a passenger, who is incapable of caring for or preventing injury to himself, knowing him to be in that condition, and fails to exercise such care as a reasonably prudent man would exercise under the circumstances to prevent him from falling from the open door of a baggage car after staggering about in the car, and after such knowledge of his condition, the company is liable for his injuries occasioned by the fall, since the passenger's negligence in occupying a dangerous position under the circumstances does not excuse defendant's negligence in the care of him.[1]

Person Accompanying Invalid.—Where the custodian of a lunatic, on his way with her to the asylum, was permitted to ride with her in a railroad baggage car by the conductor, by reason of the fact that the door of the passenger car was not sufficiently wide to permit the carrying of the lunatic into the car in an invalid chair, and such custodian was injured by being thrown from a tool box on which he was seated by a sudden lurch of the car, the fact that he was riding in the baggage car was not of itself such contributory negligence as relieved the carrier of any responsibility for his safety.[2]

Injured by Collision.—While a passenger who rides in a baggage car assumes the risk of any injury from dangers inherent in the construction or use of the car, he does not of injuries from a collision with another train.[3] Where in an action to recover for personal injuries resulting from a collision, it ap-

97. Bromley *v.* New York, etc., R. Co., 193 Mass. 453, 79 N. E. 775, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

98. Mail clerk.—Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

The fact that cars were equipped with new coupling springs and thus required more than usual force to couple cars does not charge railway mail clerk at work while cars were being switched, with negligence in not having ceased his work for the time, where the use of such new springs was not common and he was not notified that they were about to be used. Houston, etc., R. Co. *v.* McCullough, 22 Tex. Civ. App. 208, 55 S. W. 392, affirmed in 93 Tex. 731, no op.

99. Baltimore, etc., R. Co. *v.* State, 72 Md. 36, 18 Atl. 1107, 20 Am. St. Rep. 454, 6 L. R. A. 706.

1. Wheeler *v.* Grand Trunk R. Co., 50 Atl. 103, 70 N. H. 607, 54 L. R. A. 955.

2. Person accompanying invalid.—Chesapeake, etc., R. Co. *v.* Jordan, 76 S. W. 145, 25 Ky. L. Rep. 574.

3. Injured by collision.—A passenger, who was smoking, entered the smoking compartment of a combination car, which was the rear car of the train, and, finding every seat occupied, passed into the baggage compartment, at the rear of the car. There was a rule of the railroad company requiring those in charge not to permit passengers to ride in baggage cars, but of this rule he had no knowledge. He and other passengers had frequently before been permitted to ride therein without objection, and the conductor had accepted and punched their tickets while in that compartment, as he did on the occasion in question. By the company's negligence, a train, proceeding in the same direction on the same track, ran into the rear of the train on which the passenger rode, and he was thereby injured. Held that, by taking his position in the baggage compartment, the passenger took the risk of any injury from dangers inherent in the construction or use thereof for the purpose of carrying baggage; but that his conduct, even if it contributed to an injury received from the collision, could not be deemed to have been negligent, and that a charge to that effect was not erroneous. New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283, 21 Atl. 1052.

peared that a passenger left the passenger car and went into the baggage car, and that the sleeping car went through the passenger car on which he had been a passenger, killing eight persons and injuring others, the question of his negligence in going into the baggage car is for the jury.[4] The fact that a person injured was riding in the baggage car, with the knowledge of the conductor, or that he was riding free, will not preclude him from a recovery for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger car.[5]

Getting Baggage.—Where a passenger on a railway train went to the baggage car after he had reached his station, and was fatally injured by the moving of the train while assisting defendant's employees in getting out his baggage, it was for the jury to determine whether he was negligent.[6]

§ 2777. Riding in Car Intended for Colored Persons.—In an action against a railroad company for the death of a passenger, caused by the engine striking cattle on the track and being forced through the car in which deceased was riding, which car was the one provided exclusively for colored passengers, though deceased, a white person, remained in this car in violation of the rules of the company and the directions of the conductor. It was held that the deceased was not, as a matter of law, guilty of contributory negligence in riding in the car reserved for colored passengers.[7]

§ 2778. Riding on Hand Car.—A person who voluntarily places himself in a dangerous position upon a hand car, to be carried as a passenger, assumes the risk incident to such mode of conveyance, and if injured can not recover from the railroad company.[8]

§ 2779. Riding on Top of Car.—A passenger's negligence in improperly riding on the top of a car will defeat a recovery for injuries sustained by him by the mere negligence of the carrier.[9] An employee of a railroad company is guilty of contributory negligence where he was injured while riding on the top of a freight car in pursuance of a custom, known to his foreman, instead of in the cars provided for the transportation of workmen.[10] For a shipper of poultry

4. Webster *v.* Rome, etc., R. Co., 40 Hun 161.

5. Washburn *v.* Nashville, etc., R. Co., 40 Tenn. (3 Head) 638, 75 Am. Dec. 784.

6. Getting baggage.—International, etc., R. Co. *v.* Ormond, 64 Tex. 485.

7. Riding in car intended for colored persons.—Florida, etc., R. Co. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410.

8. Riding on hand car.—Cincinnati, etc., R. Co. *v.* Morley, 4 O. C. C. 559, 2 O. C. D. 706.

9. Riding on top of car.—Illinois Cent. R. Co. *v.* Brown, 28 So. 949, 77 Miss. 338.

A passenger killed in a derailment while riding on top of a box car, instead of in the caboose, which remained on the track, no one therein being injured, was negligent. Beyer *v.* Louisville, etc., R. Co., 21 So. 952, 114 Ala. 424.

Where the top of a caboose was not provided for the carriage of passengers, and was obviously a place of danger, it was error, in an action by a passenger for injuries received while riding there, to refuse to instruct that plaintiff could not recover, though he went there with the conductor's consent, and because there was no room inside, although it was charged that no recovery could be had if plaintiff "was negligent in going upon the top of the car, and remaining there until he was injured, and his negligence was the proximate cause of the injury." St. Louis, etc., R. Co. *v.* Rice, 9 Tex. Civ. App. 509, 29 S. W. 525.

Neither on general principles, nor under Rev. St. 1899, § 1080, providing that if a railroad passenger shall be injured while on the platform, or in any baggage, wood, or freight car, in violation of printed regulations posted inside of the passenger cars, the company shall not be liable if at the time it furnished room inside its passenger cars sufficient for passengers, is a passenger justified in taking a position, on account of the crowded condition of the passenger car, on the top of a freight car, holding on to a brake with his legs dangling over the end of the car. Chaney *v.* Louisiana, etc., R. Co., 75 S. W. 595, 176 Mo. 598.

10. Plaintiff, a member of defendant's track repairing gang, was injured by the derailment of a car of the train on which plaintiff was being carried to his home by defendant after termination of the day's work. Defendant provided two box cars and a caboose in which to carry plaintiff

on a freight train to attempt to get on top of the box car next to the caboose, for the purpose of walking over the tops of the cars to the car containing his shipment while the train is in motion, is manifestly dangerous; and he can not recover for a resulting injury, unless it is clear that it was necessary for him to do so.[11] The plaintiff, who was in charge of stock on a freight train, went forward while the train had stopped to examine his stock. The train started suddenly, and, finding that from its speed he could not board the caboose from the ground, he got upon the top of the train to walk back to the caboose, as it was customary for cattle men to do under the circumstances. He did not look towards the front of the train, and was struck by a bridge, of whose location he had no knowledge or warning, and was severely injured. He could not be said, as matter of law, to be guilty of contributory negligence.[12]

On Top of Caboose.—In an action for death of a passenger while riding on top of a caboose car, even if the passenger left the coach and went on top of the caboose at the suggestion of a brakeman, and the conductor saw him there while the train was stopped at the station, the passenger was guilty of gross negligence in remaining on top of the car after the train started out, and in riding thereon, since the danger of riding on a caboose car is so obvious that a prudent man should not take the risk, unless some reasonable necessity compels it.[13]

§ 2780. Passenger Accompanying Live Stock.—In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under a drover's pass, the question of

and his fellow workmen, but plaintiff, in accordance with a prior custom, known to his foreman, climbed on top of one of the cars and rode there, and at the time of the derailment was either thrown or jumped to the ground, and sustained the injury complained of. No one else was injured, and if plaintiff had remained in the cars or caboose he would not have been injured. Held, that plaintiff was negligent as a matter of law, precluding a recovery. Winters *v.* Baltimore, etc., R. Co., 163 Fed. 106.

11. Kimball *v.* Palmer, 80 Fed. 240, 25 C. C. A. 394.

Deceased was assisting in a shipment of cattle, and when the train was taken charge of by defendant the caboose was taken off, compelling deceased and others to ride on top of the cars. It was early in the morning, and quite dark, and as the train entered the stock yards it slowed up, to allow the conductor to enter the office and get orders. Almost immediately after the conductor signaled to go ahead deceased fell from the train while attempting to walk from one car to another. The train was running very slowly and smoothly, and there was no unusual jolt or jerk. Held, that deceased assumed the risk in stepping from one car to the other. Neville *v.* St. Louis, etc., R. Co., 59 S. W. 123, 158 Mo. 293.

12. Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 5 C. C. A. 551.

Plaintiff, traveling on a cattle train with his cattle, with the acquiescence of the train hands, climbed on top of a car. The car was run into by another train, whereby plaintiff received injuries. Plaintiff and other cattle men had before ridden on top of cars, with the consent of the train hands, but such riding was prohibited by order of the company. He testified that he knew it was a dangerous place to ride. Held, that the question of contributory negligence was one for the jury, and there was no error in refusing to direct a verdict for defendants. New Orleans, etc., R. Co. *v.* Thomas, 60 Fed. 379, 9 C. C. A. 29.

13. On top of caboose.—McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 1071, 81 S. C. 100, 18 L. R. A., N. S., 763.

Where the top of a caboose was not provided for the carriage of passengers, and was obviously a place of danger, it was error, in an action by a passenger for injuries received while riding there, to refuse to instruct that plaintiff could not recover, though he went there with the conductor's consent, and because there was no room inside, although it was charged that no recovery could be had if plaintiff "was negligent in going upon the top of the car, and remaining there until he was injured, and his negligence was the proximate cause of the injury." St. Louis, etc., R. Co. *v.* Rice, 9 Tex. Civ. App. 509, 29 S. W. 525.

Where a passenger was injured by an overhanging water spout while riding on top of a caboose, and it was not shown in an action for such injuries that the top of the car was prepared by the company for passengers, it was error to charge that it was defendant's duty to use ordinary care to construct and maintain its water tanks and fixtures so as to avoid injuries to its passengers. St. Louis, etc., R. Co. *v.* Rice, 9 Tex. Civ. App. 509, 29 S. W. 525.

the existence of such contributory negligence as would defeat a recovery is one of fact, to be determined by the jury.[14]

With Consent of Carrier.—Where a railroad company, by its conduct, gives cattle men to understand that its trainmen are authorized to consent to their riding on the cars with their cattle, and the trainmen do so consent, such consent is the consent of the company.[15]

Riding on Engine.—Though an engine drawing a stock train is not the place provided for shippers traveling on a drover's pass in which to ride and a caboose is provided in which they are to ride, it is not negligence as a matter of law for a shipper to ride on the engine.[16] In an action against a railroad company for injuries to plaintiff, received while riding in a car with horses of which he had charge, though the contract of shipment of the horses forbade plaintiff to ride in the car with them, it was proper to refuse instructions to the effect that, if plaintiff was injured while riding in the same car with the horses, he could not recover, since the question whether defendant waived the prohibition against such riding is for the jury.[17]

Riding in Caboose.—It is not per se contributory negligence for a man traveling in charge of a car of live freight to be in the caboose of the train instead of in such car.[18] In a suit for personal injuries it appeared that plaintiff was accompanying his stock on a stock train; that, at the point where the injury occurred, the stock train was taken into the custody of another road for the remainder of the journey; that, while it was being made up into the train of this second road, plaintiff went off to get lunch, and afterwards came back to the yards, and asked a man he saw there where his train was. This man pointed out the plaintiff an engine and caboose. Plaintiff got on his caboose, and, finding it locked and dark, stayed on the platform, though the engine was switching it around. While there, he got his foot caught and mashed. This was not the caboose that belonged to his train. The caboose belonging to the stock train was in another part of the yards, and was open so that passengers could get

14. Passenger accompanying live stock.—Omaha, etc., R. Co. *v.* Crow, 47 Neb. 84, 66 N. W. 21.

15. With consent of carrier.—New Orleans, etc., R. Co. *v.* Thomas, 60 Fed. 379, 9 C. C. A. 29.

16. Riding on engine.—Missouri, etc., R. Co. *v.* Avis, 41 Tex. Civ. App. 72, 91 S. W. 877, judgment affirmed in 100 Tex. 33, 93 S. W. 424.

17. By invitation.—Chicago, etc., R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380.

18. Riding in caboose.—Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368.

In an action against a railroad for personal injuries sustained by a shipper while riding on a pass, accompanying stock, the evidence showed that the train arrived after dark at a place where it was to be broken up, and the cars distributed into other trains; that plaintiff, without seeking information at the depot or office, started out along the tracks to find the train which was to carry him to his destination, and was finally directed by a man in the yard to a certain caboose, but was not advised or encouraged to get aboard. The caboose was locked, was being thrown about by a switch engine in connection with other cars, and was not, in fact, the one intended for his train. He got upon the platform, however, and, while so riding, was thrown off by a sudden concussion. The concussion was not an unusual one, nor did the engineer know that plaintiff was there. Several witnesses testified to admissions made by plaintiff, at the time or soon afterwards, that the injury was due to his own carelessness. Plaintiff said he got upon the caboose thinking it the safest place for him to be. He did not remember making the admissions, but would not swear that he had not made them. The pass exempted defendant from all liability, except for gross negligence. Held, that plaintiff was not entitled to recover. Chicago, etc., R. Co. *v.* Hawk, 42 Ill. App. 322.

Riding in cupola of caboose.—Plaintiff, riding on a stock-driver's pass, which provided that "parties so passed must ride in the caboose attached to the train carrying the stock," took a seat on the cupola of the caboose, which rose several feet above its roof, without guards of any kind, and while so seated a switch engine was coupled to the caboose, causing a jar, which threw plaintiff from the cupola. Held, that the jar was not prima facie evidence of negligence on the part of defendant, and that plaintiff, having been guilty of contributory negligence, could not recover. Tuley *v.* Chicago, etc., R. Co., 41 Mo. App. 432.

inside. There was no negligence on the part of the company, but that plaintiff was negligent, and could not recover.[19]

Riding in Cattle Car.—A person having cattle on a train, who, with time to do so, fails to get aboard the caboose, but boards a freight car, and is injured while riding thereon, is guilty of contributory negligence, though defendant negligently failed to bring the caboose within a reasonable distance of the depot.[20] Where a cattle transportation contract required plaintiff, who accompanied the stock, to load and unload, feed and water, and take care of the stock while being transported and exempted the carrier from any liability with reference thereto except in the actual transportation of the same, and there was neither rule nor provision requiring that plaintiff should ride in the caboose, but, on the contrary, during five days of the transportation before the accident in which plaintiff was injured he was permitted without objection to ride in the car with the cattle, the transportation contract of itself was sufficient to charge the carrier with notice that plaintiff was on its train at the time with his stock, and the failure to account for him in the caboose was sufficient to charge the carrier with notice that he was riding in the stock car.[21] Where plaintiff, while traveling on a freight train, in charge of stock, under a contract requiring him to "take care of his stock" and to "ride in the caboose," went into a car, while at a stopping place, to water his stock, by the direction of the conductor, and while there the train was started, and he was afterwards injured, it was a question for the jury whether he was given sufficient time to feed and water his stock; and, if not given enough time,—it being impossible to get back to the caboose until the next stopping place, before reaching which he was injured, he was not guilty of contributory negligence.[22] A contract made by a railroad company for the carriage of a fine mare gave free transportation for a part of the distance for an attendant, in consideration of which it was provided that

19. Chicago, etc., R. Co. *v.* Hawk, 36 Ill. App. 327.

20. Riding in cattle car.—Player *v.* Burlington, etc., R. Co., 62 Iowa 723, 16 N. W. 347.

Defendant, who was transporting live stock for plaintiff, agreed to carry him in charge of the stock on the train where it was carried. When in the car with the stock, while it was being switched to be put into the train, he was injured by its being bumped. There was evidence that after the accident the conductor asked plaintiff if he was all right, and could go ahead with the car, and that, on giving an affirmative reply, he was allowed, without protest, to ride in the car to destination; also that a brakeman just before switching knew that plaintiff was in the car, and asked if everything was all right, stating that they were about to hitch on. Held that, while no express contract entitling plaintiff to ride in the car with the stock, instead of in the passenger car on the train, was shown, it might be found that such was the contract, or that the conduct of defendant's employees was such as to justify plaintiff in inferring that he was rightly in the car, so as to entitle him to recover. Leasum *v.* Green Bay, etc., R. Co., 120 N. W. 510, 138 Wis. 593.

21. Judgment, 74 N. E. 1014, affirmed in Lake Shore, etc., R. Co. *v.* Teeters, 77 N. E. 599, 166 Ind. 335, 5 L. R. A., N. S., 425.

Plaintiff was traveling on a train which had with it a stock car carrying horses for him, his duty under his contract of carriage being "to feed, water, and take care of the horses." He sometimes rode on the stock car, but was allowed to ride on the passenger car whenever he wished. At the time the accident occurred he had left the passenger car to feed his horses while the train stopped at a station, and had not finished when the train started, after stopping fifteen or twenty minutes, instead of forty-five minutes, the usual time. Held, that he was not guilty of contributory negligence by being on the stock car at the time of the accident. Florida R., etc., Co. *v.* Webster, 25 Fla. 394, 5 So. 714.

Where a contract for the shipment of live stock provided for the free transportation of the person in charge of the stock, and required the shipper to furnish bedding and exempted the carrier from liability for the burning of hay, straw, or other material used for food or bedding, the fact that the person in charge of the stock rode in the car with it, and was there injured, did not preclude him, either upon the ground of contributory negligence or assumption of risk, from recovering from the carrier. Evansville, etc., R. Co. *v.* Mills, 77 N. E. 608, 37 Ind. App. 598.

22. Judgment, 69 Ill. App. 363, affirmed in Illinois Cent. R. Co. *v.* Beebe, 50 N. E. 1019, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253.

the mare should be in his sole charge, and the company should not be responsible for her protection, whether from theft, heat, jumping from the car, or injury she might do herself. It was the custom on that road for a person in charge of fine stock to ride in the same car with such stock, and the person in charge of the mare so rode, with the knowledge of the train officials, and without objection from them. While so riding, the car was derailed through the negligence of those in charge of the train, and the attendant was injured, though the caboose remained on the track. The contract must be construed as one for the carriage of the attendant in the car where he was, and that he was therefore not guilty of negligence, in not riding in the caboose, which would defeat his recovery for the injury.[23] Whether one accompanying live stock had a right to ride in the car with the stock while the train was in motion was immaterial, where the injury to him occurred while he was in the car when it was standing still on the tarck.[24] A shipper of live stock, who signed a written contract with the railway company to remain in the caboose, can not recover for injuries received while voluntarily standing on a moving car.[25]

In Pursuance of Contract.—The plaintiff's intestate, in pursuance of a contract for the carriage of horses, and in accordance with the custom in such case, was riding in the same car with the horses, in order to care for them. In an action to recover for his death resulting from a collision caused by defendant's gross negligence, it was held that though the position taken by the deceased was dangerous, since he did not voluntarily place himself in that position, he was not guilty of contributory negligence, precluding recovery.[26]

In Violation of Contract.—In the absence of gross negligence on the part of the company, a recovery could not be had for the death of a shipper of stock who rode in the car with the stock against the objection of the conductor and in violation of the contract of shipments, when death resulted solely from his riding in that car.[27] It was no evidence of a waiver by the company of a stipulation prohibiting plaintiff's intestate from riding in the car with the stock shipped by him, that witnesses had in several cases ridden in the car with stock shipped by them over defendant's road, in the absence of evidence that their contracts prohibited them from riding with the stock, or that defendant knew of their violation of the contracts.[28]

At Intermediate Stop.—A regulation by which a passenger with live stock on the freight train is required to remain on the cars which contain his stock is not so transgressed by his being in another part of the train when it is at rest as to make him a contributor to his own injury by that train's being run into by another.[29] Plaintiff was traveling on defendant's train in charge of cattle, and, when the train stopped to take water, plaintiff, as was customary, left the caboose to look after the stock. The train started before plaintiff returned to the caboose, whereupon he got on the top of the train, started towards, the caboose, and was struck by a pipe attached to a water tank. In an action to recover for his injuries, it was not error to admit evidence that plaintiff had no knowledge of the movement of the train in time to enable him to reach the caboose before the train started.[30] Where a trainman in authority tells a shipper of live stock that the train will remain standing for some time at a certain point, and directs him to look after the stock at that time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for their stock.[31]

23. Chicago, etc., R. Co. *v.* Lee, 92 Fed. 318, 34 C. C. A. 365.

24. Bolton *v.* Missouri Pac. R. Co., 72 S. W. 530, 172 Mo. 92.

25. Ft. Scott, etc., R. Co. *v.* Sparks, 55 Kan. 288, 39 Pac. 1032.

26. In pursuance of contract.—Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

27. In violation of contract.—Heumphreus *v.* Fremont, etc., R. Co., 8 S. D. 103, 65 N. W. 466.

28. Heumphreus *v.* Fremont, etc., R. Co., 8 S. D. 103, 65 N. W. 466.

29. At intermediate stop.—Pennsylvania R. Co. *v.* McCloskey, 23 Pa. 526.

30. Missouri Pac. R. Co. *v.* Callahan (Tex.), 12 S. W. 833.

31. Receivers *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

§ 2781. Passenger Accompanying Property.—A strong and well-built show car, placed nearest the engine, is not such a place of known danger as will render a passenger on the train, employed by a theatrical company to look after its show property, guilty of contributory negligence, as a matter of law, in riding on the car in the performance of his duty.[32] But where a passenger was injured while riding in such car against the direction of the carrier and in violation of the contract for transportation, he can not recover.[33]

§ 2782-2784. Changing Position—§ 2782. In General.—A passenger who leaves the place provided for him, and goes to one of greater danger, can not hold a carrier on the plea that he or others believed it safe.[34] The fact that a passenger of a street car was injured while moving about on the floor of the car when it was in motion is not presumptive evidence of negligence on his part.[35]

Negligence Per Se.—It is not negligence per se in a passenger in a railroad car to leave his seat and pass to another part of the car.[36]

Degree of Care Required of Passenger.—If it appears that the passenger incurs additional risk of injury by leaving his seat, or if he selects a time for doing so when there is necessarily increased violence in the movement of the car, then he is under a duty to use such care for his safety as a prudent person would under the circumstances, and failure to do so would charge him with contributory negligence.[37]

At Intermediate Stop.—Whether a passenger, who attempted to move about in a car after a stop of ten minutes had been announced, and was injured by a sudden start, was negligent, was a question for the jury.[38]

Leaving Seat to Ask Information.—A passenger is not negligent in leaving his seat to ask information as to the destination of the car of the driver, there being no conductor.[39] The conductor of an elevated train, not being at

32. Passenger accompanying property.—Blake *v.* Burlington, etc., R. Co., 89 Iowa 8, 56 N. W. 405, 21 L. R. A. 559.

33. Plaintiff's intestate, a passenger, was injured by a collision. The car on which intestate was riding was owned by a theatrical company, of which intestate was an employee, and was being used in the transportation of scenery. In one end of the car were bunks for persons to sleep, with bedding. The train consisted of passenger coaches and a baggage car, and the show car, which was placed between the baggage car and engine Plaintiff claimed that by the contract for the transportation of the car, and by virtue of his intestate's employment, he had a right to ride in the car. The contract was not given in evidence, and it was shown that intestate had charge of the property which was being carried, but it was not shown that it was his duty to ride in this car. The intestate had a regular passenger's ticket, and he was informed by the conductor, when the ticket was taken up, that he must not ride in the car, as it was not a safe place, and was against the rules of the company. Intestate replied that he did not want to go back into the passenger car, as he would have to get up too early (the car was to reach its destination about 2:30 a. m.). Held, that it was not sufficiently shown that defendant contracted to carry the intestate in this car, nor was it shown that the conductor consented to his riding there. Blake *v.* Burlington, etc., R. Co., 78 Iowa 57, 42 N. W. 580.

A shipper who unnecessarily rides in a freight car containing his goods, instead of in the caboose provided for passengers, and who is injured by the negligent handling of the freight car, is guilty of contributory negligence, notwithstanding the trainmen gave him permission to ride in the freight car. Walker *v.* Green, 56 Pac. 477, 60 Kan. 289.

34. Changing position.—Chicago, etc., R. Co. *v.* Myers, 80 Fed. 361, 25 C. C. A. 486.

A carrier may require passengers to remain in places provided for them, and if a passenger unnecessarily goes to a place of greater danger, he assumes the risk. Chicago, etc., R. Co. *v.* Myers, 80 Fed. 361, 25 C. C. A. 486.

35. Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

36. Negligence per se.—Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005; Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845.

37. Degree of care required of passenger.—Burr *v.* Pennsylvania R. Co., 44 Atl. 845, 64 N. J. L. 30.

38. At intermediate stop.—Glidden *v.* New York Cent., etc., R. Co., 20 Wkly. Dig. 313.

39. Leaving seat to ask information.—Plaintiff's intestate was injured by the derailment of defendant's street car. His version of the accident was that, it being

his post of duty, the platform of the car, when the train stopped, plaintiff, a passenger, opened the door of the car so that she could attract his attention in time to have the gate opened before the train started. In an action for injuries sustained by the door swinging to upon one of her fingers, that the question of her contributory negligence was for the jury.[40]

Moving to Shady Side of Car.—A passenger on a mixed train was not negligent in leaving his seat to change to the shady side of the car as affecting the carrier's liability for injury to him caused by violent coupling of the cars, where the passenger cars had been waiting on the side track for about three-quarters of an hour; the passenger not being bound to look out of the window to ascertain whether a coupling was about to be made, since that would have been negligence, precluding recovery for any injury received in the act.[41]

While Cars Being Coupled.—A passenger on a mixed train, who left his seat in the coach to get a drink of water while the coach was standing still, and while cars were being shifted, was not guilty of contributory negligence precluding a recovery for injuries received by the coach receiving an unusual and sudden jolt by shifting cars.[42]

Going to Watercloset.—It is not contributory negligence for a passenger on a railway train to pass from his seat to the watercloset while car is in motion.[43] A passenger on a sleeping car who while groping in the dark for the watercloset, opened the door in the vestibule between two cars, and fell out, was not, as a matter of law, negligent in not calling the porter and waiting for a light.[44] A male passenger while the train was in motion left the day coach, having no closet for men, for the smoking car to use a closet therein, and was injured in consequence of the negligence of a porter in closing the door to the smoker and smashing his fingers. There was no regulation of the carrier forbidding passengers to go from one car to another. The injury to the passenger did not result from a risk assumed by him.[45]

To Avoid Danger.—A passenger who leaves his seat to avoid danger is not negligent.[46]

too dark to observe the destination of the car, he went to the front door to inquire, and was obliged to place one foot outside the door to make room for a passenger who came to make change, when, by failing to turn the switch at a junction, the car, which was going rapidly, was derailed, and he was thrown off. This was corroborated by other evidence, but the driver contradicted it in most important particulars, saying that intestate came onto the platform and remained there though he directed him to go inside. He also denied that the car was going rapidly. The switch turned automatically by the weight of the horse, and in this instance turned the wrong way, owing, as defendant alleged, to the driver's attention being diverted by intestate. Held, that there was no evidence of contributory negligence, as, there being no conductor, intestate was compelled to make his inquiries of the driver, and had a right to remain at the door until they were answered. Farrell *v.* Houston, etc., R. Co., 51 Hun 640, 4 N. Y. S. 597, 21 N. Y. St. Rep. 84.

40. Baker *v.* Manhattan R. Co., 118 N. Y. 533, 23 N. E. 885.

41. Moving to shady side of car.—Lancon *v.* Morgan's, etc., Steamship Co., 127 La. 1, 53 So. 365.

42. While cars being coupled.—Suttle *v.* Southern R. Co., 64 S. E. 778, 150 N. C. 668.

43. Going to watercloset.—Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

44. Piper *v.* New York, etc., R. Co., 89 Hun 75, 34 N. Y. S. 1072, 68 N. Y. St. Rep. 835.

45. St. Louis, etc., R. Co. *v.* Neely, 45 Tex. Civ. App. 611, 101 S. W. 481.

46. Plaintiff, a woman sixty-nine years of age, was injured while riding on defendant's street car by a collision between the car and an ice wagon approaching each other at right angles at a crossing. Plaintiff saw the wagon and the danger of collision just before it occurred, when she got up and stepped to the other side of the car as she saw other passengers doing; and, when the collision occurred, she was thrown forward onto the back of a seat, and the tongue of the wagon, entering the car, dragged down over her back and hip. Held, that plaintiff's act in moving from her position was done in an emergency not of her creation, and the fact that she made an unwise choice of means to escape did not constitute contributory negligence. South Covington, etc., St. R. Co. *v.* Crutcher (Ky. App.), 123 S. W. 268.

§ 2783. Going on Platform.—That an electric railway passenger unnecessarily and negligently left a place of safety on a car and walked to the rear platform while the car was moving so rapidly as to make his position highly and obviously dangerous to one of ordinary prudence, and when it was manifest that he would probably fall from the car, and that as a proximate consequence of such attempt plaintiff fell from the car and was injured, shows a good defense to his claim for such injury.[47]

§ 2784. Passing from One Car to Another.—It is not an act of negligence for a passenger to pass from one car of a railroad train to another car while such train is in motion, but the passenger assumes the risk incident to such undertaking from ordinary causes.[48] The liability of the railroad company in such cases depends upon proof of negligence on its part that rendered the passage more than ordinarily dangerous, which could not be anticipated by the passenger.[49] A carrier's duty to exercise the highest degree of care to passengers in the maintenance of its track and the operation of the train extends to a passenger attempting to pass from one car to another of a moving train.[50] If he is injured in his effort to go from one car to another, and the railway company is not guilty of negligence proximately causing the injury, the passenger can not recover.[51] Or, if the railway company is negligent, and the plaintiff could have avoided the consequences thereof by the use of ordinary care and diligence, he can not recover.[52]

Negligence Per Se.—It is not negligence per se for a passenger on a rapidly

47. Going on platform.—Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

Where the engineer of a heavy freight train, in a dark night, upon a trestle bridge, obeyed a signal to stop, and, from necessity, in starting, so slackened as to jerk the train, causing C., a passenger, who, without inquiry of the conductor as to the safety, had stepped upon the caboose platform, to be precipitated upon the ice twenty feet below, held, that C.'s carelessness, compared with the negligence, if any, of the railroad company, was so great as to preclude him from recovering damages for the consequent injury. Rockford, etc., R. Co. *v.* Coultas, 67 Ill. 398. See, Riding on Platform.

48. Passing from one car to another.—Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.; Choate *v.* San Antonio, etc., R. Co., 90 Tex. 82, 36 S. W. 247, 37 S. W. 319; Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239.

A passenger who undertakes to pass from one car to another while the train is in motion assumes the risk of injury caused by an ordinary movement of the train of good construction and repair over a track in good condition, but does not assume any risk of injury resulting from the carrier's negligence. St. Louis, etc., R. Co. *v.* Pollock, 93 Ark. 240, 123 S. W. 790.

A passenger is not guilty of contributory negligence merely because he attempts to pass from one car to another of a moving train to do a favor for a lady passenger. Galveston, etc., R. Co. *v.* Patillo, 45 Tex. Civ. App. 572, 101 S. W. 492.

A passenger has the right to occupy a car other than that to which he has been assigned, or in which he has taken a berth, and he is not guilty of contributory negligence in so doing. Illinois Cent. R. Co. *v.* Sandusky, 14 Ky. L. Rep. 767.

A passenger taking the train of the Galena & Chicago Union Railroad for a short distance, was told that the passenger car was full, and that he must ride in the baggage car. He commenced playing with his companions, obtruded into the passenger car, and when that car was thrown from the track he leaped from it, and was injured. Held, that he could not recover for the injury. Galena, etc., R. Co. *v.* Yarwood, 15 Ill. 468, followed in Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

For a traveler upon a railroad train to pass from one car to another while the train is in motion may generally be considered an act of negligence or imprudence. Cleveland, etc., R. Co. *v.* Manson, 30 O. St. 451.

49. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

50. Galveston, etc., R. Co. *v.* Patillo, 101 S. W. 492, 45 Tex. Civ. App. 572.

51. Hicks *v.* Georgia, etc., R. Co., 108 Ga. 304, 32 S. E. 880.

52. Blitch *v.* Central Railroad, 76 Ga. 333; Southern R. Co. *v.* Strickland, 130 Ga. 779, 61 S. E. 826; Auld *v.* Southern R. Co., 136 Ga. 266, 71 S. E. 426, 37 L. R. A., N. S., 518.

moving train to attempt to pass out of one car into another, in search of a seat.[53] In an action for damages for injuries sustained by being thrown from the platform while passing from one car to another, a charge that the jury are to determine from the facts whether the plaintiff was negligent in so doing, is correct.[54] The question whether a passenger injured by the sudden separation of the coaches of the train while he was passing from one car to the other to obtain water was in the exercise of ordinary care is one for the jury, and the grant of a nonsuit in such a case is erroneous.[55]

Request or Direction of Conductor.—Where, a passenger is directed by an agent of the carrier, acting in the line of his duty, to pass from one car to another while the train is in motion, and the danger in doing so is not obvious, he is not negligent in attempting to obey, and where injury results the carrier is liable.[56] In an action for injuries occasioned to a passenger who was proceeding

53. Negligence per se.—Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 833.

Plaintiff's intestate, while passing from one car in a railroad train to another while the train was in motion, was thrown by a sudden lurch of the train in rounding a curve and killed. Held, that deceased was not negligent per se, but it was a question for the jury. McAfee *v.* Huide-Koper, 9 App. D. C. 36, 34 L. R. A. 720.

Where, in an action against a carrier, it appears that plaintiff was thrown from the platform, where he had stopped while going from one car to another in search of a seat, it was not error to sustain an exception to that part of defendant's answer which alleged that the train was an excursion train, and that plaintiff took passage in consideration of the reduced fare, and with knowledge of the probable inconvenience incident thereto, and therefore assumed the risk, but did not allege that the plaintiff knew that he would not be provided with a seat, since leaving the car in search of a seat was not negligence in itself. Galveston, etc., R. Co. *v.* Morris (Tex. Civ. App.), 60 S. W. 813, judgment affirmed in 61 S. W. 709, 94 Tex. 505.

The act of crossing from one car platform to another on a moving train is not per se negligence, in the absence of a rule or notice warning the passenger from such act. A passenger who undertakes to go from one car to another while the train is in motion assumes only the risks incident to such undertaking in the ordinary operation of the train; and if such passenger is injured by being thrown from the platform by a sudden jerk, questions of negligence of the defendant in causing the injury and of the passenger's contributory negligence are for the jury. Auld *v.* Southern R. Co., 136 Ga. 266, 71 S. E. 426, 37 L. R. A., N. S., 518.

Some early cases may be found in other jurisdictions in which it is said that a passenger's attempt to cross the platforms between the coaches while the train was running was a negligent act. The later cases are harmonious that it is not per se negligence for a passenger to go from one coach to another while the train is in motion. The modern view results from the great improvement in constructing cars; the tacit or implied invitation by railroad companies in the make up of the trains, including a smoking car, a dining car, and other coaches, that the passenger may pass from one to the other for his comfort or convenience. A passenger who undertakes to pass from one coach to another while the train is running assumes the risk of injury caused by the ordinary movements of the train. Auld *v.* Southern R. Co., 136 Ga. 266, 71 S. E. 426, 37 L. R. A., N. S., 518.

54. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493, affirmed in 93 Tex. 720, no op.

Where plaintiff was thrown from the platform of a rapidly moving train in the act of passing from one coach to another by sudden jerk thereof, a peremptory charge to find for defendant is erroneous; plaintiff's negligence should have been left to the jury. Gaunce *v.* Gulf, etc., R. Co., 20 Tex. Civ. App. 33, 48 S. W. 524.

55. Cotchett *v.* Savannah, etc., R. Co., 84 Ga. 687, 11 S. E. 553.

56. Request or direction of conductor.—Central, etc., R. Co. *v.* Carleton, 163 Ala. 62, 51 So. 27.

When a party, acting under a suggestion from the conductor, attempts to pass from car to car, and is injured in consequence of the fact that the train was still moving, such party will not be debarred his right of recovery merely because he undertook to comply with the conductor's suggestion, and it is the province of the jury to determine both the nature and effect of the conductor's remarks; whether they were intended and understood as an order to change from car to car, or were by way of advice, and also whether such remarks affected the action of the parties, and caused them to act differently from what they otherwise would. Cleveland, etc., R. Co. *v.* Manson, 30 O. St. 451.

A female passenger in a railroad train, on a dark and rainy night, upon being ordered by an officer of the train to pass to a forward car, attempted to step from the platform of one car to that of the other, and in doing so fell and was in-

to another car under the direction of the conductor to secure a seat, and was either carelessly or purposely jostled by a brakeman and thrown from the train, it was proper to instruct that a passenger must follow the reasonable directions given him by the agent in charge of the railway train in respect to passing from one car to another while they were in motion for the purpose of finding a seat, but, if the passenger himself knows that the movement would be attended with danger, it would not in such case be his duty to obey the agent, and that a passenger may assume that the agents and servants are familiar with the operation of the cars and have reasonable knowledge of what is required for safety and protection while giving such directions.[57]

Custom and Usage.—Where it is the custom of passengers and conductors to pass from one electric car to another by swinging from the step of one to the other, and grasping the iron handles on the dashboards between them, and there is no rule against it, or reason to apprehend a current of electricity, one who does so, and is injured by electricity with which the handles are charged, is not, as a matter of law, guilty of contributory negligence.[58]

Injury from Jerking of Train.—Passenger passing from one coach to another while train is moving may recover for being thrown off by an ususual jerk since he merely assumes the risk of that nature incident from ordinary causes.[59] A passenger upon a train, was injured while passing from one coach to another as the train was, as he believed, about to stop for a station other than that of his destination, by being thrown from the platform of the coach by a sudden jerking motion. There was no evidence that the jerk was not such as is usual in stopping and starting trains under ordinary circumstances. The evidence was, as a matter of law, insufficient to warrant a recovery.[60] A passenger on defendant's train found the rear car full, and attempted to pass to the next car. The distance between the platform of the two cars was about six inches, and there was nothing to prevent her from stepping from one platform to the other; but, without looking, she placed her foot on the buffers just as the train started, and her foot was caught and injured. She had been lame for many years, and had often traveled on this train. The evidence also showed that the train started with a jerk, and did not stop as long as usual at that place, but the train had no fixed time to stay there, or for leaving. The passenger was held guilty of contributory negligence.[61]

stantly killed. Held, in an action against the railroad company for causing her death, that she was not so clearly guilty of negligence as to justify the court in taking the case from the jury. McIntyre *v.* New York Cent. R. Co., 43 Barb. 532, affirmed in 37 N. Y. 287, 35 How. Prac. 36.

Plaintiff took a wrong train, through his own fault, and was informed by the conductor, after the train started, that he could not stop at the point where he wished to go, but, by taking a rear car, could stop at a station beyond, and return to his destination later. Plaintiff, in crossing the platforms of the moving train to reach the rear car, collided with a passenger, and by a sudden but ordinary lurch of the train was thrown from the platform, and injured. Held, that the information given by the conductor was not such a command or direction as to justify plaintiff in going to the rear car at the risk of the railroad company, and that he could not recover. Stewart *v.* Boston, etc., R. Co., 146 Mass. 605, 16 N. E. 466.

57. Louisville, etc., R. Co. *v.* Kelly, 92 Ind. 371, 47 Am. Rep. 149.

58. Custom and usage.—Burt *v.* Douglas County St. R. Co., 83 Wis. 229, 53 N. W. 447, 18 L. R. A. 479.

59. Injury from jerking of train.—San Antonio, etc., R. Co. *v.* Choate, 22 Tex. Civ. App. 618, 56 S. W. 214, affirmed in 93 Tex. 718, no op.

In an action against a railroad company for personal injuries, plaintiff's evidence showed that, while rightfully on the platform, passing from one car to another as a passenger, a sudden and unusual jerk of the train, while it was running at a rate prohibited by law, threw him off his balance, and the railing gave way, and he fell. The evidence was contradicted by the employees of defendant and by certain doctors, to whom plaintiff had made statements. Held error to peremptorily direct a verdict for defendant, under the statute providing that the jury in all cases shall be the exclusive judges of the facts proved and of the weight of the testimony. Gaunce *v.* Gulf, etc., R. Co., 48 S. W. 524, 20 Tex. Civ. App. 33.

60. Choate *v.* San Antonio, etc., R. Co., 90 Tex. 82, 36 S. W. 247, 37 S. W. 319, affirming (Tex. Civ. App.), 35 S. W. 180.

61. Snowden *v.* Boston, etc., R. Co., 151 Mass. 220, 24 N. E. 40.

While Train Rounding Curve.—Where a passenger voluntarily attempted to pass from one car to another while the train was running at a high rate of speed around a curve, and fell from the train, he was guilty of negligence.[62] But a passenger on an electric car who, knowing that the car was approaching a sharp curve at a high rate of speed, left his seat, and spoke to the conductor in the vestibule, was not, as a matter of law, guilty of negligence contributing to injuries received by being thrown against the side of the car when the curve was reached, since he had a right to presume that the speed would be slackened before the car arrived at that point.[63]

Where Coupling Defective.—In an action by a passenger for personal injuries, where the evidence shows that plaintiff started into another car to get water while the train was moving slowly, but stopped a minute on the platform to talk, and, just as he was passing on, the coupling pin broke, and the cars parted, throwing him off, it is error to direct a nonsuit on the ground that plaintiff was not in the exercise of ordinary care.[64] But it has been held that a passenger on a train in motion, who attempted to pass from one car to another and in doing so was thrown from the platform by a sudden jerk of the train, could not recover, though the coupling between the cars was defective.[65]

Passing to and from Baggage Car.—It is not negligence per se for a passenger to voluntarily leave his seat in a passenger car, and go into a baggage car, and afterwards undertake to return, so as to bar a recovery for his death caused by falling between the cars.[66] The plaintiff left the passenger compartment of a carrier's combination car, in which there were empty seats, and went into the baggage compartment to talk to the baggage master. A collision occurred, in which the plaintiff was thrown over a low box of fowl, causing the injuries complained of. The plaintiff's negligence, in changing his position in the passenger compartment and occupying an exposed position, contributed to his injury, and he was, therefore, not entitled to recover.[67]

Passing to and from Dining Car.—It is not negligence per se for a passenger to pass to and from a dining car over the platform of an unvestibuled car.[68]

Passing to and from Engine.—There being no water in a car a passenger went to the engine to get some, and in attempting to pass from the tender to the platform of the coach he grasped the brake, which was loose, just as the engineer put on the air brakes. The suddenness of the jerk and the turning

62. While train rounding curve.—Dougherty *v.* Yazoo, etc., R. Co., 36 So. 699, 84 Miss. 502.

63. Blondel *v.* St. Paul City R. Co., 68 N. W. 1079, 66 Minn. 284.

64. Where coupling defective.—Cotchett *v.* Savannah, etc., R. Co., 84 Ga. 687, 11 S. E. 553.

Where a passenger, who was injured by reason of a defective coupling between passenger cars, testified that he noticed the shaky condition of planks connecting the cars when he went over them first, but that when he returned he had forgotten the defect, and thought he could cross safely, he was not guilty of contributory negligence as a matter of law. St. Louis, etc., R. Co. *v.* Keitt (Tex. Civ. App.), 76 S. W. 311, affirmed in 97 Tex. 645, no op.

65. Bemiss *v.* New Orleans, etc., R. Co., 47 La. Ann. 1671, 18 So. 711.

66. Passing to and from baggage car.—Louisville, etc., R. Co. *v.* Berg, 17 Ky. L. Rep. 1105, 32 S. W. 616.

67. Bromley *v.* New York, etc., R. Co., 79 N. E. 775, 193 Mass. 453, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

68. Passing to and from dining car.—A passenger boarded a railroad train, which was vestibuled, with the exception of a tourist sleeper placed between the day coach and the dining car. The sleeper had no device for inclosing its platforms or guarding persons who might be thereon. The passenger entered the day coach, and went back to the dining car, and started to return to the day coach. He was not seen, after passing out of the dining car, until his body was found near the track opposite a sharp curve. Held, that the fact that deceased was in the habit of traveling on such trains, and knew that they contained an unvestibuled sleeper, did not deprive him of the right to visit the dining car, or make it negligence for him to do so, and the question whether he was exercising ordinary care was for the jury. Northern Pac. R. Co. *v.* Adams, 116 Fed. 324, 54 C. C. A. 196, reversed in 24 S. Ct. 408, 192 U. S. 440, 48 L. Ed. 515.

of the brake caused him to fall between the engine and the coach. The passenger knew that, there being no steps on the engine, he would have to pass over the iron railing to the coach. His extreme negligence contributing to his injury was a complete defense.[69]

Passing from Open to Closed Street Car.—As the running board of an open street car, and the steps of a closed car, are not intended as a means of passing from one car to another, where a passenger is injured by attempting to pass by such means, his contributory negligence will defeat a recovery for the injury, even if the trainmen were negligent in suddenly increasing the speed of the train.[70]

Passing to Car Added to Train.—Where passengers on a train are notified by an employee of the railroad company that another car will be added to the train, and, after feeling the bumping of another car against theirs, are informed that such car has been added, they are justified in assuming that the car they see adjoining theirs is so attached to it as to enable them safely to pass into such car in search of seats.[71]

Passing to Heated Car.—In an action for injuries to a passenger while walking from one coach to another, the exclusion of evidence to show that the reason that he was going from one coach to the other was the insufficient heating of the car, is not error, where such fact was not controverted and the court in its charge assumed such to be the fact.[72]

Going to Coach for Colored Persons.—It is not contributory negligence for a passenger in the white coach of a train to go into the colored coach, the rules separating the coaches of whites and blacks being for the segregation of the races, and not the safety of the passengers.[73]

Stepping Off Rear Platform.—Where a passenger on a train at night passed from one coach to another and by the conductor and porter, who were in the rear car, in search of water, and stepped off the back platform of the rear coach, thinking he was going into another, there being no light or guard chain on such rear car, he can not recover for the injuries received; the proximate cause of the injury being his own negligence.[74]

69. **Passing to and from engine.**—McDaniel *v.* Highland Ave., etc., R. Co., 90 Ala. 64, 8 So. 41.

70. **Passing from open to closed street car.**—Hill *v.* Birmingham Union R. Co., 100 Ala. 447, 14 So. 201.

71. **Passing to car added to train.**—Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219.

In an action by a passenger for personal injuries, it appeared that there were no vacant seats on the train when plaintiff boarded it, and she was told by the conductor that another coach would be attached, which was shortly backed up; but, the drawheads failing to catch, the coupling was not made, and the cars separated several feet. As the cars came together, one of plaintiff's party passed over, and called to her to come on. Just then she heard the conductor cry, "All aboard!" and, hurrying forward, she fell through the open space, and was injured. It was about dusk, and there were other passengers on the platform in front of plaintiff, who obstructed her view. Held, whether plaintiff was guilty of contributory negligence was a question for the jury, plaintiff not being bound to remain where she was till the coupling was completed; for the announcement of, "All aboard!" by the conductor, warranted her in supposing that the passage was safe. Lent *v.* New York, etc., R. Co., 120 N. Y. 467, 24 N. E. 653, affirming 54 N. Y. Super. Ct. 317.

72. **Passing to heated car.**—On a cold night plaintiff was a passenger on defendant's train. The car he was in was not properly heated. While it was in rapid motion, he attempted to pass from such car to one in front; and when on the platform he slipped, and fell to the ground. Held, that it was harmless error to exclude evidence that it was customary for passengers to pass over the platforms of the cars in going from one coach to the other, and that they habitually did so, where there was no contest on such point, and the court charged that plaintiff had the right to pass from one coach to another in quest of a warmer one, and that it was not an act in itself that showed negligence, but the conditions and circumstances that surrouded the act would indicate its character. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493.

73. **Going to coach for colored persons.**—St. Louis, etc., R. Co. *v.* Evans, 99 Ark. 69, 137 S. W. 568.

74. **Stepping off rear platform.**—Hunter *v.* Atlantic, etc., R. Co., 51 S. E. 860, 72 S. C. 336, 110 Am. St. Rep. 605.

Vestibuled Cars.—A passenger is not negligent in passing from one vestibuled coach to another if he exercises due care in doing so, as he can assume that he is safe, and that all appliances on the platforms, such as the doors over the steps, are in proper position.[75] Where a passenger, knowing the purpose of drop doors on the platform of a vestibuled train and of the reasonable use of the same while the train was at a station, left the coach he had boarded and went upon the platform for the sole purpose of standing there while the train was at the station, and he was injured by falling down the steps, because the drop floor was raised, and because of the absence of a light he was negligent, precluding a recovery. He assumed the risk of injury, though the carrier knew that passengers habitually resorted to the platform, where the carrier did not acquiesce therein by keeping the drop door down at stations.[76]

Children.—Where a child twelve years of age traveling with his mother, was unable to find a seat in a car with her, it was not negligence per se for her to permit him to go alone into another car to find a seat.[77]

§§ 2785-2828. Leaving Conveyance—§ 2785-2799. In General—§ 2785. Care Required of Passengers in General.—See ante, "Care Required of Passengers in General," § 2695. A passenger, attempting to alight from a carrier's conveyance, is bound to use reasonable care, proportionate to the risk incurred, to prevent injury, and, if injured by reason of his own contributing act, may not recover.[78]

Reasonable Care Defined.—"Reasonable care," which a passenger is required to exercise in alighting from a car, is such care as a person of ordinary prudence would exercise under similar circumstances; such care being proportioned to the risk incurred.[79] Slight negligence, on the passenger's part, not contributing to the injury is not incompatible with due and reasonable care,[80] as negligence of an alighting passenger in order to preclude a recovery

75. Vestibuled cars.—St. Louis, etc., R. Co. *v.* Oliver, 123 S. W. 662, 92 Ark. 432.

76. Clanton *v.* Southern R. Co., 165 Ala. 485, 51 So. 616, 27 L. R. A., N. S., 253.

77. Children.—Downs *v.* New York Cent. R. Co., 47 N. Y. 83.

78. Leaving conveyance.—Coye *v.* People's R. Co. (Del.), 80 Atl. 638; Lexington R. Co. *v.* Lowe, 143 Ky. 339, 136 S. W. 615; Walthour *v.* Pennsylvania R. Co., 40 Pa. Super. Ct. 252.

Declining assistance of carrier's servants.—A passenger who, when alighting, declines the assistance of the carrier's servants and is injured by her own acts without any negligence on the part of the carrier's servants, can not recover, as her injuries are attributable to her own negligence and her want of ordinary care. Southern R. Co. *v.* Hardin, 107 Ga. 379, 33 S. E. 436.

Unknowingly exposing oneself of danger.—A passenger, in alighting from a street car, is only bound to exercise due care under the circumstances, and the fact that he placed himself in a position of danger while exercising such care does not show contributory negligence, as a matter of law. Johnson *v.* Yonkers R. Co., 91 N. Y. S. 508, 101 App. Div. 65.

Alighting in stormy weather.—The prevalence of storm and freezing weather imposes upon a passenger an extra degree of care to prevent injury in alighting from a car. Riley *v.* Rhode Island Co., 29 R. I. 143, 69 Atl. 338, 15 L. R. A., N. S., 523, 17 Am. & Eng. Ann. Cas. 50.

Alighting near passing vehicles.—A woman who was thrown down by the sudden starting of a car from which she was alighting, and was injured by a passing truck, was not shown to have been negligent, as a matter of law, by the fact that she stopped the car and attempted to alight in front of the approaching truck. Norton *v.* Third Ave. R. Co., 49 N. Y. S. 898, 26 App. Div. 60.

Unnecessarily alighting in the dark.—Where, when an electric car arrived at the terminus of its line, and the conductor was reversing the trolley to prepare the car for its return journey, and the night was dark and the reversal of the trolley extinguished the lights temporarily, a passenger electing to leave the car before the lights were restored by replacing the trolley pole on the trolley wire and injured in leaving the car, where it was not alleged that the place where the car stopped was unsafe, can not recover for the injuries received. Hester *v.* Savannah Elect. Co., 60 S. E. 1045, 130 Ga. 454.

79. Reasonable care defined.—Elliott *v.* Wilmington City R. Co. (Del.), 6 Pen. 570, 73 Atl. 1040.

80. In an action against a street railway company for personal injuries received in alighting from defendant's car,

for injury must constitute the proximate cause of the injury.[81]

As Affected by Carrier's Negligence.—Where, however, the passenger fails to exercise the due and reasonable care called for under the circumstances, and is injured because of such failure he can not recover even though the carrier was also guilty of negligence.[82]

§ 2786. Due Diligence in Leaving Car.—See post, "Alighting from Moving Car on Failure to Stop for Sufficient Time," § 2822. Under ordinary circumstances, a passenger ought to alight with reasonable promptness when the train arrives at his destination, provided it stops long enough for him to do so with safety,[83] but there is no rule of law that forces a passenger to rush for the steps of the platform as soon as the car stops, or that forbids his giving precedence to a lady, or to others more infirm than himself.[84]

Unnecessary Hurry.—Where a passenger leaves a car hurriedly and there is no necessity for him to hurry, and his injury is attributable solely to such unnecessary hurry, he can not hold the carrier responsible for his injury.[85]

Sudden Starting While Passenger Alighting.—Where a passenger is exercising due diligence in alighting, but before he can leave the car he is injured by the sudden jerking or starting of the train he can not be said to be guilty of such contributory negligence as will bar recovery. He has a right to assume that he will be given a reasonable time to leave the car, a duty owed him by the carrier,[86] and it has been held that he need not look to see if those

due to the alleged negligence of defendant in suddenly starting the car, an instruction that slight negligence on plaintiffs part was not incompatible with due and ordinary care is not erroneous. Chicago City R. Co. *v.* Dinsmore, 44 N. E. 887, 162 Ill. 658.

81. Kearney *v.* Seaboard, etc., R. Co., 158 N. C. 521, 74 S. E. 593.

82. As affected by carrier's negligence.—The plaintiff was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then, if she did proceed, it was at her own peril, even though the defendant was guilty of negligence. Seymour *v.* Chicago, etc., R. Co., 3 Biss. 43, Fed. Cas. No. 12,685.

Though a carrier is negligent in failing to announce the station or to have its depot platform lighted, a passenger must exercise such care as a person of ordinary prudence under similar circumstances will usually exercise, and, where he fails to do so and is injured, he can not recover. Chesapeake, etc., R. Co. *v.* Robinson (Ky. App.), 123 S. W. 308.

83. Kearney *v.* Seaboard, etc., R. Co., 158 N. C. 521, 74 S. E. 593; Dobson *v.* Receivers, 90 S. C. 414, 73 S. E. 875; Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

84. Britton *v.* Street R. Co., 51 N. W. 276, 90 Mich. 159.

85. Unnecessary hurry.—Tucker *v.* Central, etc., R. Co., 122 Ga. 387, 50 S. E. 128. See post, "Unnecessary Exposure to Danger," § 2791.

86. Nance *v.* Carolina Cent. R. Co., 94 N. C. 619.

In an action for personal injuries, received while attempting to alight from one of defendant's street cars, plaintiff testified that the car was an open one; that she was standing beside the post at the side of the car, expecting to get down; that the bell rang just as she was in the act of putting her foot on the step; and that the car started almost immediately, throwing her to the ground. Held, that it could not be said that plaintiff was negligent in failing to turn back after the bell rang, and before the car started, and that the case was properly submitted to the jury. Lacas *v.* Detroit City R. Co., 92 Mich. 412, 52 N. W. 745.

Plaintiff's evidence was that, as soon as defendant's train, on which he was riding, stopped, he arose from his seat, near the front door of the car, and proceeded to leave by that door; that when he had placed one foot on the last or lowest step, and was proceeding to step off the car with the other foot, he released his hold of the railing, and, the train starting at the same moment with a sudden jerk, he was thrown to the ground, causing the injuries sued for. Held, that it justified a finding that defendant was guilty of negligence, and plaintiff free therefrom, as the company was bound to give him reasonable time in which to alight. McDonald *v.* Long Island R. Co., 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. Rep. 437.

Waiting for team to pass.—Where plaintiff testified that, as she was about to alight from the rear platform of a street car, she requested the conductor to wait a moment for a team to pass, which was rapidly approaching on the side of

in charge are about to start, but may rely on the carrier's proper performance of this duty.[87]

Acts in Emergencies.—A passenger can not be held to strict accountability for his actions under such circumstances, being forced to decide and act quickly without time to consider carefully the consequences. Thus, it has been held that, where a passenger on the steps of a car attempts to get off at his station and the train suddenly starts, he is not guilty of contributory negligence in jumping.[88]

§§ 2787-2789. On Invitation or Direction of Carrier's Employees—§ 2787. In General.—Where the invitation or direction of the employees of a train are within the scope of their agency, a passenger, in alighting from the train in obedience to them, can not be held guilty of contributory negligence, although he may receive an injury, unless obedience to such invitation or direction exposes him to an obvious risk which a prudent man would not incur.[89]

§§ 2788-2789. Facts Justifying Assumption of Invitation to Alight—§ 2788. Stopping Cars.—To authorize a passenger to start to alight, no

the car on which she was, and after it had passed, and as she was putting one foot from the lower step to the ground, she was injured by the sudden starting of the car, a motion for nonsuit was properly refused, since there were sufficient facts from which the jury might infer that she was in the exercise of due care. Hutchins *v.* Macomber, 44 Atl. 602, 68 N. H. 473.

87. Failing to notice whether conductor is about to start.—The fact that a passenger on an elevator fails to look particularly to see if the conductor is about to close the door, which he has opened for the purpose of admitting passengers, does not necessarily constitute contributory negligence. Chicago Exch. Bldg. Co. *v.* Nelson, 98 Ill. App. 189, judgment affirmed in 64 N. E. 369, 197 Ill. 334.

88. Jumping on sudden starting.—Odom *v.* St. Louis, etc., R. Co., 45 La. Ann. 1201, 14 So. 734, 23 L. R. A. 152; Caruth *v.* Texas, etc., R. Co., 45 La. Ann. 1228, 14 So. 736. See post, "Acts in Emergencies."

89. On invitation or direction of carrier's employees.—Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; Pence *v.* Wabash R. Co., 90 N. W. 59, 116 Iowa 279.

Assumption of safety.—Persons alighting from railway trains upon the implied invitation of the officers are justified in assuming that the officers have taken proper precautions to insure their safety. Leveret *v.* Shreveport Belt R. Co., 34 So. 579, 110 La. 399.

Directions given generally.—In an action against a carrier for damages sustained in getting off the train, where the passenger was promised the assistance of the trainmen, the court may properly instruct the jury that she might rely on the direction of the conductor, though addressed to passengers generally, to get off the train, "provided she took no more risks in getting off the train than a prudent person would have taken under the same circumstances." St. Louis, etc., R. Co. *v.* Baker, 55 S. W. 941, 67 Ark. 531.

Disregarding directions.—Where a passenger in the caboose of a freight train, upon its stopping at a station, stepped upon the front platform, and was warned by an employee of the approach of a train about to collide behind, but, not understanding English, resisted his effort to drag him away, held not to be such contributory negligence as to preclude a recovery by his administrator for the company's negligence. Walter *v.* Chicago, etc., R. Co., 39 Iowa 33.

Authority to give directions.—If, on a train consisting of a large number of coaches and carrying many passengers, the conductor was unable to fully discharge the usual duties of his position between stations, and with his authority and knowledge another employee of the railroad on the train took charge of a section thereof and acted as the conductor in connection with it and with taking up tickets, notifying passengers of stations and directing them in regard to alighting, and if there was nothing to indicate that he was not the conductor, and a passenger so dealt with him, believed him to be the conductor, and acted on his announcements of a station and under his command as to leaving the car, the company would be liable to such passenger for an injury occurring in leaving the train, to the same extent as if the person thus acting was the conductor. Atlanta, etc., R. Co. *v.* Haralson, 133 Ga. 231, 65 S. E. 437.

Where a passenger on a train under the control of a switch crew was ordered by the only member thereof present to alight, he had a right to presume that such employee had authority to give such commands. Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653; S. C. (Tex. Civ. App.), 70 S. W. 359, affirmed in 72 S. W. 165, 96 Tex. 301.

further invitation is necessary than for the car to stop at a regular stopping place for passengers.[90]

Stopping in Obedience to Signal.—Where a car stops as if in obedience to a signal, a passenger may reasonably consider the act of stopping as an invitation to alight, and may reasonably assume that the operatives of the car will conduct themselves accordingly.[91] Thus, it has been held that notice to the driver of a horse car of the desire to alight;[92] or to the conductor at the time of paying the fare,[93] was sufficient to justify the passenger's assumption that the car would be stopped as requested.

§ 2789. Announcing Station.—The calling of a station by the brakeman and the opening of the door of the car is an invitation to the passengers desiring to alight at the station to get ready to do so, but is an invitation to alight only after the train has stopped.[94]

§ 2790. Using Means Afforded for Alighting.—Where a car has stopped for the purpose of permitting its passengers to alight, and is standing perfectly still, it is not negligence, as a matter of law, for a person to step off it, without retaining hold of supports. It is a question for the jury to determine in view of all the surrounding circumstances.[95]

90. Stopping cars.—Indianapolis, etc., Rapid Transit Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138.

The facts that a car has stopped at the side entrance of an hotel, that the bell has rung, and that a number of the passengers have arisen from their seats, and started for the door to get out, justify a passenger in acting on the assumption that he was expected to alight. Belt Elect. Line Co. *v.* Tomlin, 40 S. W. 925, 19 Ky. L. Rep. 433.

By stopping a street car so that plaintiff and other passengers could alight, the motorman assured her that she would have a reasonable opportunity to safely alight. Vine *v.* Berkshire St. R. Co., 99 N. E. 473, 212, Mass. 508.

The slowing of a train as it approached a station, the sounding of the whistle, the announcement by the brakeman of the station, the stopping of the train, the act of the conductor and brakeman in leaving the caboose with a light, and the detachment of the engine to take water, can, in an action for injuries received by a passenger, be construed in no other light than as a direction to passengers to alight, and plaintiff in the absence of anything appearing to the contrary had a right to conclude that it would be safe for him to alight at that place. McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706.

In determining the question of the contributory negligence of a passenger alighting from a street car on the company's private way, the fact of the conductor stopping the car for the passenger to alight must be considered. Topp *v.* United, R., etc., Elect. Co., 59 Atl. 52, 99 Md. 630.

91. Stopping in obedience to signal.—Monroe *v.* United R. Co., 154 Mo. App. 39, 133 S. W. 645.

A passenger on a street car has a right to rely upon the assurance of safety implied from an invitation to alight from the car at a point where it was stopped after the passenger had signified his desire to alight. Mobile, etc., R. Co. *v.* Walsh, 40 So. 560, 146 Ala. 295.

92. In an action to recover damages on account of injuries received from a horse car, it was held that the plaintiff was not chargeable with any fault in that he did not prefer the request to the conductor to stop the cars, instead of to the driver. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370.

93. A passenger on an interurban railway, who pays his fare and informs the conductor at the time of his destination, may assume that the carrier will discharge its duty and stop at that point without further notice to the conductor, and that the carrier will exercise due care in stopping the car at the point of destination. Indiana Union Tract. Co. *v.* Keiter, 92 N. E. 982, 175 Ind. 268, 32 L. R. A., N. S., 1190.

94. Announcing station.—Illinois Cent. R. Co. *v.* Dallas, 150 S. W. 536, 150 Ky. 442.

In an action against a railroad company, by a passenger injured in alighting from a train, the fact that the name of the station was not announced, and that the stop was very brief, and similar circumstances, considered, in determining whether the passenger was negligent in the manner of alighting. Dickens *v.* New York Cent. R. Co., 40 N. Y. 23, 1 Abb. Dec. 504.

95. Using means afforded for alighting.—Crump *v.* Davis, 33 Ind. App. 88, 70 N. E. 886; Martin *v.* Second Ave. R. Co., 3 App. Div. 448, 38 N. Y. S. 220, 73 N. Y. St. Rep. 714.

Though a passenger is bound to use ordinary care in alighting, an instruction that in alighting it was her duty to take

Failing to Observe Means Afforded for Alighting.—Where proper facilities for alighting are provided and a passenger fails to observe them or fails to use them under circumstances which would prompt an ordinary prudent person to use them, he is precluded from recovery for injury resulting therefrom.[96]

Insufficient Facilities.—Where the cars are stopped at a station for passengers to leave, and some facilities, though insufficient ones, for alighting are provided by the company, then, although the passenger is injured in getting off, when he would have escaped injury by remaining, he may recover; provided there was not an apparent danger which would have deterred a person of ordinary prudence from alighting. The company has no right to require the passenger to chose between going on to another station, and attempting a dangerous mode of descending.[97]

Injury Avoidable by Care on Part of Carrier.—Even where a passenger was negligent in failing to use the appliances provided for alighting, he can still hold the carrier responsible for injury where the carrier was itself guilty of negligence which could have been avoided by the exercise of ordinary care on the part of its employees.[98]

hold of the hand rail of the car with her right hand while going down the steps, and to retain such hold while descending from the last step to the ground, is properly refused. Werner *v.* Chicago, etc., R. Co., 81 N. W. 416, 105 Wis. 300.

As safeguard against injury from sudden movement.—It is not negligence per se for a passenger to alight from a street car without taking hold of the railings to guard against a sudden movement of the car. Schaefer *v.* Central Crosstown R. Co., 61 N. Y. S. 806, 30 Misc. Rep. 114.

Facing rear of train.—Where the conductor of a street railway car stops the car for passengers to alight, and a passenger, without unreasonable delay, arise from her seat, and, while in the act of stepping off, the car is negligently put in motion, and she is thrown to the ground and injured, her right to recover is not impaired by the fact that she may have stepped off with her back to the front of the train and without holding to the car. Rouser *v.* Washington, etc., R. Co., 13 App. D. C. 320.

Stepping on coupling.—The act of a railroad passenger stepping on the connecting link between two cars, in getting off a train, after it has stopped at a station, is not per se negligence. Johnson *v.* Winona, etc., R. Co., 11 Minn. 296, 88 Am. Dec. 83.

96. Failure to observe car steps.—A passenger on a car which should have three steps, but has only the first two, is guilty of contributory negligence where he steps down, without looking, while the car is approaching a station, to where the step should have been. Coburn *v.* Philadelphia, etc., R. Co., 48 Atl. 265, 198 Pa. 436.

Failure to notice location of platform.—A railroad company is not liable to a passenger who fell, and was injured, while stepping from the second step at the end of the car without having his hand on the iron railing, and without looking for the platform, where the third step was eight inches below the top of the platform and one foot seven inches from the side, and the second step was four inches below the top and two feet two inches from the side. Lafflin *v.* Buffalo, etc., R. Co., 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433.

97. Insufficient facilities.—Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

Jumping from high step.—Where the steps of a car were so high that passengers could not conveniently alight by stepping down, negligence can not be imputed as a matter of law to a passenger, who, having a right to alight, determined that he could alight with greater safety by jumping than in attempting to step down. Truesdell *v.* Erie R. Co., 99 N. Y. S., 694, 114 App. Div. 34.

In an action by a passenger for injuries by defendant's failure to furnish proper means to enable plaintiff to alight from the car, thereby requiring her to jump from the lowest car step, there was testimony that the conductor stood on the platform, calling out, "All off for W.!" that plaintiff, after reaching the lowest step, tried to step off, but was unable to reach the ground, which was from two and a half to three feet lower than the step; that no stool was placed beside the step to assist her; and that she then jumped. Held, that plaintiff was not, as a matter of law, guilty of contributory negligence in jumping. Brodie *v.* Carolina Mid. R. Co., 46 S. C. 203, 24 S. E. 180.

98. Injury avoidable by care on part of carrier.—In an action for damages for injuries resulting to plaintiff by being thrown from defendant's street car, even if plaintiff was negligent in failing to avail herself of the appliances in the car in alighting, defendants was guilty of

§ 2791. Unnecessary Exposure to Danger.—A passenger who unnecessarily exposes himself to danger while alighting from a train is guilty of contributory negligence, though he does not know of the dangers to which he is exposed.[99]

Alighting to Inquire Reason for Delay.—Thus, it has been held to be negligence for a passenger to alight in a dangerous place for no other reason than to inquire the reason for a delay.[1] It is not, however, held to be contributory negligence for a passenger to leave a train except in cases of necessity. The question of his negligence is governed entirely by his exercise or failure to exercise reasonable care in alighting.[2]

§§ 2792-2795. Place of Alighting.—See post, "Alighting at Place Other than Station or Platform," §§ 2802-2806.

§ 2792. Right to Assume Place Safe.—A passenger on a street car has a right, when the car stops for him to alight, to assume that the car has been stopped at a place where by the exercise of due care he may alight in safety,[3] and he is not required to inquire of the carrier or its agents as to whether the place of stopping is a reasonably safe place to alight.[4]

§ 2793. Duty to Look before Alighting.—Where a passenger, injured while alighting from a street car in consquence of the distance from the step of the car to the street, had as good an opportunity as the carrier or its servants to observe the conditions and to know whether the conditions were dangerous in an attempt to alight, the passenger was guilty of contributory negligence, precluding a recovery, the law requiring a person to use his own faculties so as to avoid danger if he can reasonably do so; and one will be deemed to have actually seen what he could have seen, had he looked.[5]

New Hampshire Rule.—In New Hampshire the contrary doctrine is followed. There it is held that the right to assume that the place at which a car

negligence where it permitted the car to be started while plaintiff was alighting, the car being an open one, so that the conductor, in the exercise of ordinary care, could have seen plaintiff and averted the accident. Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

99. Unnecessarily exposing oneself to danger.—Illinois Cent. R. Co. *v.* Davidson, 64 Fed. 301, 12 C. C. A. 118.

1. Where there was a space of but four feet between the rear ends of two trains standing on the same track, and overdue to start, it was contributory negligence for a passenger, wishing to inquire the reason of delay, to alight, and undertake to pass between the two trains: there being an opening at a street crossing fifty yards away, and the station being near by on the side of the train on which the passenger alighted. Illinois Cent. R. Co. *v.* Strauss, 22 So. 822, 75 Miss. 367.

2. An instruction based on the assumption that a passenger in a car standing at a station has no right to leave the car except in case of necessity, or when assisted by an agent of the company, held rightly refused. Texas, etc., R. Co. *v.* Mayer, 183 Fed. 575, 105 C. C. A. 646.

3. Right to assume place safe.—Indiana Union Tract. Co. *v.* Jacobs, 78 N. E. 325, 167 Ind. 85.

A passenger who is invited by the carrier to alight from a car in a locality where he is a stranger has a right to presume that the place where he is asked to alight is reasonably safe. Mensing *v.* Michigan Cent. R. Co., 76 N. W. 98, 117 Mich. 606.

A passenger who, in leaving a train on a clear night, falls into an opening seventeen inches wide between the car and the platform, is not necessarily guilty of contributory negligence in attempting to leave the car at that point. Missouri Pac. R. Co. *v.* Long, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811.

4. A plea assuming that it was the duty of a passenger to inquire of a street railway company or its agent as to whether the place of stopping is a reasonably safe place for him to alight was properly overruled. Montgomery St. R. Co. *v.* Mason, 32 So. 261, 133 Ala. 508.

5. Duty to look before alighting.—Indianapolis Tract., etc., Co. *v.* Pressell, 77 N. E. 357, 39 Ind. App. 472.

Stepping in open gutter.—Where a passenger in alighting from a street car, without looking at the ground where she was about to step, put down her foot, and let go of the car before her foot touched ground, and fell into a gutter which ran by the side of the road and was eight inches deep, she could not recover from the street car company for her injury. Quinlan *v.* Newton, etc., St. R. Co., 77 N. E. 486, 191 Mass. 58.

stops for passengers to alight is complete and broad enough to absolve a passenger from contributory negligence because of a failure to look and examine the place of alighting.[6]

§ 2794. Knowledge of Character of Place.—Where a passenger is familiar with the conditions at the place of stopping, he is required to avail himself of such knowledge and his failure to do so will charge him with contributory negligence.[7] But a passenger can not be charged with more than reasonable care in avoiding injury.[8]

Passenger Selecting Stopping Place.—The fact that a passenger selects the place to stop will not charge him with contributory negligence, if the place was not necessarily dangerous, and the injury was caused by the negligent manner in which the stop was made.[9]

6. New Hampshire rule.—An instruction that it was plaintiff's duty to use great care in alighting from a street car, and if there was any defect at the place of alighting which might contribute to her injury, and by looking she could have discovered such defect, but neglected to do so, and the neglect to look contributed to the accident, she could not recover, was properly refused. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

An instruction that a passenger on a street car has no right to expect that the street where she alights shall be in a safe condition, and that if plaintiff alighted without looking to see where she was stepping, and was injured thereby, she was guilty of such negligence as would prevent her recovery, was properly refused. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

An instruction that the defendant had a right to presume that plaintiff, in alighting from a car in broad daylight, would notice any defect in a street, which was open to ordinary view, at the place where she stepped from the car, was properly refused. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

An instruction that if the plaintiff, in alighting from a street car in broad daylight, in full possession of her sense of sight, did so without looking to the ground, or using any means of seeing where she was stepping or the distance to the ground, she was guilty of such negligence that she can not recover for an injury sustained in alighting, was properly refused. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

Encumbered passenger.—An instruction that the plaintiff, being incumbered with bunches of flowers and her wraps, was under greater obligations to look where she was about to step than she would have been if she had the free use of her person, was properly refused. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170. See post, "Children and Others under Disability," §§ 2796-2797.

7. Knowledge of character of place.—It is the duty of a passenger to exercise reasonable care in alighting from a car, and a passenger familiar with the railway, its stopping places, and the operation of the cars is bound to avail himself of such knowledge. Benson *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 202, 75 Atl. 793.

It is the duty of a passenger in alighting from a train to exercise the care and caution of a reasonably prudent person, with the knowledge possessed by him regarding the place and circumstances. Truesdell *v.* Erie R. Co., 99 N. Y. S. 694, 114 App. Div. 34.

Though a street car passenger knew the unsafe condition of the street in which she was injured while alighting from a car at night, she had the right to expect that the company having the same knowledge, would perform its duty in so stopping the car as to provide her with a safe place for alighting. Murray *v.* Seattle Elect. Co., 97 Pac. 458, 50 Wash. 444.

8. Plaintiff, after leaving defendant's street car, had to cross some rails which defendant had placed along the street while repairing the track. She stepped on one of the rails, and it tilted and threw her down. In an action for the injuries so caused, defendant requested a charge that "plaintiff saw the rails, and after looking at them decided that they were safe for her to step upon, and for her error of judgment defendant is not liable." Held, that the effect of such request was to charge plaintiff with more than reasonable care in avoiding injury. Wells *v.* Steinway R. Co., 45 N. Y. S. 864, 18 App. Div. 180.

9. Where plaintiff employed a transfer company to convey her in a cab to a station, and the place where she directed the coupe driver to stop was not necessarily dangerous, the fact that the driver, in stopping at the place, stopped so near a curve in a street car track that the cab was overturned on being struck by the rear of a street car while rounding the curve, did not sustain a charge of contributory negligence against plaintiff. Frank Bird Transfer Co. *v.* Krug, 65 N. E. 309, 30 Ind. App. 602.

§ 2795. Customary Stopping Place.—A passenger is within his legal rights in attempting to alight from a car which has come to a full stop at a point where the cars of the carrier were accustomed to stop.[10] Thus, it has been held that to attempt to pass through an elevator door opened by the conductor without stopping to look or listen is not, as a matter of law, contributory negligence.[11]

Unaccustomed Stopping Place.—But where the stop is at a place not regularly used for the reception and discharge of passengers, a passenger is not entitled to assume that the place is provided with all the customary means and safeguards for alighting.[12]

§§ 2796-2797. Children and Others under Disability—§ 2796. In General.—A passenger seeking to alight from a conveyance of a carrier when incumbered with bundles or parcels or hindered by age, sex or physical condition so as to interfere with or impede locomotion, should exercise a degree of care commensurate with the situation and surroundings.[13]

10. **Customary stopping place.**—Chicago City R. Co. *v.* Lowitz, 119 Ill. App. 360, judgment affirmed in 75 N. E. 755, 218 Ill. 24.

11. **Leaving elevator.**—Plaintiff entered defendant's elevator on the eighth floor, desiring to go to the ground floor, and knowing it to be the custom, when a passenger wished to get off at an intermediate floor, to notify the conductor. On reaching the second floor, the elevator stopped, and plaintiff, under the impression that it was the ground floor, started to leave without speaking to the conductor, who started the elevator before closing the door, and plaintiff was injured. Held, that it was not error to submit to the jury the questions of ordinary care and negligence at the time plaintiff was leaving the elevator, without consideration of his mistake, as he had a right to alight at any of the usual stopping places. Judgment 98 Ill. App. 189, affirmed in Chicago Exch. Bldg. Co. *v.* Nelson, 64 N. E. 369, 197 Ill. 334.

12. **Unaccustomed stopping place.**—At a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, but only when they are flagged, or to discharge a special passenger, a passenger is not entitled to expect or rely on the company's having furnished a platform or other convenient place for the reception and discharge of passengers. Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168.

13. **Children and others under disability.**—Chicago & A. R. Co. *v.* Noble, 132 Ill. App. 400. See ante, "Care Required of Children and Others under Disability." §§ 2696-2699.

Woman sixty-five years of age, weighing 170 pounds.—In an action by a woman in good health, sixty-five years old and weighing 170 pounds, to recover damages for personal injuries occasioned by the starting of a train while she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether she exercised ordinary care and diligence at the time of the accident. Hickman *v.* Missouri Pac. R. Co., 91 Mo. 433, 4 S. W. 127.

Woman with baggage injured by sudden starting.—Plaintiff, a woman fifty-five years of age, and her daughter, passengers on defendant's train, on its arrival at their station opened the car door with difficulty, and stepped on the platform, plaintiff preceding her daughter. She was a little dizzy from riding, and carried a large bundle. The daughter proposed to help plaintiff off, but this the latter declined, and, no employee of defendant being near to assist her, was alighting from the steps, when the train was started, and she was thrown to the ground and injured. Held that, on the questions of defendant's negligence and plaintiff's contributory negligence in an action for the injuries received by her, a verdict for plaintiff should be sustained. Vredenburgh *v.* New York, etc., R. Co., 58 Hun 607, 12 N. Y. S. 18, 34 N. Y. St. Rep. 953.

A woman injured in leaving a train by reason of its suddenly starting could not be regarded as guilty of contributory negligence merely because she carried with her a grip weighing perhaps sixty pounds, there being no evidence that she was not in good health, and of sufficient strength to carry it as far as the platform. Chicago, etc., R. Co. *v.* Armes, 74 S. W. 77, 32 Tex. Civ. App. 32.

Wearing unusually long dress.—A passenger injured by her dress catching on the plunger of a street car as she alights, and by the car starting up while it is so caught, is not guilty of contributory negligence, as matter of law, because wearing a dress so long as to be more than likely to catch on any appliance extending above the platform. Judgment 67 N. Y. S. 185, 55 App. Div. 143, affirmed in Smith *v.* Kingston City R. Co., 62 N. E. 1100, 169 N. Y. 616.

Plaintiff's dress, when she was leaving a street car in the usual manner, caught

§ 2797. Intoxicated Passengers.—Where a passenger is injured while attempting to alight from a car, the fact that he was intoxicated does not in itself charge him with contributory negligence which would constitute a defense.[14] It is merely a circumstance to be considered in determining whether such intoxication contributed to the injury. If he was under the influence of liquor to such an extent that it hindered or delayed him in getting off, or influenced his judgment in getting off, and his being under the influence of liquor contributed to his injury, he can not recover.[15] Thus, where a street railway passenger is injured by the sudden starting of the car while he is attempting to alight, that he may have been intoxicated is no bar to a recovery; but his condition would only be a circumstance touching his knowledge as to whether the car had stopped before he attempted to alight.[16]

§ 2798. Alighting from Train in Emergency.—See post, "Acts in Emergencies," § 2819. Where a passenger induced to alight in order to escape from peril, caused by the misconduct or negligence of the carrier, or by a reasonable apprehension of such peril, he can not be charged with such negligence on the ground of error of judgment, such as to bar his recovery.[17]

in the sheet iron covering of the car wheel projecting above the floor, which had been unscrewed, throwing her forward to the ground. It was shown that the defect in question was known to the person in charge of the car. Held, that the question whether the defect was the cause of plaintiff's injury was properly submitted to the jury, and their verdict for the plaintiff justified by the evidence, and that there was no contributory negligence on the part of the plaintiff. Chase *v.* Jamestown St. R. Co., 60 Hun 582, 15 N. Y. S. 35, 38 N. Y. St. Rep. 954.

Wearing hoop skirt.—Plaintiff, a woman, with a child in her arms, while alighting from one of defendants' cars, caught upon a nail projecting from the car platform a steel hoop of a hoop skirt which she wore as part of her clothing, and was thereby thrown upon the ground, and dragged some distance over the pavement, before the car was stopped, and seriously frightened and injured. Held, that there was no contributive negligence; that if hoop skirts are worn by such passengers as the railroad company were in the habit of conveying, the defendants were bound to provide for the safety of the passengers wearing that kind of a garment with as much care and caution as prudent and cautious persons would be bound to exercise. Poulin *v.* Broadway, etc., R. Co., 34 N. Y. Super. Ct. 296, affirmed in 61 N. Y. 621.

Failing to inform carrier of disability.—Plaintiff, a passenger, was carried beyond her station, when the conductor directed her to step out on a flat car and she was taken back by that means. On arriving at the station, the switchman in charge assured plaintiff that there was no means of alighting except for her to jump, and assisted her to the ground. As a result of her thus alighting, plaintiff suffered a miscarriage. Held, that she was not guilty of contributory negligence in not informing the switchman of her condition. West *v.* St. Louis, etc., R. Co., 86 S. W. 140, 187 Mo. 351.

Female passenger with injured ankle failing to ask assistance.—Where a passenger, in alighting from a car, did not ask for assistance, though having an opportunity, nor inform the servants in charge of the train of the weakness of her ankle, nor look to see whether there was a portable step, and what was the distance from the step to the platform, she was negligent, precluding recovery for an injury to her ankle. Young *v.* Missouri Pac. R. Co., 93 Mo. App. 267.

Children.—In alighting from a street car, a child of eight years old can only be held to a reasonable degree of care according to her years. Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315.

14. Intoxicated passengers.—Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603; Louisville, etc., R. Co. *v.* Deason, 96 S. W. 1115, 29 Ky. L. Rep. 1259.

15. Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712.

16. Rangenier *v.* Seattle Elect. Co., 100 Pac. 842, 52 Wash. 401.

17. Alighting from train in emergency.—Where a carrier's negligence in starting a car places an alighting woman passenger in a position of danger, it can not complain of her contributory negligence on the ground of her error of judgment in the emergency in retaining hold of a child accompanying her, who was upon the car, instead of letting go of the child, and taking hold of the car, Montgomery *v.* Colorado Springs, etc., R. Co., 114 Pac. 659, 50 Colo. 210.

To avoid apparent collision.—Where the negligence of a street car driver in driving onto a railroad crossing without stopping to look for trains seemed about to result in a collision, and a passenger, in endeavoring to escape from the car, was injured by a fall, the driver's negligence was the proximate cause of the in-

§ 2799. Negligence as to Incidental Dangers.—Ordinarily a passenger in alighting is not required to observe the surroundings in order to avoid dangers incidental to and not closely associated with the act of alighting. Unless the existence of such dangers are open and obvious he can not be held to be guilty of contributory negligence in failing to avoid them.[18]

§§ 2800-2801. Preparing to Leave Conveyance before It Stops—§ 2800. Standing in Aisle or Seat.—A passenger on a street car or train who, on being notified that the car is approaching his destination, gets up, and goes to the door of the car, while it is in motion, so as to be ready to alight, is not necessarily negligent provided he uses due prudence and avails himself of his knowledge of the operation of the cars.[19]

jury. Selma St., etc., R. Co. *v.* Owen, 31 So. 598, 132 Ala. 420.

Leaving elevator to avoid effect of conductor's negligence.—Where a passenger in an elevator is caught in the door, and the elevator raised above the floor, and then, through the negligence of the operator, lowered in such a manner as to injure the passenger, his negligence in attempting to alight is no defense. Luckel *v.* Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

18. Shooting by fellow passengers.—A passenger was guilty of contributory negligence barring recovery for injury on being shot on alighting by one fellow passenger attempting to shoot another, if he left the car while the pistol was pointed toward the platform, and the danger was as obvious to him as to the carrier. Penny *v.* Atlantic, etc., R. Co., 69 S. E. 238, 153 N. C. 296, 32 L. R. A., N. S., 1209.

Warning carrier's servants of impending collision.—On a suit for injury to a passenger caused by cars colliding while she was alighting, a plea that the motorman of the colliding car was engrossed in his personal affairs and became excited at the presence of the other car, but not stating why he became excited or whether he perceived the car sufficiently far away to have stopped his car, that the passenger's husband was standing on the ground to assist her to alight and saw the car in ample time to have given an alarm and caused the on coming car to stop or the other car to move on, but took no steps to prevent the collision, and that the employees on the standing car failed to observe the approach of the other car because engaged in assisting alighting passengers, is insufficient to show contributory negligence of the husband imputable to the wife. Basler *v.* Sacramento, etc., Elect. Co., 111 Pac. 530, 158 Cal. 514, 31 L. R. A., N. S., 559.

Walking over trestle after being put off wrong train.—Where a passenger was informed by a brakeman that he was on the right train but, after going a few hundred yards, was put off by the conductor as being on the wrong train, and in trying to walk back on the railway track he fell through trestle work, he was not guilty of contributory negligence. Houston, etc., R. Co. *v.* Devainy, 63 Tex. 172.

Returning by vehicle after being carried past station.—The act of a passenger who was carried past her destination in riding back in an open hack was not, as a matter of law, a failure to use such ordinary prudence as would preclude her recovery for injuries sustained thereby from exposure to the weather. St. Louis, etc., R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315.

Where the next train was not due until the next evening, and the passenger was a stranger in the little place at which she got off, and did not know the conditions as to hotels and boarding houses, but was dressed in winter wear, and wore a shoulder cape, making the trip by buggy was not negligence per se. St. Louis, etc., R. Co. *v.* Foster, 103 S. W. 194, 46 Tex. Civ. App. 517.

19. Standing in aisle or seat.—Babcock *v.* Los Angeles Tract. Co., 128 Cal. 173, 60 Pac. 780; Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001; Chesapeake, etc., R. Co. *v.* Topping, 78 S. W. 135, 25 Ky. L. Rep. 1390; Consolidated Tract. Co. *v.* Thalheimer, 59 N. J. L. 474, 37 Atl. 132.

Where a passenger on a street car notified the servants in charge of the car to stop at a crossing, and the car as it approached the crossing slackened its speed as if to stop, the passenger, in leaving his seat and proceeding to the door for the purpose of alighting when the car came to a stop, was not guilty of contributory negligence as a matter of law, precluding a recovery for injuries received by reason of the sudden jerking of the car occasioned by the sudden turning on of the electric current. Griffin *v.* Pacific Elect. R. Co., 82 Pac. 1084, 1 Cal. App. 678.

It is not negligence per se to rise from a seat and step to the side of a slowly moving open car which is coming to a stop, for the purpose of getting on the runboard to alight when the car does stop. Davis *v.* Camden, etc., R. Co., 63 Atl. 843, 73 N. J. L. 415.

Leaving seat to ascertain if train was approaching station.—The facts that a passenger had spent a portion of the afternoon and most of the evening in

Passengers on Freight Trains.—Passengers riding on freight trains, who are familiar with the operation of such trains may be found guilty of contributory negligence in getting up and slowly leaving their seats before the train stops.[20] Particularly would this be true, where the passenger knew of rules and notices warning passengers to remain seated until the train stopped.[21]

§ 2801. Going on Platform or Steps before Trains Stops.—Ordinarily, it is not, as a matter of law, contributory negligence for a passenger, when a car is slowing up to allow him to alight, to make preparations to leave by arranging his baggage and going out upon the platform or steps before the car has actually stopped.[22] Whether he was guilty of contributory negligence must depend upon the conditions and circumstances surrounding each particular case.[23]

saloons; that shortly after taking his seat near the rear of the smoking car he fell asleep, and so remained till the train reached the curve at a street; that he then, on waking up and hearing the call "B. next," started towards the door to ascertain whether the train, which was slackening speed, had reached, or was approaching, the B. station, whereupon the train started ahead with the motion usual on the release of the brakes, and he was thrown through the open door, onto the platform and thence to the ground, do not as a matter of law establish negligence contributory to the injuries caused by carrier's negligence in leaving wholly unprotected, by gate or warning, the platform liable to be used by passengers, while the train was in motion. Hoyt *v.* New York, etc., R. Co., 63 Atl. 393, 78 Conn. 709.

Standing without support.—In an action by a passenger against a street railway company to recover damages for personal injuries, plaintiff held guilty of contributory negligence, where she arose, and, after signaling the conductor to stop, remained standing without any support, and was thrown by the stopping of the car. Bendon *v.* Union Tract. Co., 26 Pa. Super. Ct. 539.

20. Passengers on freight trains.—A passenger riding on a freight train, who was familiar with the operations of such trains, was guilty of contributory negligence in preparing to leave the car as soon as the train had made its first stop at his destination, and before it had come to a full stop, and without waiting a sufficient length of time to justify the inference that the stop was final. Young *v.* Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175, affirmed in 88 S. W. 767, 113 Mo. App. 636.

Riding on steps.—A passenger who was asleep in the caboose when his station was reached, being told by the conductor shortly after passing it, if he wanted to get off, to get off quickly, took his stand on the steps, ready to get off if the train stopped, and while standing there was thrown off by a sudden jerk in taking up the "slack" of the train. Held, that he was guilty of contributory negligence. Lindsey *v.* Chicago, etc., R. Co., 64 Iowa 407, 20 N. W. 737.

21. A passenger on the caboose of a local freight, whose injury is contributed to by his getting up before the train stops, may be found guilty of contributory negligence in so doing after warning, though he did not hear the conductor tell the passengers, after the train began to slow up, to keep their seats till the station was reached; there having been a notice in the car, headed in large capital letters, "Warning! Notice! Danger!" which forbade passengers to stand up while the train was in motion, and he having previously frequently ridden on local freight trains, and known that similar warnings were posted in them. Abelson *v.* St. Louis, etc., R. Co., 105 S. W. 81, 84 Ark. 181.

22. Going on platform or steps before train stops.—Birmingham R., etc., Co. *v.* Barrett (Ala.), 60 So. 262; Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847; Watkins *v.* Birmingham, R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; Washington, etc., R. Co. *v.* Chapman, 26 App. D. C. 472; Pim *v.* St. Louis Transit Co., 108 Mo. App. 713, 84 S. W. 155; Holland *v.* Metropolitan St. R. Co., 157 Mo. App. 476, 137 S. W. 995. See ante, "Riding on Platform," §§ 2743-2756.

Where a passenger on a street car, after signaling for a stop, went to the platform to alight when the car which was slowing down, stopped, she was not guilty of negligence for the car company permitted persons to ride on platforms and in the aisles, and for the further reason that, if passengers were not ready to alight when cars were stopped, traffic would be delayed. Anderson *v.* Metropolitan St. R. Co., 141 S. W. 461, 159 Mo. App. 449.

23. Sudden jerking of car.—If a conductor of a street car negligently fails to observe whether a passenger has alighted, or, knowing that he has not, negligently starts the car with a sudden jerk, in consequence whereof the passenger is thrown from the step, and injured, such negligence as might be imputed to the

Where Danger is Obvious.—A passenger leaving his seat when he must know that it would be highly dangerous to attempt to alight, as when the train

passenger in being upon the step at all can not be properly considered as contributory negligence. Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

After trainmen calling "all off."—For a passenger to leave a car and take a position on the platform steps preparatory to alighting while the car is still in motion, is not negligence per se; a trainman, just after announcing the near approach to H., having called, "All out for H." Southern R. Co. *v.* Roebuck, 31 So. 611, 132 Ala. 412.

When car one block from stop.—The fact that a passenger on a street car, instead of waiting until the car reached its stopping place, in anticipation of alighting, left his seat, and took a position standing upon the rear platform, while the car was a block distant from the point of his destination, does not, per se, make him negligent. North Chicago St. R. Co. *v.* Baur, 79 Ill. App. 121, affirmed in 53 N. E. 568, 179 Ill. 126, 45 L. R. A. 108.

Riding on steps.—A railway passenger, after the name of the station was called, went to the platform while the train was slacking up, and asked the conductor if it would stop there for water. The conductor said it would. The passenger then got upon the lower step of the platform, and when the train stopped at the usual landing place tried to step off; but immediately, and without any notice or signal, the train started with a jerk, and drew up at the water tank, a few feet further on, throwing the passenger to the ground, and severely injuring him. Held, that he had a right of action against the railway company, his conduct in going on the platform before the train stopped not being proximately connected with the injury. Wood *v.* Lake Shore, etc., R. Co., 49 Mich. 370, 13 N. W. 779.

Riding on footboard of street car.—A passenger on a cable car notified the gripman of his intention to get off at a crossing, and preparatory to doing so stepped on a footboard running alongside the car on which persons getting off the car were obliged to step. The motorman failed to stop at the crossing, and stated he would let the passenger off at the next crossing, and thereupon the pasenger remained standing on the footboard, though there were empty seats in the car, and, before reaching the next street, he was killed by the car colliding with a wagon on the track. Held, that the passenger was not guilty of contributory negligence in remaining on the footboard while the car was going to the next crossing, the position not having been voluntarily assumed by him. Sweeney *v.* Kansas City Cable R. Co., 51 S. W. 682, 150 Mo. 385.

Knowledge of obstruction on track.—Nor was he guilty of contributory negligence in that he saw the obstruction which caused the injury on the track ahead of the car in time to have stepped back into his seat, and failed to do so, as he had a right to assume that he would be carried safely, and that the gripman would see the obstruction in time to prevent a collision. Sweeney *v.* Kansas City Cable R. Co., 51 S. W. 682, 150 Mo. 385.

Arising when passing improper place for alighting.—Though a street car passenger, upon hearing the bell ring, arose in her seat to alight when the car stopped, the fact that the place she was passing when she arose was not a proper place to alight would not affect her right to recover for injuries by suddenly starting the car, where she did not attempt to leave the car. Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, rehearing denied in 93 N. E. 1028.

Child nine years old.—The proof being that plaintiff remained inside the cable car until the conductor gave the bell signal to stop, then went out on the step waiting till the car should come to a full stop, there was no error in submitting to the jury, "under all the facts and circumstances in proof," "whether plaintiff [who was only nine years old] had at the time sufficient capacity and discretion to understand" that the steps were a more dangerous place than the inside of the car, in connection with the instruction that to entitle plaintiff to recover they must find plaintiff "acting with reasonable care and diligence for one of his years." Ridenhour *v.* Kansas, etc., R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

Signaling to go ahead.—Plaintiff, while riding on defendant's street car, gave a signal to the motorman to stop. When the car had almost come to a stand, she stepped on the platform, and gave another signal, which she thought was a signal to stop. The car immediately started forward with a jerk, and plaintiff was thrown therefrom, and injured. It was not shown that the motorman or conductor knew of her danger, or that the second signal was necessary, or that it was the signal to stop, and not the regular signal for starting the car. Held, that plaintiff's injuries were caused by her own act. Sirk *v.* Marion St. R. Co., 11 Ind. App. 680, 39 N. E. 421.

Where a passenger on an open electric car signals the conductor to stop at a crossing before and after it had reached it, and the conductor does not heed the signal, and the passenger stands at the edge of the car with his face to the rear and an arm around a stanchion, and again signals the conductor when the car is in the middle of the block, and the car

is running at a high rate of speed, would be barred from recovery for injury,[24] but even though at the time he leaves his seat there is no apparent danger and to do so would be no more than an ordinarily prudent man would do, still if he is injured through no fault of the carrier, and would not have been hurt if he had remained in his seat until the car had stopped, he can not hold the carrier responsible. Thus, where a passenger standing in the aisle or on the platform or steps of a car loses his balance and is injured, he can not recover if the carrier in stopping its car did so with no more jerk than was incident to its stoppage with ordinary care.[25]

is then suddenly stopped with a jar, and the passenger is thrown out, he is guilty of contributory negligence barring recovery for the injuries received. Jennings *v.* Union Tract. Co., 55 Atl. 765, 206 Pa. 31.

By direction of carrier's employees.—A person, having traveled on freight trains of defendant before, boarded one, and offered to pay his fare. The conductor refused it, and told him he would have to get off. The passenger offered to get off, if the train were stopped, which was refused, and he was told to get off when the train reached a hill which it was then approaching. Going on the platform before the hill was reached, he fell off; he testifying that he was kicked off by the conductor, which the conductor denied. Held, that the passenger was not negligent in boarding the train, and in voluntarily going on the platform preparatory to jumping off. Texas, etc., R. Co. *v.* Kelly (Tex. Civ. App.), 47 S. W. 809.

24. High rate of speed.—Where a passenger knew that the train was rounding a double curve at thirty miles an hour and could not be slowed down to allow him to jump off, and he went on the platform and down on the lower step, from which he was thrown, he was guilty of contributory negligence, and the mere fact that the engineer had promised to slow down to allow him to jump off was no excuse. Clark *v.* Atchison, etc., R. Co., 164 Cal. 363, 128 Pac. 1032.

A passenger on a regular passenger train is not justified in relying on the promise of the engineer to slow down the train to permit him to alight, on the assumption that he has authority to slow down trains for that purpose, and the promise of the engineer so to do is not a promise of the carrier. Clark *v.* Atchison, etc., R. Co., 128 Pac. 1032, 164 Cal. 363.

A promise by a conductor to a passenger to stop a train when it arrived at a station at which it was not scheduled to stop, so as to allow the passenger to alight thereat, accompanied by a direction "to be out on the platform ready to get off," did not warrant the passenger, except at his own risk, in leaving his seat in a car and going out on the platform thereof, when the train was rushing by the station at a high rate of speed (in the present instance, forty-five miles an hour), and there was no slackening of its speed or anything indicating an intention by the persons in charge of it to bring it to a stop. The evidence introduced for the plaintiff showing affirmatively that the injuries of which he complained were caused by his own gross negligence, the court was right in granting a nonsuit. Hicks *v.* Georgia, etc., R. Co., 108 Ga. 304, 32 S. E. 880; Southern R. Co. *v.* Strickland, 130 Ga. 779, 61 S. E. 826.

This was a suit by a passenger against a railroad company for damages resulting from injuries received by the passenger, from being thrown from the platform of the car. The uncontradicted evidence shows that when the train was about a mile from a regular station where cars were accustomed to stop, and which was the place of destination of the plaintiff, the porter came into the car where the plaintiff was seated, and, announcing the name of the station, called, "All off." This was at night, and the train was running at a high rate of speed, estimated at from thirty to forty-five miles per hour. After the announcement of the station, the plaintiff immediately arose from his seat and walked out on the platform of the car, in order to be ready to alight as soon as the train stopped. After he got out upon the platform he was thrown therefrom by the motion of the car, and injured. There had been no perceptible slackening of the speed of the train. The plaintiff was twenty-seven years of age and had never ridden on a railroad train before. Held, that, under the rulings in Blitch *v.* Central Railroad, 76 Ga. 333, and Hicks *v.* Georgia, etc., R. Co., 108 Ga. 304, 32 S. E. 880, the plaintiff was not entitled to recover. Southern R. Co. *v.* Strickland, 130 Ga. 779, 61 S. E. 826.

25. Absence of negligence on part of carrier.—Lunsford *v.* Louisville, etc., R. Co., 153 Ky. 283, 155 S. W. 378.

A passenger, who, on approaching her destination, leaves her seat and stands by the door before the train stops at the station, can not recover for injuries sustained in a fall caused by the stopping of a train with no more jerk than was incident to its stoppage in the exercise of proper care. Illinois Cent. R. Co. *v.* Jolly, 78 S. W. 476, 117 Ky. 632, 25 Ky. L. Rep. 1735.

Where a passenger stands on the step

Massachusetts Rule.—In Massachusetts it is held that if a passenger goes on the platform or step of a car before it has stopped, from no other cause except his own convenience, he does so at his own risk.[26]

§§ 2802-2806. Alighting at Place Other than Station or Platform —§ 2802. In General.—While the servants of a street railroad company are charged with the duty of knowing whether a place at which a car is stopped to allow passengers to alight is reasonably safe, the passenger is charged with no such duty, and is not negligent in alighting at such place, though it is not at the regular station or platform, unless the danger is obvious, he having a right to assume that the place is safe.[27] Thus, a street car passenger carried by his sta-

of a car as it is about to stop, and loses his balance and falls, and he alleges the sudden jerking of the car, and the evidence shows that such jerking was not greater than was usual in the stopping of street cars, and there was no discoverable defect in the step, he can not recover for injuries. Phillips *v.* St. Charles St. R. Co., 31 So. 135, 106 La. 592.

Where plaintiff was riding in an open summer car having a running board along its side, and wished to get off at a certain street, and when the car stopped before it came to the point where she wished to alight she stepped down on the landing board, and attempted to step off backwards, and found the distance too great for her to touch the ground comfortably with her foot, and, whether from confusion or inability to control herself, she fell and was hurt, it was error to submit the case to the jury. Scanlon *v.* Philadelphia Rapid Transit Co., 57 Atl. 521, 208 Pa. 195.

26. Massachusett's rule.—A passenger who, after the station is called, and before the train stops, leaves the car, and stands on the steps, is guilty of such contributory negligence as prevents his recovery for injuries resulting from the steps striking a truck on a track by the side of the car. Fletcher *v.* Boston, etc., Railroad, 73 N. E. 552, 187 Mass. 463, 105 Am. St. Rep. 414.

"Plainly, if he had remained in the car until the train stopped, this danger would have been avoided, but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury which common experience has shown is incident to standing upon the platform of a moving railroad car. The fact that the station had been announced, and the train was being reduced in speed preparatory to stopping, or that the combination of conditions causing the accident was peculiar, and ordinarily not to be anticipated, does not furnish a sufficient excuse for his conduct. See Manning *v.* West End St. R. Co., 166 Mass. 230, 44 N. E. 135. Even if it could be found that the baggage master, being a servant of the railroad, might properly announce the stations for the information of passengers, who would be justified in treating such an announcement as an invitation to leave the car, as held in Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797, yet this is not an invitation to leave a train while in motion, but after it has regularly stopped. At the fartherest it afforded no justification for the plaintiff to leave the car and attempt to finish his journey on the platform or steps. England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1. As the plaintiff was not compelled by necessity arising from insufficient means of transportation furnished, or by the management of its train on the part of the carrier, or misled by an invitation to leave the place properly provided for his transportation, the action taken by him was for his own convenience, and at his own risk. Hickey *v.* Boston, etc., R. Co. (Mass.), 14 Allen 429; Files *v.* Boston, etc., R. Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411." Fletcher *v.* Boston, etc., Railroad, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414.

27. Alighting at place other than station or platform.—Mobile, etc., R. Co. *v.* Walsh, 146 Ala. 295, 40 So. 560.

Where a carrier, taking a passenger beyond his destination, stops the train and lets him off, he may assume that the place selected is reasonably safe for the purpose. Birmingham R., etc., Co. *v.* Anderson, 163 Ala. 72, 50 So. 1021.

The doctrine of assumption of risk has no application to the case of a passenger injured while attempting to alight from an electric car at a dangerous place selected by the carmen, though she made no demand to have the car returned to a safe place for alighting. Fillingham *v.* St. Louis Transit Co., 77 S. W. 314, 102 Mo. App. 573.

Plaintiff, a passenger on defendants' train, was to transfer to another road at a certain point. After stopping, defendants' train backed from the station towards a river, as plaintiff knew, to switch the three rear cars to the other road. While so doing, defendants' conductor called, "The three rear cars for F." Plaintiff, who was in the front car, walked back to the platform of the third car, which was one of the three for F., though plaintiff was not aware of that fact. The train had then stopped, and the platform on which the plaintiff stood was over the river, and 700 feet from the station.

tion and directed to alight in a dark, strange place has the right to assume that the place is safe, in the absence of directions how to reach his destination.[28]

Surroundings Obviously Inconsistent with Stopping Place.—But where the surroundings at the place where a train stops are such as to preclude a reasonable belief on a passenger's part that he is getting out where the company intended him to leave the train, and such that no ordinarily prudent person could suppose that the train had arrived at the place of his intended departure, a passenger who, notwithstanding, leaves the train at such a place and is hurt in consequence can not recover damages.[29]

People were standing in the aisle of the car on which he was, and plaintiff, wishing to go to the rear car, stepped off the platform, with the intention of going back on the outside, and fell through the railroad bridge, and was injured. It was dark, and he could not see, and did not know where he was stepping. He was familiar with the station and the bridge. Held, in an action for damages, that a verdict was properly directed for defendants, because of his failure to use due care. Kellogg *v.* Smith, 61 N. E. 138, 179 Mass. 595.

The train was not stopped at the platform of the station, and a passenger carrying an infant and a valise was injured in alighting. He thought the train had arrived at the usual stopping place, the night being dark. He was familiar with such place, and could have alighted there with safety, incumbered as he was. He did not discover his mistake until he had placed one foot where he thought the platform should have been, when he attempted to recover himself, but could not, and had to step to the ground. Held, that he was not guilty of contributory negligence. Texas, etc., R. Co. *v.* Porter (Tex. Civ. App.), 41 S. W. 88.

Assumption that approaches to station safe.—Where plaintiff, after alighting from a train and making his way to the platform, did not know, when walking on the end of the ties and holding to a car, that he was on a trestle or that he was in a dangerous position, he was not negligent, as he had the right to assume that the company had discharged its duty in making the approaches from its passenger cars to the station reasonably safe. Chesapeake, etc., R. Co. *v.* Harris, 49 S. E. 997, 103 Va. 635.

Alighting at highway crossings.—A passenger on an interurban car stopping at highway crossings does not assume the risk involved in stopping the car for him to alight at a more dangerous place than the usual place for alighting, where he had no knowledge of the added danger. McGovern *v.* Interurban R. Co., 111 N. W. 412, 136 Iowa 13, 13 L. R. A., N. S., 476.

Passenger unacquainted with station.—While plaintiff and her husband were passengers on defendant's train the conductor told them they would have to change cars at certain station. Afterwards he took up their checks, and shortly thereafter the brakeman called out the name of the station, and in a little while the train stopped. Plaintiff and her husband gathered up their wraps, and with their baby started to the rear end of the car to get off, but made no inquiries, though they saw no other passengers preparing to leave the train. The conductor and brakeman saw them passing out of the car, but said nothing. The husband got off the train, and, as plaintiff was following, the train started with a jerk, throwing her to the ground, and injuring her. The train had not reached the station, but had stopped at a railroad crossing, where there were no lights nor platform. It was dark, and plaintiff and her husband thought they were at the station. They had never been there before, and knew nothing about it. Held, that a finding that plaintiff was not culpably negligent was warranted. Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593.

Danger avoidable by use of ordinary care.—Although a railway company may have been negligent in permitting a passenger to get off at a place not at a regular station, yet it may defeat a recovery by showing that, when the passenger was in danger by its negligence, he could have avoided the consequences of it by the use of ordinary care. Central R. Co. *v.* Thompson, 76 Ga. 770.

28. Cossitt *v.* St. Louis, etc., R. Co., 123 S. W. 569, 224 Mo. 97, 19 Am. & Eng. Ann. Cas. 1210.

Duty to examine ground.—Where the conductor of a street car failed to stop at the place plaintiff requested, but stopped a short distance beyond, where the track ran close to the edge of the highway, and plaintiff, in alighting with a number of bundles and wraps, fell into a hole and was injured, the fact that she did not look at the ground before alighting was not sufficient to charge her with contributory negligence. Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

29. Farrell *v.* Great Northern R. Co., 111 N. W. 388, 100 Minn. 361, 9 L. R. A., N. S., 1113.

A carrier is not liable for injuries to an incumbered passenger who fell from a train after dark, while attempting to alight where the train made a slight stop just before reaching the station, where

Proximate Cause.—The mere fact that a passenger has unnecessarily alighted at a place other than the station or platform will not debar him from recovery for injuries inflicted through the carrier's negligence, unless his act was the proximate cause of the injury.[30]

Temporary Stops.—A passenger is not justified in alighting where the stop is made at a place other than the station or platform and all indications point to the fact that the stop is only temporary. Thus, where the stop is made to allow another train to pass,[31] or to set a switch,[32] or on account of a wash-

she acted hastily, was familiar with the station, knew that a trainman always assisted alighting passengers, and where the brakeman was standing opposite her on the next car ready to alight and assist the passengers when the train reached the station. McMelon *v.* Illinois Cent. R. Co., 52 So. 783, 126 La. 606.

The fact that a train is about to stop at a railway junction in accordance with statute does not justify a passenger in disregarding the appearance of the actual environment, nor in concluding that the train had arrived at the place named as the next station. Farrell *v.* Great Northern R. Co., 111 N. W. 388, 100 Minn. 361, 9 L. R. A., N. S., 1113.

The defendant's train, upon which the plaintiff was a passenger, ran a short distance beyond the station where she was to alight, stopped for a moment, and then backed to the station. As soon as the train stopped, the plaintiff, who supposed it was at the station, without the knowledge of any one in charge of the train, left the car by the rear door, and was on the steps getting off, when, by a sudden jerk of the train, she was thrown off and injured. It was very dark, and there was no station platform or light where the plaintiff attempted to leave the car. The name of the station had not been announced, no notice had been given to passengers to alight, and there was no brakeman at the end of the car where the plaintiff attempted to get off. Held, that the plaintiff was guilty of contributory negligence. Taber *v.* Delaware, etc., R. Co., 4 Hun 765, reversed in 71 N. Y. 489.

Stopping in cut.—As defendant's train was approaching a station, its name was called, and the train was stopped very soon thereafter, to take the side track for the passage of another train. When it stopped, plaintiff, whose destination it was, went out of the rear door of the car, and was descending with one foot on the first step of the car, and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. The place of the stoppage was in a cut, about 200 yards from the depot building. It was about 1 o'clock p. m. All the surroundings indicated that the spot at which he attempted to leave the train was not the proper place for alighting. Held, that defendant was not liable for the injuries caused by the fall. Smith *v.* Georgia Pac. R. Co., 88 Ala. 538, 7 So. 119, 16 Am. St. Rep. 63, 7 L. R. A. 323.

Absence of light as warning.—It is not the act of a reasonably prudent man, accustomed to railroad travel, to step from a car into utter darkness under the supposition that the car had stopped at the usual place provided for the landing of passengers; the very darkness itself being sufficient to warn him that the station is not there. Ouellette *v.* Grand Trunk R. Co., 76 Atl. 280, 106 Me. 153.

Alighting on trestle.—A passenger who attempted to alight from a car standing on a high trestle, with notice of its situation, was guilty of criminal negligence precluding a recovery for his death, which occurred as the result of the attempt. Chicago, etc., R. Co. *v.* Hague, 48 Neb. 97, 66 N. W. 1000.

30. Proximate cause.—Where a passenger, getting off a car while it is standing still, is injured by defects in the car, and the fact that the place where the injury occurred was not a usual stopping place is relied on as showing contributory negligence, it is proper to instruct that, although the passenger got off the car on the north side of a street, when the usual place for alighting was on the south side, that fact alone would not bar his recovery, unless it was the proximate cause of the injury. North Chicago St. R. Co. *v.* Eldridge, 151 Ill. 542, 38 N. E. 246.

31. Where a train is run upon a switch to allow the passage of another train, and the stoppage is not for the purpose of allowing passengers to board the train or to alight therefrom, one leaving the train must usually assume all the ordinary risks incident to his action. Chicago, etc., R. Co. *v.* Sattler, 90 N. W. 649, 64 Neb. 636, 57 L. R. A. 890, 97 Am. St. Rep. 666.

32. Where a passenger, without notice to any of the employees of the train, attempts to alight before the train reaches the station, on the momentary stopping of the train to allow a switch to be set, and is injured by it suddenly starting and throwing her to the ground, such injury being the result of the passenger's own fault, she can not recover. Georgia, etc., R. Co. *v.* Murray, 39 S. E. 427, 113 Ga. 1021.

out,[33] or to await signals, a passenger alighting does so at his own risk.[34]

Stopping in Obedience to Signal.—Though a car stops at a place which is obviously not a regular or usual stopping place, a passenger may assume that it stopped in obedience to his signals to allow him to alight and is not guilty of contributory negligence in alighting, in the absence of any knowledge that the stop was made for other purposes.[35]

§§ 2803-2805. By Direction, Invitation or Acquiescence of Carrier —§ 2803. In General.—A passenger is not guilty of contributory negligence in alighting from a train upon which he has been carried as a passenger at a point where he was invited or expressly directed by the carrier to alight, unless the circumstances and indications make it manifest that to obey would be dangerous.[36]

33. Plaintiff, in an action against a railroad company for personal injuries, had bought a ticket on defendant's road to his home, which was the third station from his starting point. At the third stop after the journey began, several passengers, bound for the same place as plaintiff, started up, one of them saying that it was their destination; and plaintiff, going onto the platform of the car, got off in the dark, and, after falling fifteen feet into a canyon, discovered that the train had stopped on a trestle some distance from his station. No signal had been given for the stop, and it lasted only a minute or less, so that no one else had time to get off. One of plaintiff's witnesses testified that there had been a washout there; and it was not shown that it was so dark that plaintiff could not have noticed the canyon if he had taken the time to look. Held, that a nonsuit was properly granted. Nagle *v.* California, etc., R. Co., 88 Cal. 86, 25 Pac. 1106.

34. Where a street railway company adopts and publishes reasonable regulations as to where its cars shall stop in taking on and letting off passengers, one who is injured by the sudden starting of the car while alighting at a point where the car has temporarily stopped to await a signal of a flagman, and not at a regular stopping point, can not recover. Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

35. Stopping in obedience to signal.—A passenger on a street car notified the conductor to stop at a street crossing. The car carried him beyond the point of stopping prescribed by an ordinance requiring cars to stop on the further side of the street approached by them. The bell was immediately rung, and the car stopped. While the passenger attempted to alight, he was injured by the starting of the car. Held that, though the car stopped at an unusual place, the passenger had the right to assume that it stopped pursuant to signals to let passengers alight, in the absence of knowledge that it stopped for another purpose. Selby *v.* Detroit Railway, 104 N. W. 376, 141 Mich. 112.

A passenger who has signaled the car to stop is justified in assuming that he might alight when the car did stop, notwithstanding it was in the middle of a block. Gardner *v.* Metropolitan St. R. Co., 167 Mo. App. 605, 152 S. W. 98.

36. By direction.—Illinois Cent. R. Co. *v.* Johnson, 123 Ill. App. 300, judgment affirmed in 77 N. E. 592, 221 Ill. 42.

Where a train runs beyond a passenger's station, at night, without his knowledge, and the ground is so covered with snow that its surface can not be distinguished, it is not negligence for the passeger to assume, on the carrier's invitation to alight, that his car is at the station platform. Chesapeake, etc., R. Co. *v.* Friel, 39 S. W. 704, 19 Ky. L. Rep. 152.

Plaintiff was riding at night on one of defendant's cars, and notified the conductor that he wished to get off at a certain street at which place there was a plank roadway some forty feet wide, guarded by railings, and at which the cars were accustomed to stop. The car did not stop until it had passed the street, at a place where there was no protection, and where the track passed over a trestle twelve feet above the tide flats. The conductor, knowing that plaintiff was going to the power house, pointed towards it, and plaintiff, thinking they were at the usual stopping place, stepped from the car, and started towards the power house, and fell through an unprotected space between the track and the wagon road. Held, that plaintiff was not guilty of contributory negligence. Henry *v.* Grant St. Elect. R. Co., 64 Pac. 137, 24 Wash. 246.

Direction to hurry.—Where a train stopped at a switch at midnight instead of the station, and the conductor told plaintiff to be quick and get off, and he did, and fell into a waterway, plaintiff's failure, by the light of a dim lantern of his own, to discover the waterway, is not evidence of contributory negligence. Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

A train stopped, on a dark night, away from the platform, and a passenger's station was called. The passenger was told by the conductor to hurry, as he would be carried by if he did not, and

§ 2804. Stop after Calling Station as Invitation.—When the name of a station is called and the train soon thereafter is stopped, a passenger may reasonably conclude that the train has stopped at the station, and may, without negligence, endeavor to get off, unless the circumstances and indications make it manifest that the proper and usual stopping place has not been reached.[37] The mere fact that the station has been called and the train stopped will not relieve him of the duty to exercise due diligence in determining whether the train has arrived at the place where the company intended them to alight.[38]

thereupon stepped from the car, and fell several feet, on a pile of wood. Held, he was not guilty of contributory negligence so as to bar a recovery for injuries from the company. International, etc., R. Co. *v.* Causler, 97 Ala. 235, 12 So. S. W. 642.

Implied invitation.—In an action for personal injuries there was evidence that plaintiff was in the habit of leaving defendant's dummy train, on which he was riding, at a certain street crossing; that those in charge of the train knew this; that the train passed the crossing without stopping, but when approaching the next crossing it came to a full shop; that nothing was said that the train was to back to plaintiff's usual stopping place; that plaintiff had previously left the train where it stopped; and that, after plaintiff had got off, and was reaching back for his crutches, the train, without warning, backed, and knocked him down. Held, that it was proper to charge that plaintiff was not negligent in getting off, if he believed he had an implied invitation to do so, and the train was stopped for that purpose. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235. 12 So. 439.

Against carrier's warning.—The box car in which plaintiff was riding had no steps or other means of alighting therefrom. It was stopped before it arrived at the station platform, so that plaintiff, in order to alight, would be compelled to jump to the ground. She testified that she believed at the time that the jump was dangerous, and it was shown that she was warned not to do so. Held, that she could not recover for injuries resulting from jumping from the car merely to avoid being carried to the next station. Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

Authority of conductor to give directions.—Where a conductor of a railway train invites passengers to get off at a place other than that provided by the company for that purpose, it can not be said that he has exceeded his authority, and that for that reason the company is not responsible for injuries received by a passenger in acting on his invitation; while the company has the right to prescribe rules for the regulation of passengers, the conductor is the person to administer those rules, and passengers travel under his directions, and are generally bound to conform to them. Louisville, etc., R. Co. *v.* Smith, 13 Ky. L. Rep. 974.

37. Stop after calling station as invitation.—Davis *v.* Kansas, etc., R. Co., 86 S. W. 995, 75 Ark. 165.

On a station being called a passenger has the right to infer that the first stop will be such station, and on the train stopping it is an invitation to alight. Wagner *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 171.

Passengers for station other than one announced.—A passenger, though his destination is other than a station announced, may accept the invitation to alight implied from its announcement and rely upon the implied assurance of safety in alighting. St. Louis, etc., R. Co. *v.* Glossup, 88 Ark. 225, 114 S. W. 247.

38. Stop after calling station as invitation.—Farrell *v.* Great Northern R. Co., 111 N. W. 388, 100 Minn. 361, 9 L. R. A., N. S., 1113.

Where the conductor on a railroad train calls the name of a station, and the engineer, before reaching there, though without the conductor's knowledge, stops the train over a trestle, and a passenger steps off and is injured, the fact that the night was dark, that the conductor himself did not at first know that he had not reached the station, and that he could not see the trestle without the aid of his lantern, is sufficient to show that a passenger was not negligent in attempting to alight. Richmond, etc., R. Co. *v.* Smith, 92 Ala. 237, 9 So. 223.

Appearances similar to those at depot.—Where the porter calls out the name of a station, and soon after the train stops, and the appearances there are the same as opposite the depot building, except that the small building is not just opposite, though there is a building opposite which might indicate the train had stopped for the depot, it is not negligence for a passenger to alight there. St. Louis, etc., R. Co. *v.* Farr, 68 S. W. 243, 70 Ark. 264.

Strange locality.—Where a conductor on a street car called out the street at which plaintiff, a passenger, intended to alight and the car immediately stopped, she had a right to assume, in the absence of warning to the contrary, that the car had stopped at such street, she being unacquainted with the neighborhood, and she was not guilty of contributory negligence in attempting to alight, though the car had not, in fact, reached plain-

§ 2805. Slowing Up for Railroad Crossing—Custom.—Unless an electric railway company has by its practice waived its established rule that passengers shall alight only at the designated stopping places the slowing up of a car before crossing another track, at a place not designated as a stopping place, is not an invitation to passengers to alight, and evidence that passengers have been in the habit of taking advantage of such slowing up or stopping to alight there does not establish such waiver.[39]

§ 2805½. On Advice of Fellow Passenger.—Negligence of a railroad company in carrying a passenger beyond his destined station while he was asleep does not justify his attempting to get off the car in a dark night, on the train's stopping at a bridge to take water, although encouraged to the effort by his fellow passengers.[40]

§ 2806. Running Past or Stopping Short of Destination.—Where a street car is run past the place at which a passenger has signified his desire to alight, and stopped at an unusual and dangerous place, and the passenger in alighting there does no more than an ordinarily prudent person would have done under the circumstances, he is not guilty of contributory negligence.[41]

Duty to Require That Train Be Run Back.—Where a train runs beyond a station platform before stopping, and a passenger instead of requiring the conductor to back his train to the platform chose to alight where the train was standing, and the trainmen have no reason to believe that it would be dangerous for him to do so, he takes the risk, and can not complain that the place was not a suitable one for alighting.[42]

Duty to Pass Through Cars to Station Platform.—Where a train is stopped short of or overshoots the station and it is possible to reach the platform by passing through the other cars, a passenger knowing this, but who elects to

tiff's destination. McNally *v.* Metropolitan St. R. Co. (Mo. App.), 129 S. W. 464.

For obstruction before reaching depot.—A passenger on a street car had received a transfer to another line. As the car approached the transfer point the conductor called out the place, and directed the passengers to transfer to that line. The car came to a stop, and the passenger attempted to alight, but, while so doing, the car started and threw her to the ground. The car stopped because of a wagon in front of it, and when the wagon moved the car started up. The passenger received no notice to delay the transfer. The rear of the car, when it stopped, was from fifty to one hundred feet from the street crossing where it usually stopped. Held, that the passenger was not guilty of contributory negligence, as a matter of law, in attempting to alight. United R., etc., Co. *v.* Woolbridge, 55 Atl. 444, 97 Md. 629.

39. Slowing up for railroad crossing—Custom.—Stevens *v.* Boston Elevated R. Co., 85 N. E. 571, 199 Mass. 471.

40. On advice of fellow passenger.—Illinois Cent. R. Co. *v.* Green, 81 Ill. 19, 25 Am. Rep. 255.

Where a passenger on a stock train was awakened at night by one not an employee of the road, and informed that his cattle were being unloaded, and, without any invitation to alight or making inquires as to where the train had stopped, stepped from the car in the dark, and fell from a railroad bridge on which the train had stopped, he can not recover. Blevins *v.* Atchinson, etc., R. Co., 3 Okla. 512, 41 Pac. 92.

41. Running past or stopping short of destination.—Mobile, etc., R. Co. *v.* Walsh, 40 So. 560, 146 Ala. 295.

Where a railroad train ran past a station, and was stopped at a dangerous place in a dark night, it was not negligence for a passenger to alight. Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

Loss or injury in traveling back.—A passenger negligently carried beyond his station can recover for the inconvenience, loss of time, and expense of traveling back; but if he leaves the train under circumstances which render the act imprudent he does so at his own risk. Owens *v.* Wabash R. Co., 84 Mo. App. 143.

42. Duty to require that train be run back.—Louisville, etc., R. Co. *v.* Keith, 58 S. W. 468, 22 Ky. L. Rep. 593.

If plaintiff got off without objection, and without requesting the conductor or other agent of the carrier to run the train back to the depot, he can recover no damages by reason of having to walk back to the depot. Gulf, etc., R. Co. *v.* Head, 4 Texas App. Civ. Cas., § 209, 15 S. W. 504,

alight where there is no platform and is injured, can not recover,[43] but where a passenger is unable to tell whether the car is opposite the station because of darkness or for other reasons, and the trainmen open the door and call the station, he will not be debarred from recovery.[44]

Stopping Street Car on Wrong Side of Street.—A passenger on a street car may attempt to alight without being guilty of contributory negligence where the car is stopped on the near side of a street crossing, particularly where the signal for stopping has just been given,[45] and the fact that to stop on the near side of a street is in violation of a city ordinance will not prevent his recovery.[46]

§§ 2807-2810. Alighting at Wrong End or Part of Car or on Wrong Side of Train—§ 2807. Wrong End of Car.—Ordinarily a passenger may alight from either end of a car without being charged with negligence.[47]

Knowledge of Right End.—Where, however, it is within the knowledge of a passenger that one end of a car is the usual, customary and proper end from which to alight and he voluntarily alights from the other he is negligent and can not recover.[48]

43. Duty to pass through cars to platform.—Defendant did not draw the car in which plaintiff was riding up to the station platform, and in stepping from the car to the ground she fell and was injured. Plaintiff could have safely gained the platform by passing through the next car forward. Held, that plaintiff's negligence precluded a recovery. Eckerd *v.* Chicago, etc., R. Co., 70 Iowa 353, 30 N. W. 615.

A passenger can not recover from a railroad company for personal injuries occasioned by her neglect, in alighting, to avail herself of the suitable place for landing provided by the company. Chicago, etc., R. Co. *v.* Dingman, 1 Ill. App. 162.

44. As the train approached plaintiff's station at night, the brakeman opened the door of the rear car, in which plaintiff was, and called the station, and plaintiff and other passengers got off on the ground, not knowing that they were eighty yards from the depot. The night was dark, and plaintiff, after the train left, in walking along the unlighted track toward the depot, fell into an unguarded cattle guard and was injured. Held, that plaintiff was not guilty of contributory negligence in not going through the cars between him and the station platform before getting off, or in not finding the conductor, who was at the front end of the train, and requesting him to move the train until the rear car reached the platform. Chesapeake, etc., R. Co. *v.* Smith, 49 S. E. 487, 103 Va. 326.

45. Stopping street car on wrong side of street.—West Chicago St. R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. 958.

Though an ordinance required defendant street railway company to stop its cars on the far crossing, yet, cars having frequently, to plaintiff's knowledge, been stopped at the place of the accident before reaching the far crossing, to receive or discharge passengers, and she having signaled the car to stop to let her off, she had a right to suppose, on its stopping before it reached the far crossing, that it stopped to let her off, so that, there being no suggestion that it stopped for any other purpose, defendant can not complain that the jury were authorized to find that it was stopped for such purpose. Franklin *v.* St. Louis, etc., R. Co., 87 S. W. 930, 188 Mo. 533.

46. In violation of city ordinance.—Franklin *v.* St. Louis, etc., R. Co., 188 Mo. 533, 87 S. W. 930.

Though an ordinance require street cars to stop on the further side of cross streets, to prevent their obstruction, a passenger may, without being negligent, attempt to alight where a car is stopped just before reaching the street. Judgment, 70 Ill. App. 239, affirmed in West Chicago St. R. Co. *v.* Manning, 48 N. E. 958, 170 Ill. 417.

47. Rear end.—It is not negligence for a passenger to leave a railroad car at the rear platform. McDonald *v.* Illinois Cent. R. Co., 88 Iowa 345, 55 N. W. 102.

It is not negligence for a passenger to attempt to alight from the rear end of a car, where the uncontradicted evidence shows that it was a proper place. Olson *v.* Chicago, etc., R. Co., 102 N. W. 449, 94 Minn. 241.

Front end.—In the absence of a rule or custom requiring passengers to alight from the front end of a car, it is not negligence to alight from the rear end. Cartwright *v.* Chicago, etc., R. Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274.

48. Knowledge of right end.—Plaintiff got on defendant's train at the rear platform. It was raining, snowing, and freezing, and the steps were slippery. After a ride of six minutes, he reached his destination, and got off at the same platform, and fell on the slippery steps. The conductor stood at the front end of the car to assist passengers on and off the train. Plaintiff had made the same trip daily for years, and knew that was the usual custom. Held, that plaintiff was negligent, and could not recover. Pittsburg, etc.,

In Violation of Rules.—The rule of a city passenger railway company that passengers shall not get on or off any car by the front platform is a reasonable rule, and if a party be injured in consequence of a known violation of such rule, unless compelled thereto by some existing necessity beyond his control, the company is not liable. In such case the question of negligence on the part of the passenger is a legal question for the court to decide.[49] But it has been held in New York that a passenger who got off a car at the front end in violation of the carrier's rules would not constitute such negligence as to preclude recovery.[50]

§§ 2808-2809. Wrong Side of Car—§ 2808. In General.—Whether getting off on the wrong side of a train constitutes negligence must depend upon all surrounding circumstances. It can not be said that to get off on the side of a train opposite from the platfrom provided by the carrier is as a matter of law negligence,[51] though it has been held to be so in some states—that a passenger voluntarily alighting on the side away from the platform assumes the risk.[52]

R. Co. *v.* Aldridge, 61 N. E. 741, 27 Ind. App. 498.

Absence of knowledge of danger at usual end.—Where a carrier provided a place for its passengers to alight, and stopped its train there in the night after announcing the station, not having warned a passenger not to alight at the front end of the coach, that end being a usual place of exit, a passenger could assume, in the absence of knowledge of danger, that she could safely get off at that end. Rearden *v.* St. Louis, etc., R. Co. (Mo.), 114 S. W. 961.

Boarding and alighting at same end.—In an action for personal injuries it appeared that plaintiff was a passenger on a street car, and, while in the act of alighting from the front of the car, was thrown into the street by the driver loosing the brake. Held, that there was no fault in the attempt of the plaintiff to get off the front platform, instead of the rear one; he having got on at the front platform without objection, and it not appearing that any notice was given to passengers that they must not get off at the front platform. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370.

49. In violation of rules.—Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

50. After defendant's street car had stopped, plaintiff alighted from the front platform, in violation of defendant's rules. The horses were detached, and, on turning around, struck plaintiff, six feet from the car, and injured him. Held, that his violation of the rules was not contributory negligence precluding a recovery. Platt *v.* Forty Second St., etc., R. Co. (N. Y.), 4 Thomp. & C. 406.

51. Wrong side of car.—Getting off the wrong side of a train, the side opposite the platform, is not, as matter of law, negligence. McQuilken *v.* Central Pac. R. Co., 64 Cal. 463, 2 Pac. 46.

Where a passenger was injured by the sudden moving of the train while he was alighting, he could recover, though he was leaving on the opposite side of the train from the station, and on the side where passengers were not accustomed to alight. Kearney *v.* Seaboard, etc., R. Co., 74 S. E. 593, 158 N. C. 521.

A passenger started to get off the train, as soon as it stopped, on the usual side, but, seeing another train between that and the depot, and nobody to help her, she tried to get off the other side. The train, however, started before she succeeded, and in jumping to the ground she was hurt. It did not appear that one side was safer to alight than the other, though there was a brakeman on the other side, assisting passengers, but not at plaintiff's car. Held, that the passenger was free from negligence. Gulf, etc., R. Co. *v.* Vinson (Tex. Civ. App.), 24 S. W. 956.

52. Kentucky.—In an action for injuries it appeared that plaintiff alighted from defendant's train on the right of the track, where there were neither platform nor lights, and was injured in leaving the yards. The evidence showed that there was a safe and well lighted platform on the left side, of which plaintiff could have known by the exercise of reasonable diligence. Held, that plaintiff assumed the risk. Louisville, etc., R. Co. *v.* Ricketts, 96 Ky. 44, 27 S. W. 860, 16 Ky. L. Rep. 281.

Where a railroad company provides a platform for the use of passengers in getting on and off its trains, it will not be liable for injuries sustained by one in alighting from a train on the side opposite the platform, where it appears that he knew, or by diligence could have known, of the platform, and that, had he stepped off upon it, he would not have been injured. Louisville, etc., R. Co. *v.* Payne, 104 S. W. 752, 31 Ky. L. Rep. 1173.

Plaintiff, a passenger on defendant's train, when it arrived at a station at night, got off on the side opposite the platform, which platform was safe and well lighted. He knew which side the platform was on, but took the opposite side, to save a walk of eight feet, and by reason of the darkness stumbled over a water box, throwing one of his hands un-

§ 2809. On Invitation or Acquiescence of Carrier.—Where it was the custom—known and consented to by the railroad company—of passengers to alight, at a place other than the depot, on the side of the train where the company operated a parallel track, the mere act of a passenger alighting on such side was not, as matter of law, negligence, but the question is solely for the jury to determine.[53]

In Violation of Rules of Carrier.—If the custom of passengers to disregard a rule was so common as to charge the servants of the carrier with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it. A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting the requirement to be generally disregarded, and then proceeding upon the theory that every one is bound to comply with it. If, in such case, an accident occur, the defendant should not be allowed to rely exclusively upon a breach of its regulation.[54]

der the train, and was injured. The train stopped four minutes, and plaintiff, by the use of ordinary prudence, could have left the cars and depot grounds with reasonable safety had he taken the platform side. Held, that plaintiff left the cars at his own risk, the defendant not being required to have the side opposite the platform lighted, even though plaintiff and others had sometimes gotten on and off before on that side, as a matter of convenience to themselves. Louisville, etc., R. Co. *v.* Ricketts, 93 Ky. 116, 14 Ky. L. Rep. 19, 19 S. W. 182.

Pennsylvania.—Where a railroad company has provided a sufficient platform for the accommodation of passengers boarding or alighting from its cars, it is not liable for injuries to a passenger resulting from his voluntarily leaving the cars on the opposite side and receiving injuries from a train on another track. Pennsylvania R. Co. *v.* Zebe, 33 Pa. 318; S. C., 37 Pa. 420.

A passenger on a railroad train, in the nighttime, alighted, in violation of the rules of the company, on the north side instead of the south side of the train, and in so doing he fell into a ditch, dug that day, and was injured. He knew that a platform and accommodations for passengers to alight had been provided on the south side of the track, but that there were none on the north side, and that passengers were forbidden to alight there. Held, that the injury was the result of his own negligence. Drake *v.* Pennsylvania R. Co., 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

53. On invitation or acquiescence of carrier.—Judgment, 68 Ill. App. 635, affirmed in Pennsylvania Co. *v.* McCaffrey, 50 N. E. 713, 173 Ill. 169.

Where passengers were alighting on a dark night from a train indiscriminately on both sides, with the knowledge and assistance of the trainmen, and plaintiff, without knowledge as to the existence of the platform, fell into a ditch after alighting, he was not guilty of contributory negligence because, the company having provided a suitable platform for the purpose, it was his duty to use it. Chesapeake, etc., R. Co. *v.* Harris, 49 S. E. 997, 103 Va. 635.

Where plaintiff, who was ignorant of the surroundings, was directed to get off a train and go to the depot, and people were getting off on both sides of the train, evidence that he stated he did not get off on the other side of the train because there was such a rush, and he never followed a crowd in a rush, does not show a want of due care. Chesapeake, etc., R. Co. *v.* Harris, 49 S. E. 997, 103 Va. 635.

The fact that passengers were invited to alight from a train only on one side away from the depot, and that plaintiff passenger was killed after alighting from the train on the depot side, does not per se show contributory negligence, where passengers were not forbidden to alight on the depot side, but, on the contrary, had always been permitted to do so. Atlantic City R. Co. *v.* Goodin, 42 Atl. 333, 62 N. J. L. 394, 45 L. R. A. 671, 72 Am. St. Rep. 652.

54. A passenger, while crossing the track next to the train he had left, was injured by another train passing thereon. He had alighted on that side, contrary to a notice of the railway company, without special necessity, but it was customary for passengers to do so, without objection. There was no manifest danger, and he got off in such a way that he could not have failed to see a train coming, if properly lighted. Held, that disregarding the notice was not, as matter of law, contributory negligence. Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131.

Deceased left a train, at a station, on the side opposite to the platform provided, it being nearer to his residence, and attempted to cross an intervening track, eight feet distant from the train, when he was struck and killed by another train, running in the opposite direction. Rain was falling at the time, which obscured vision; and deceased, as he left the car,

Double-Track Railway.—It is not per se negligence for a passenger on a double-track railroad to alight from the car on the side near the other track.[55] If the danger is obvious and there is no necessity for getting off on that side, he can not recover for injury.[56]

Pennsylvania Rule.—But it has been held in Pennsylvania that a passenger who, on leaving the train at a place where passengers are received and discharged without station or platform, gets off on the track side, instead of getting off on the side where passengers usually alight, is properly nonsuited in an action for injuries received by a passing train, though he testifies that the track side was the leveler surface and the easier place to alight; it not appearing that the other side was dangerous.[57]

§ 2810. Side Door of Baggage Car.—Where a passenger in a crowded combination car voluntarily, and in violation of a rule of the company, attempts to get off at a side door, used for baggage, and is injured, the railroad company is not liable.[58]

pulled his hat over his face to shield it. The company's rules required trains to approach that station under full control, and prohibited trains from passing that station while other trains were receiving or discharging passengers. These rules were habitually disregarded, and the train which struck deceased was running at fifteen miles per hour at the time. When the road was first built, cars were equipped with gates to prevent passengers from leaving, except on the platform side of the cars; but these had been taken off some time before the accident, and there was no notice or other warning forbidding passengers from alighting away from the platform. Deceased uniformly, and other passengers generally, without objection of the company, got off on either side, at their convenience. Held, that the company had impliedly invited passengers to alight on either side, and that the question of deceased's contributory negligence was for the jury. Graven *v.* MacLeod, 92 Fed. 846, 35 C. C. A. 47.

55. Chicago, etc., R. Co. *v.* Bolton, 37 Ill. App. 143.

Alighting on the wrong side, and before the train stopped, neither of which caused the injury, is not negligence contributing to an injury received from an engine on an adjoining track, which the passenger had no reason to suspect was approaching. Pennsylvania Co. *v.* McCaffrey, 68 Ill. App. 635, affirmed in 50 N. E. 713, 173 Ill. 169.

56. Plaintiff's husband was struck and killed by a passing train at a station on defendant's railroad. In an action to recover damages for the death, the only testimony was that introduced by plaintiff, which was uncontradicted, and showed that the road was a double track road, trains running west on the north track and east on the other, there being a space of twelve feet between the two; that there were platforms for passengers on the north side of the north track and on the south side of the south track, but no platform between; that decedent alighted from a west bound train on the south side of the same in the daytime, and started across the south track, when he was struck by an east bound train thereon, The only witness to the accident was another passenger, an employee of defendant, who alighted on the same side in advance of decedent and crossed the south track ahead of the train. He testified that such train was in plain view and whistled, and also that he called and motioned to decedent to stay back, but that decedent started to run, and had reached the south rail when he was struck. There was no evidence of any invitation by defendant to passengers to alight on that side of trains, or that it had knowledge of any custom to do so; nor did decedent, who was a stranger to the place, have knowledge of any such custom, if it existed. Held, that the court properly directed a compulsory nonsuit on the ground of contributory negligence. Fadley *v.* Baltimore, etc., R. Co., 153 Fed. 514, 82 C. C. A. 464.

Decedent, a passenger on defendant's railway train, alighted on the side of the train where there were other tracks, and was struck by a rapidly moving train making a great noise, and was killed. He had imperfect vision, but good hearing, and knew that he could have alighted on the other side of the train where there were no tracks. Held, that he was guilty of such contributory negligence as precludes a recovery. Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58; S. C. (N. Y.), 50 How. Prac. 126.

57. Pennsylvania rule.—Morgan *v.* Camden, etc., R. Co. (Pa.), 1 Monag. 122, 16 Atl. 353.

58. Side door of baggage car.—Geogagn *v.* New York, etc., R. Co., 42 N. Y. S. 205, 10 App. Div. 454; Deery *v.* Camden, etc., R. Co., 163 Pa. 403, 30 Atl. 162.

§§ 2811-2819. Alighting from Moving Train or Car in General—§ 2811. General Rule.—While there are some cases which hold that the act of a passenger in voluntarily leaving a car while in motion constitutes contributory negligence,[59] the better doctrine, and that sustained by the great weight

59. Alighting from moving train or car in general.—*United States.*—Secor *v.* Toledo, etc., R. Co., 10 Fed. 15.

California.—Joyce *v.* Los Angeles R. Co., 147 Cal. 274, 82 Pac. 204.

Delaware.—Reiss *v.* Wilmington City R. Co.(Del.), 67 Atl. 153.

Illinois.—Illinois Cent. R. Co. *v.* Cunningham, 102 Ill. App. 206; Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Cincinnati, etc., R. Co. *v.* Dufrain, 36 Ill. App. 352; Louisville, etc., R. Co. *v.* Johnson, 44 Ill. App. 56.

Indiana.—Evansville, etc., R. Co. *v.* Athon, 33 N. E. 469, 6 Ind. App. 255, 51 Am. St. Rep. 303.

Kentucky.—Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432; Dallas *v.* Illinois Cent. R. Co., 139 S. W. 958, 144 Ky. 737.

Massachusetts. — Gavett *v.* Manchester, etc., R. Co. (Mass.), 16 Gray 501, 77 Am. Dec. 422. See Lucas *v.* New Bedford, etc., R. Co. (Mass.), 16 Gray 501, 77 Am. Dec. 406; White *v.* West End St. R. Co., 165 Mass. 522, 43 N. E. 298.

Minnesota.—Olson *v.* Chicago, etc., R. Co., 102 N. W. 449, 94 Minn. 241.

Missouri. — Parker *v.* United R. Co. (Mo. App.), 133 S. W. 137; Straus *v.* Kansas, etc., R. Co., 75 Mo. 185.

New York.—Lynch *v.* Interurban, etc., R. Co., 88 N. Y. S. 935.

Oregon. — Armstrong *v.* Portland R. Co., 52 Ore. 437, 97 Pac. 715.

Pennsylvania.—McClintock *v.* Pennsylvania R. Co. (Pa.), 21 Wkly. Notes Cas. 133.

Tennessee. — East Tennessee, etc., R. Co. *v.* Massengill, 83 Tenn. (15 Lea) 328.

West Virginia.—Hoylman *v.* Kanawha, etc., R. Co., 65 W. Va. 264, 64 S. E. 536, 22 L. R. A., N. S., 741.

Wisconsin.—Walters *v.* Chicago, etc., R. Co., 89 N. W. 140, 113 Wis. 367.

Wyoming. — Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

"'All experience has demonstrated that to get off a moving car is highly dangerous; therefore it is held that such an act is negligence per se, and the passenger if thereby injured, except in very rare cases, is guilty of contributory negligence and can not recover.' O'Toole *v.* Pittsburg, etc., R. Co., 158 Pa. 99, 27 Atl. 737, 22 L. R. A. 606, 38 Am. St. Rep. 830. 'An adult who knowingly and unnecessarily steps from a railroad train in motion is guilty of contributory negligence as a matter of law.' Walters *v.* Chicago, etc., R. Co., 113 Wis. 367, 89 N. W. 140. Such is held to be the law in most of the courts." Hoylman *v.* Kanawha, etc., R. Co., 65 W. Va. 264, 64 S. E. 536, 22 L. R. A., N. S., 741.

In an action by a passenger to recover damages for personal injuries received while alighting from defendant's train, there being evidence to support the hypothesis, the court erred in refusing to give, without qualification, an instruction that, "if the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move, she is guilty of contributory negligence, and can not recover," and in informing the jury that they were to determine from all the evidence whether plaintiff was guilty of contributory negligence. New York, etc., R. Co. *v.* Enches, 127 Pa. 316, 17 Atl. 991, 14 Am. St. Rep. 848, 4 L. R. A. 432.

It is proper to charge that if the plaintiff voluntarily went out of the car upon the platform steps while the car was in motion, and then deliberately jumped off, or was thrown off by the motion of the car, he was guilty of contributory negligence, since in extreme cases negligence is a question of law. Hoehn *v.* Chicago, etc., R. Co., 152 Ill. 223, 38 N. E. 549, affirming 52 Ill. App. 662.

In an action against a railroad company for injuries sustained in alighting from a train before it stopped, it appeared that the night was "so dark that a person couldn't see where he or she was going." Defendant's brakeman called the station, and fastened open the car door. The cars were lighted, and at the station platform, which the train was passing, there was a lighted lamp. Plaintiff had ridden frequently over the road, and the place where she attempted to alight and was injured was near the usual stopping place, but unlighted. Held, that plaintiff could not recover, from want of due care on her part. England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1.

In an action for injuries received on alighting at a station from a train after it had started, it was shown that plaintiff had alighted there every day for thirty-five years, and that it was daylight at the time of the accident. Plaintiff testified that it was a dark and drizzling evening, that he did not look to see if the train was moving, that his sight was good, and that there was nothing to distract his attention. There was a truck and a lamp on the platform within the range of his vision, which would have shown him that the train was in motion, if he had looked. Held, that plaintiff could not recover, because of a lack of due care. Brown *v.* New York, etc., R. Co., 63 N. E. 941, 181 Mass. 365.

Method of propulsion immaterial.—It is negligence per se to attempt to get on

of authority, is that such conduct on the part of a passenger is not negligence per se. Whether it is negligence or not, in a particular case, for a passenger to attempt to alight from a moving train, must depend upon the circumstances of danger attending the act, and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury; and unless the danger is obviously great such as to preclude a person of common prudence and ordinary intelligence from attempting to alight, it will not be held that leaving the train is, as a matter of law, such negligence as should preclude a recovery. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting are to be taken into consideration in determining whether or not the person was guilty of negligence on his part in leaving or attempting to leave the train.[60] And where the danger is so obviously great and the testi-

and off a moving car, whether propelled by steam or electricity. Boulfrois *v.* United Tract. Co., 59 Atl. 1007, 210 Pa. 263, 105 Am. St. Rep. 809.

Construction of car.—A passenger who voluntarily jumps from a moving street car does so at his own peril, and the construction of a car is not defective which is only unsafe in view of such conduct. Werbowlsky *v.* Fort Wayne, etc., R. Co., 48 N. W. 1097, 86 Mich. 236, 24 Am. St. Rep. 120.

60. *Alabama.* — Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210; S. C., (Ala.), 59 So. 438.

Arkansas.—Little Rock, etc., R. Co. *v.* Atkins, 46 Ark. 423.

Georgia.—Tallulah Falls R. Co. *v.* Harris, 129 Ga. 305, 58 S. E. 838; Southern R. Co. *v.* Parham, 10 Ga. App. 521, 73 S. E. 763; Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005; Coursey *v.* Southern R. Co., 113 Ga. 297, 38 S. E. 866; West End, etc., St. R. Co. *v.* Mozely, 79 Ga. 463, 4 S. E. 324; Covington *v.* Western, etc., R. Co., 81 Ga. 273, 6 S. E. 593; Southwestern Railroad *v.* Singleton, 67 Ga. 306; Suber *v.* Georgia, etc., R. Co., 96 Ga. 42, 23 S. E. 387, distinguishing Coleman *v.* Georgia, R., etc., Co., 84 Ga. 1, 10 S. E. 498; McLarin *v.* Atlantic, etc., R. Co., 85 Ga. 504, 11 S. E. 840; Barnett *v.* East Tennessee, etc., R. Co., 87 Ga. 766, 13 S. E. 904.

Illinois.—Chicago & J. E. Ry. Co. *v.* Lloyd, 129 Ill. App. 156; West Chicago St. R. Co. *v.* Dudzik, 67 Ill. App. 681; Chicago City R. Co. *v.* Mumford, 97 Ill. 560; Chicago, etc., R. Co. *v.* Bonifield, 104 Ill. 223; Chicago, etc., R. Co. *v.* Byrum, 153 Ill. 131, 38 N. E. 578, affirming 48 Ill. App. 41.

Indiana. — Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; Louisville, etc., R. Co. *v.* Bean, 9 Ind. App. 240, 36 N. E. 443; Pittsburgh, etc., R. Co. *v.* Gray, 64 N. E. 39, 28 Ind. App. 588; Harris *v.* Pittsburg, etc., R. Co., 70 N. E. 407, 32 Ind. App. 600.

Iowa.—Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44; Raben *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621.

Kansas. — Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, 40 Pac. 919.

Missouri.—Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Gress *v.* Missouri Pac. R. Co., 84 S. W. 122, 109 Mo. App. 716; Hecker *v.* Chicago, etc., R. Co., 84 S. W. 126, 110 Mo. App. 162; Waller *v.* Hannibal, etc., R. Co., 83 Mo. 608; Leslie *v.* Wabash, etc., R. Co., 88 Mo. 50; Taylor *v.* Missouri Pac. R. Co., 26 Mo. App. 336; Jackson *v.* St. Louis, etc., R. Co., 29 Mo. App. 495; Duncan *v.* Wyatt Park R. Co., 48 Mo. App. 659; Richmond *v.* Quincy, etc., R. Co., 49 Mo. App. 104; Sanderson *v.* Missouri Pac. R. Co., 64 Mo. App. 655.

Nebraska. — Chicago, etc., R. Co. *v.* Winfrey, 67 Neb. 13, 93 N. W. 526; Union Pac. R. Co. *v.* Porter, 38 Neb. 226, 56 N. W. 808; Omaha St. R. Co. *v.* Craig, 39 Neb. 601, 58 N. W. 209.

New Jersey.—New Jersey Tract. Co. *v.* Gardner, 38 Atl. 669, 60 N. J. L. 571.

New York.—Mettlestadt *v.* Ninth Ave. R. Co., 32 How. Prac. 428, 27 N. Y. Super. Ct. 377; Conley *v.* Forty Second St., etc., R. Co., 56 N. Y. Super. Ct. 607, 2 N. Y. S. 229; Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327; Munroe *v.* Third Ave. R. Co., 50 N. Y. Super. Ct. 114; Lewis *v.* Delaware, etc., Canal Co., 145 N. Y. 508, 40 N. E. 248, reversing 80 Hun 192, 30 N. Y. S. 28; Wallace *v.* Third Ave. R. Co., 55 N. Y. S. 132, 36 App. Div. 57; McAlan *v.* New York, etc., Bridge, 60 N. Y. S. 176, 43 App. Div. 374, affirmed in 67 N. Y. S. 1139, 56 App. Div. 629.

Ohio. — Holmes *v.* Ashtabula Rapid Transit Co., 10 O. C. D. 638.

Texas. — Galveston, etc., R. Co. *v.* Krenek (Tex. Civ. App.), 138 S. W. 1154; Galveston, etc., R. Co. *v.* Smith, 59 Tex. 406; Houston, etc., R. Co. *v.* Stewart, 37 S. W. 770, 14 Tex. Civ. App. 703; International, etc., R. Co. *v.* Satterwhite, 38 S. W. 401, 15 Tex. Civ. App. 102.

Virginia.—Newport News, etc., Elect. Co. *v.* McCormick, 106 Va. 517, 56 S. E. 281.

A passenger is not negligent in alighting from a moving train if the speed of the train and all the surrounding circumstances are such that a person of ordinary prudence would have done the

mony is undisputed, the court may, as a matter of law, declare that the passenger's conduct was reckless and negligent.[61]

same thing. Puget Sound Elect. Railway *v.* Felt, 181 Fed. 938.

There being evidence that the plaintiff was a passenger upon a train of the defendant company, having a ticket from Redan, Georgia, to Atlanta, Georgia; that there was a well established custom in respect to this particular train, which was known as the "shoo-fly" train, to slow it down or stop it at various street crossings and points in the yards of the defendant company, other than the regular station at Atlanta, for the purpose of receiving and discharging passengers; that the train slowed down at a point at which it was accustomed to slow down for the purpose of allowing passengers to alight, and that when it was running very slowly, the plaintiff, as he had done a number of times before in respect to this same train, attempted to get off, and, as he was in the act of alighting and before he had time to get completely off the steps, the engineer caused the train to give a sudden lurch forward, whereby the plaintiff was thrown to the ground and hurt. Held: (a) It is not negligence, as a matter of law, for a passenger to be upon the platform of a moving train, or for him to attempt to alight from a slowly moving train. Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005, distinguishing a number of cases apparently to the contrary, and criticising and practically overruling Paterson *v.* Central R., etc., Co., 85 Ga. 653, 11 S. E. 372. (b) The fact that the point at which the train slowed down and at which the plaintiff attempted to alight was in the midst of a switch yard, where there were likely to be a number of moving trains, does not render the plaintiff guilty of contributory negligence adequate to defeat a recovery, since he was not hurt by reason of any of these dangers. (c) Under the facts of the case, the presumption of negligence attached against the carrier. Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840. (d) The court erred in granting a nonsuit. Pierce *v.* Georgia R., etc., Co., 9 Ga. App. 666, 72 S. E. 66.

Generally a passenger, alighting from the conveyance of a carrier, should wait until such conveyance has come to a complete stop, or is moving so slowly as not to enhance the danger attending an attempt to alight. Craig *v.* Wabash R. Co., 126 S. W. 771, 142 Mo. App. 314.

Effect of act dependent upon exercise of proper care by passenger.—If a passenger on leaving a car while in motion took no more risk in so doing than a man of ordinary prudence would have taken under similar circumstances, he was not negligent. Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756.

A passenger is guilty of contributory negligence in attempting to get off a moving car at a time when a reasonably prudent person similarly situated would not attempt to alight. Sweet *v.* Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667.

If a passenger interprets the customary announcement of a station by the flagman on a passenger train with the order "all out for" such station and his fastening back the door of the car, as an invitation to him to alight, with an assurance that the train had stopped, he would not thereby be absolved from the duty to use due care, and where a passenger upon such announcement repaired to the platform while the train was moving at a pace with which he was perfectly familiar, so that the least observation would have shown him that the train was in motion, and, without looking or taking any precaution to see if the train was moving, stepped off and was run over and injured, he could not recover. Illinois Cent. R. Co. *v.* Massey, 97 Miss. 794, 53 So. 385.

In an action for injuries received from a defect in a platform while alighting from a train, an instruction that if plaintiff leaped from the train while it was in rapid motion, and disembarked in a reckless and negligent manner, he could not recover, is erroneous, as the train need not be moving rapidly, if plaintiff negligently leaped from it, and it is not necessary that there be a concurrence of negligence and recklessness. Missouri, etc., R. Co. *v.* Wylie (Tex. Civ. App.), 26 S. W. 85.

61. Where facts undisputed—Matter of law.—Watkins *v.* Birmingham R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297.

While it can not be held, as matter of law, where an injury is received by a passenger upon a railroad in attempting to alight from a car while it is in motion, that this act, under all circumstances, constitutes contributory negligence, it is not in every case a question of fact for a jury. When the facts are undisputed, the question of contributory negligence may become one of law. Morrison *v.* Erie R. Co., 56 N. Y. 302.

By reason of the rapid speed of a train, or the existence of facts and circumstances at the time that a passenger attempts to board or leave it, the indications of danger may be so apparent and obvious that one must necessarily be charged with knowledge of its existence; and in such a case the court might conclude, as a matter of law, that it would be contributory negligence to attempt to leave or board the train under the circumstances. Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59

Proximate Cause.—Although one alights from a train before it has quite stopped, he may recover for an accident to which his act does not contribute.[62]

Absence of Negligence on Carrier's Part.—While it is not negligence as a matter of law to step off from a moving street car, a person stepping off assumes the risk of injury, in the absence of negligence or fault on the part of the carrier.[63]

§ 2812. Where Danger Obvious.—The mere act of alighting from a train which is in motion is not negligence per se, but it is negligence to attempt to alight at a time or where the circumstances are such that the danger of injury is obviously great. The conduct of a person of ordinary sense and prudence is the standard required by law; and hence, where the circumstances are such as to make the danger of alighting from a moving train obvious to such a person, it is negligence to alight. This obvious danger may arise from various circumstances, such as the speed at which the train is moving, the nature of the ground where it is sought to alight, the distance from the step to the ground, the position in which the person leaving the train places himself in his effort to alight safely, and other circumstances.[64]

S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291; Galveston, etc., R. Co. *v.* Sanchez (Tex. Civ. App.), 65 S. W. 893; Gulf, etc., R. Co. *v.* Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653, affirmed in 96 Tex. 301.

Alighting from elevator in motion.—In an action for injuries sustained while alighting from a passenger elevator, a declaration alleging that plaintiff attempted to alight while the elevator was in motion, and before it had reached the level of the floor to which she was being carried, was demurrable, as showing that plaintiff was guilty of contributory negligence. Bullock *v.* Butler Exch. Co., 46 Atl. 273, 22 R. I. 105.

62. Proximate cause.—Van Ostran *v.* New York, etc., R. Co. (N. Y.), 35 Hun 590.

A passenger jumping from a moving train and slipping on a greasy platform could not recover if his negligence directly contributed to the injury, though his negligence was only slight. Newcomb *v.* New York, etc., R. Co., 69 S. W. 348, 169 Mo. 409.

Where one having a ticket entitling him to ride on a train boarded the train at an unusual time and place, and on a portion where passengers were not received, and, being ordered off, jumped off while the train was in motion, if there was negligence on the part of such person, it could not be said to be the proximate cause of the injury, as a matter of law. Martin *v.* Southern R. Co., 28 S. E. 303, 51 S. C. 150.

63. Absence of negligence on carrier's part.—Jones *v.* Canal, etc., R. Co., 33 So. 200, 109 La. 213.

A street railway company is not liable for injury to a passenger from his attempting to alight from a moving car where the injury is caused by the passenger's act without any negligence on the part of the company. Burton *v.* Wichita R., etc., Co., 132 Pac. 183, 89 Kan. 611.

If a passenger attempts to alight from a car before it has stopped, without knowledge of those in charge thereof, the carrier is not liable for injuries received by him through a sudden jerking of the car. Chicago City R. Co. *v.* Gregg, 69 Ill. App. 77.

In an action by a passenger against a street railway for personal injuries, evidence examined, and held to sufficiently show that she was injured while attempting to alight from the car while it was in motion, and without the knowledge of the car employees that she desired to get off, and that, therefore, they were not guilty of negligence in increasing the speed of the car. Blakney *v.* Seattle Elect. Co., 68 Pac. 1037, 28 Wash. 607.

Where a passenger attempted to alight from a train at a crossing without notifying those in charge of the train, the facts that it was a known custom for passengers to alight at the crossing, and that the train started forward with a jerk which threw the passenger from the step, did not relieve him from the effect of his own contributory negligence. Mercher *v.* Texas Mid. Railroad (Tex. Civ. App.), 85 S. W. 468.

64. Where danger is obvious.—*Georgia.*—Southern R. Co. *v.* Clariday, 124 Ga. 958, 53 S. E. 461; Lindsay *v.* Southern R. Co., 114 Ga. 896, 41 S. E. 46. See also, Suber *v.* Georgia, etc., R. Co., 96 Ga. 42, 23 S. E. 387.

Missouri.—Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541.

South Carolina. — Smith *v.* Southern Railway, 80 S. C. 1, 61 S. E. 205; Norton *v.* Columbia St. R., etc., Co., 64 S. E. 962, 83 S. C. 26.

Texas.—Dallas, etc., St. R. Co. *v.* Lasch (Tex. Civ. App.), 99 S. W. 729.

Under Nebraska statute.—Under

Rate of Speed.—Alighting from a rapidly moving train, known to be so moving, or which should have been known by an ordinarily prudent person, where such act is not invited or ordered by the agents of the railroad company, or is not done to avoid some apparently threatened peril, is such negligence as will bar a recovery in damages.[65]

Comp. St. c. 72, art. 1, § 3, which provides that "every railroad company shall be liable for all damages inflicted upon the persons of passengers while being transported over the road, except in cases where the injury done arises from the criminal negligence of the person injured," jumping from a moving train is not such contributory negligence as will in every case prevent a recovery; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence, as above defined. Chicago, etc., R. Co. *v.* Landauer, 36 Neb. 642, 54 N. W. 976.

65. Rate of speed.—*Alabama.*—Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210.

Georgia.—Jarrett *v.* Atlanta, etc., R. Co., 83 Ga. 347, 9 S. E. 681; Georgia, etc., R. Co. *v.* Hutchins, 121 Ga. 317, 48 S. E. 939; Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005.

Missouri. — Scroggins *v.* Metropolitan St. R. Co. (Mo. App.), 120 S. W. 731; Ghio *v.* Metropolitan St. R. Co., 103 S. W. 142, 125 Mo. App. 710.

Texas.—Missouri, etc., R. Co. *v.* McElree, 41 S. W. 843, 16 Tex. Civ. App. 182.

Where it was obviously dangerous for the passengers to alight, on account of the rapid motion of the train, without the direction of the conductor, if the circumstances from such rapid motion would make it likely, or seemed likely to him, as an ordinarily prudent man, that it would be dangerous to do so, plaintiff can not recover. Sanders *v.* Southern R. Co., 32 S. E. 840, 107 Ga. 132.

Five miles per hour.—A passenger is guilty of contributory negligence as a matter of law in attempting to leave a train moving at the rate of five miles an hour. Gress *v.* Missouri Pac. R. Co., 84 S. W. 122, 109 Mo. App. 716.

Street car running six miles per hour.—While alighting from a moving street car does not, in all cases, constitute negligence as matter of law, yet an adult man of ordinary intelligence, laboring under no fright or excitement, and confronted with no exigency, who alights from a street car, which to his knowledge is moving at the rate of six miles an hour, is negligent. Fosnes *v.* Duluth St. R. Co., 122 N. W. 1054, 140 Wis. 455, 30 L. R. A., N. S., 270.

Eight miles per hour.—Plaintiff was injured in alighting from defendant company's train, and in an action therefor testified that he was familiar with the surroundings, and knew on which side of the track was the station; that, when an employee announced, "All off for Hopkinsville," he stepped off on the opposite side of the track. The train was moving eight miles an hour, and was yet several squares from the station. Held, that a nonsuit was properly directed. Hughlett *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 178, 22 S. W. 551.

Ten miles per hour.—In an action against a railroad for injuries caused by jumping from the train, where there is no evidence that plaintiff had any reason to believe that he would suffer bodily harm by remaining on the train, or that he would be ejected by force while the train was in rapid motion, his attempt to leave the train while running at the rate of ten or twelve miles an hour was reckless, and the railroad is not liable for the damages he received thereby. St. Louis, etc., R. Co. *v.* Rosenberry (Ark.), 11 S. W. 212.

Twenty to forty miles per hour.—Plaintiff's intestate was in the habit of returning, every evening, to his home, on defendant's train. On the evening of his death, during broad daylight, as the train was approaching his home station, at a speed of about twenty to forty miles an hour, deceased rose from his seat and went to the rear platform of the car, and, when 900 feet distant from the station, either voluntarily stepped from the platform, or was thrown therefrom by the momentum of the train, and killed. Held, that the acts of deceased constituted negligence per se, and that the court properly refused to submit the question of the existence of contributory negligence to the jury. Herdman *v.* New York, etc., R. Co., 62 Hun 621, 17 N. Y. S. 198, 42 N. Y. St. Rep. 293.

Ordinary speed between stations.—The evidence showed that the injuries received were caused by plaintiff's alighting from a train between stations while it was running at its ordinary speed. Held, that plaintiff was guilty of contributory negligence. High *v.* International, etc., R. Co. (Tex. Civ. App.), 55 S. W. 526; Tannehill *v.* Birmingham R., etc., Co. (Ala.), 58 So. 198.

Twenty miles per hour—Passenger's knowledge.—It is gross negligence in a passenger on a street railway to jump from the car when it is going at a speed of twenty miles an hour, whether he knows or does not know that the car is going so fast. Masterson *v.* Macon, etc., St. R. Co., 88 Ga. 436, 14 S. E. 591.

Where a passenger, who had stood upon the car steps two or three minutes

Rounding Curve.—It has been held that, a passenger attempting to alight while a car is moving around a curve is guilty of such negligence as precludes a recovery for injuries incurred by a fall.[66]

Passenger's Knowledge of Character of Place.—The knowledge of a passenger of the place at which he alighted from a moving train is properly considered by the jury in determining whether he was negligent in so alighting.[67] Thus, where a passenger familiar with a railroad crossing, jumps from a moving train in the night time and falls ten feet to a platform below the crossing, he can not recover for injuries received therefrom.[68] But, though he be familiar with the dangerous character of the place, he will not be precluded from recovery where the injury was not caused by reason of any of those dangers.[69]

§ 2813. Manner of Alighting.—The manner in which a passenger alights from a moving train may change what would otherwise be the act of an ordinarily prudent man into that of a negligent one. Thus, it has been held that where a passenger gets off a slowly moving train backwards,[70] or carelessly jumps

before attempting to alight and was by the passing objects enabled to determine the speed of the train, and who was incumbered with baggage, attempted to alight while the train was running from six to ten miles an hour, he was guilty of contributory negligence as a matter of law. Hunter *v.* Louisville, etc., R. Co., 150 Ala. 594, 43 So. 802, 9 L. R. A., N. S., 848.

Carrier violating speed ordinance.—The fact that a city ordinance restricted the speed of street cars to seven miles an hour will not relieve a passenger from the legal effect of his negligence in jumping from a car while it is moving at the rate of twenty miles an hour. Masterson *v.* Macon, etc., St. R. Co., 88 Ga. 436, 14 S. E. 591.

Conductor's failure to warn when passenger advised to jump.—Where a passenger is injured in jumping from a street car moving at the rate of twenty miles an hour, the fact that the conductor was present, and was silent on hearing another passenger tell the passenger injured that the car was not gong to stop, and he had better get off, will not relieve him of the legal effect of his contributory negligence. Masterson *v.* Macon, etc., St. R. Co., 88 Ga. 436, 14 S. E. 591.

On wrong train through carrier's fault.—The fact that plaintiff's act in getting upon the wrong train was due to the negligence of the defendant railroad company did not justify him in alighting from the train while it was moving at a rapid speed. Rothstein *v.* Pennsylvania R. Co., 171 Pa. 620, 33 Atl. 379.

Conductor calling all out for station.—Where a passenger, after the conductor calls out the name of his station, and says "all out for" such station, gets off the train several hundred yards before it reaches the depot, and while running at a high rate of speed, he is guilty of such negligence as precludes a recovery for injuries received. Louisville, etc., R. Co. *v.* Depp, 17 Ky. L. Rep. 1049, 33 S. W. 417.

66. Rounding a curve.—Taylor *v.* Dry Dock, etc., R. Co., 9 N. Y. St. Rep. 498.

67. Knowledge of character of place.—Sanders *v.* Southern R. Co., 32 S. E. 840, 107 Ga. 132.

68. As defendant's train was approaching a station, the name of the station was called, and the train stopped soon afterwards at a crossing with another railroad. Where it stopped, plaintiff, whose destination was the station called, went out of the rear door of the car, and, though the train was by this time again in motion, jumped from the car, and fell on a platform about ten feet below the crossing. It was at night, and there were no lights, no depot building, or any other landmark, where the train stopped, to indicate a station. Plaintiff was acquainted with the location, and knew of the crossing. Held, that defendant was not liable for the injuries caused by the fall. East Tennessee, etc., R. Co. *v.* Holmes, 97 Ala. 332, 12 So. 286, following Smith *v.* Georgia Pac. R. Co., 88 Ala. 538, 7 So. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63.

69. The fact that the point at which the train slowed down, and at which plaintiff attempted to alight from the slowly moving train, was in the midst of a switchyard, where there was likely to be a number of other trains, does not render plaintiff guilty of contributory negligence adequate to defeat a recovery, where he was not hurt by reason of any of those dangers. Pierce *v.* Georgia R., etc., Co., 9 Ga. App. 666, 72 S. E. 66.

Nighttime.—A woman, attempting to alight from a train in the nighttime, with a parcel in her hand, while the car is in motion, takes the risk thereof. McMichael *v.* Illinois Cent. R. Co., 34 So. 116, 110 La. 18.

70. Manner of alighting.—Where a man steps from a street car while in motion, with his back towards the street, falls over, and is injured, he is guilty of contributory negligence, and such evidence justifies a compulsory nonsuit. Beattie *v.* Citizens', etc., R. Co. (Pa.), 1 Sad. 244, 1 Atl. 574.

from the rear of a freight train in the dark,[71] or clings to the handrail after alighting, he can not recover.[72] Though it has also been held that a passenger did not assume the risk of injury by stepping straight out from a car step after the train had started, unless he knew that such method of alighting was dangerous and liable to result in injury.[73]

§ 2814. Children and Others under Disability.—A child is not to be bound by the same degree of care and prudence as an adult, his capacity being the measure of his responsibility; whether he is at fault in jumping from a moving car depends on whether the ordinary child of his age and experience and with his knowledge of the situation and its dangers would have done what he did.[74]

71. M., a passenger in the caboose of a freight train, was awakened by the conductor, and informed that he had reached his destination; and after the train had passed it a little, and stopped at the frog, M. was again awakened by the conductor, and could then have gotten off safely. The conductor soon returned, and awoke M. a third time, telling him to get off, and then went out at the end of the caboose, and, the night being very dark, stood on the station platform with the lantern in his hand, within less than three feet of the car platform. There was no chain across the end of the car platform in rear of the caboose, and it was not customary to have any. The train commenced backing. M. walked to the end of the car, jumped off, and was severely injured by the cars passing over him. Held that, although the company was culpably negligent for having insufficient station lights, and for not warning M. to wait until the train was still, M.'s contributory negligence precluded him from recovering for the injury. Richmond, etc., R. Co. *v.* Morris, 72 Va. (31 Gratt.) 200.

72. Where, after a train on which plaintiff was a passenger had started to move east from a station, plaintiff got off on the south side, clinging to the hand rail with his right hand, and was thereby jerked down onto the platform of the station and dragged backward until his grip on the hand rail was loosened, he was guilty of contributory negligence, as a matter of law, precluding a recovery for injuries so sustained. Alabama, etc., R. Co. *v.* Jones, 38 So. 545, 86 Miss. 263.

73. St. Louis, etc., R. Co. *v.* Bryant, 103 S. W. 237, 46 Tex. Civ. App. 601.

74. Children and Others under Disability.—Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

A boy ten years of age entered a street car with his brother and sister, both younger, who afterwards, without his knowledge, got off with other passengers. After the car started, he, seeing they were out, tried to get off by the rear platform, but could not on account of the crowd. He then went to the front platform, and asked the driver to stop. The driver slacked up, but did not stop, and the boy jumped off, and was injured. Held, in an action for injuries against the street car company, that the boy was not bound to the same degree of care and prudence as an adult, his capacity being the measure of his responsibility. Philadelphia, etc., R. Co. *v.* Hassard, 75 Pa. 367.

Boy fifteen years old.—Thus while the conduct of a boy fifteen years of age who was frightened into jumping from a moving train by the acts of the carrier's servants is not to be judged by the same standard as that of a man, he is nevertheless held to a higher degree of responsibility than one whom the law regards as an infant of tender years. A person of his age is presumed to be capable of realizing danger and of exercising the necessary forethought and caution to avoid it, and is presumptively chargeable with diligence for his own safety where the peril is obvious. The jury may, however, consider his youth in determining whether the alleged threats and menacing acts of the carrier's servants were calculated to and did produce on his part, such fear and excitement as to render him in some degree irresponsible for his own acts and excuse his conduct in jumping from the train. Central R., etc., Co. *v.* Phillips, 91 Ga. 526, 17 S. E. 952.

Seventeen years of age.—An instruction that the act of a youth of seventeen years and of sound mind, in jumping from a street railway car in rapid motion, constituted per se negligence in law on his part, held to be erroneous. Wyatt *v.* Citizens' R. Co., 55 Mo. 485.

A boy sixteen years old voluntarily alighted from a moving train for the reason that from the speed of the train it appeared he would be carried by his destination. He was not directed to do so by any servant of the carrier. Held, that the carrier was not liable for his injuries. Jones *v.* Georgia, etc., R. Co., 29 S. E. 927, 103 Ga. 570.

Child six years old.—Negligence can not be imputed to a boy six years old if he attempts to alight from the front platform of a street car after it has

Encumbered with Baggage or Otherwise.—Where a street car slows up to allow a passenger to alight, and he is injured by a sudden jerk thereof, his attempting to alight before the car actually stops can not be held contributory negligence as matter of law, but it is for the jury to determine, though the passenger was encumbered with baggage, whether he was negligent or not.[75]

§§ 2815-2819. Justification or Excuse—§§ 2815-2818. Direction or Invitation of Carrier—§ 2815. In General.—A passenger alighting from a moving train at the direction of an agent of the carrier in authority is not, as a matter of law, guilty of contributory negligence, where there was no obvious danger either in the locality where he alighted or the rate of speed of the train, and he acted as a prudent man would have acted in the circumstances.[76] A pas-

slowed up. Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

Failure to ask conductor to stop.—A boy eleven years old who goes quickly to the front platform and jumps from the car while it is in motion, without asking the conductor to stop, is guilty of contributory negligence. Purtell *v.* Ridge Ave. Pass. R. Co., 3 Pa. Co. Ct. Rep. 273.

Failure of parents to warn of danger.—In an action for injuries sustained by an infant traveling alone, by jumping from the train, defendant can not avoid liability on the ground that plaintiff's parents did not instruct him as to the dangers of the route, where it appeared that the mother warned him generally not to leave the train while in motion; they having no knowledge of any unaccustomed irregularity in its movements. Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

75. Encumbered with baggage or otherwise.—Birmingham R., etc., Co. *v.* James, 25 So. 847, 121 Ala. 120.

Plaintiff, an able bodied man, stepped from a slowly moving train, holding a valise in one hand and a basket in the other, and in so doing was injured. Held, that the question of contributory negligence was for the jury. Cumberland, etc., R. Co. *v.* Maugans, 61 Md. 53, 48 Am. Rep. 88.

Alighting before reaching station.—A passenger, incumbered with hand baggage, who alighted from a train moving six miles an hour, on a dark night, before it had reached the platform of the station where he was to get off, and with which he was familiar, and with no reason to believe the train would not stop as usual, was negligent. South, etc., R. Co. *v.* Schaufler, 75 Ala. 136.

Carrying keg of lead.—Stepping unnecessarily from a moving street car, with a keg of lead in hand, when danger and injury would have been avoided by remaining on the car, is negligence which will defeat recovery because of prior negligence of the servants of the car company. Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353.

With child under arm.—Plaintiff, an infant twelve years of age, in care of her parents, was a paying passenger upon defendant's cars. The conductor announced their station and the cars stopped. It was a dark evening. Before they could get out of the car, the train started and moved slowly by the station. They went on to the platform of the car, and while the train was moving, and after it had passed the platform of the station, plaintiff's father took her under his arm, stepped from the car, fell, and she was injured. Held, that plaintiff as matter of law was chargeable with contributory negligence. Morrison *v.* Erie R. Co., 56 N. Y. 302.

76. Direction or invitation of carrier.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; St. Louis, etc., R. Co. *v.* Person, 49 Ark. 182, 4 S. W. 755.

District of Columbia.—Jones *v.* Baltimore, etc., R. Co., 10 Mackey 346.

Georgia.—Southern R. Co. *v.* Bandy, 120 Ga. 463, 47 S. E. 923, 102 Am. St. Rep. 112.

Michigan.—McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724.

North Carolina.—Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508; Watkins *v.* Raleigh, etc., R. Co., 116 N. C. 961, 21 S. E. 409.

Pennsylvania.—Delaware, etc., Canal Co. *v.* Webster (Pa.), 3 Sad. 280, 6 Atl. 841.

Texas.—Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ App. 435, 23 S. W. 618; Gulf, etc., R. Co. *v.* Shelton, 69 S. W. 653, 30 Tex. Civ. App. 72; S. C. (Tex. Civ. App.), 70 S. W. 359. Affirmed in 72 S. W. 165, 96 Tex. 301.

Plaintiff took passage on defendants' freight train, which, when it reached his station, halted in such a position that the caboose in which he was riding was quite a distance from the station. He was alighting, when the brakeman told him not to get off, for, after the freight was unloaded, the train would be moved so as to bring the caboose near the platform. The train, instead of slowing up as the caboose neared the platform, increased its speed, and plaintiff, acting under the advice of the brakeman, jumped off, and was injured. Held, that defendants were estopped by the act of

senger must exercise due care in construing the directions or warnings of the carrier's agent's, and where through carelessness or inattention the passenger erroneously interprets certain remarks or actions of the conductor or trainmen as an invitation to alight while the train is moving and is injured in so doing, he can not recover.[77] Thus, the failure of brakeman to warn plaintiff not to step off a moving train did not amount to an assurance on the part of defendant that it was safe to alight before the cars stopped.[78] And it has been held that for the conductor to tell a passenger when to jump,[79] or to advise him when he may do so safely,[80] will not relieve him from the responsibility of alighting from a moving train.

their servants from claiming that plaintiff was in fault in not leaving the train when it first stopped, or that its contract of carriage was fully performed at such time; and plaintiff was entitled to recover if, in jumping off the train, he acted as a prudent man would have acted in the circumstances. Eddy *v.* Wallace, 49 Fed. 801, 1 C. C. A. 435.

Defendants' conductor called out plaintiff's station, told her to get off, and held the door open for her. As plaintiff reached the platform, the train, which had stopped, began to move, and, hurriedly descending the steps, she jumped off, it being too dark for her to see the ground, and was injured. The place was about 400 yards from the station, and the train had merely stopped to allow a freight train to pass onto a side track. Held, that plaintiff had a right to assume that it was the usual stopping place, and could recover. East Tennessee, etc., R. Co. *v.* Conner, 83 Tenn. (15 Lea) 254.

In darkness.—Ordinarily a passenger who is injured by stepping from a moving train is guilty of such contributory negligence as to prevent recovery, but if, owing to darkness and the absence of lights, he steps from a slowly moving train in obedience to the direction of one of the carrier's servants and is injured, the carrier is liable; the negligence of its servant being the proximate cause of his injury. Louisville, etc., R. Co. *v.* Moore, 150 S. W. 849, 150 Ky. 692.

It is not negligence per se to alight from a moving train in the darkness at the direction of the train officials, or in the belief that it had come to a stop. Baltimore, etc., R. Co. *v.* Mullen, 75 N. E. 474, 217 Ill. 203, 2 L. R. A., N. S., 115, 3 Am. & Eng. Ann. Cas. 1015, affirming judgment in 120 Ill. App. 88.

After agreement to slack up.—In an action by a passenger against a railroad company for personal injuries, a declaration which alleges that, plaintiff having paid his fare to a given point, defendant's servants agreed to slack up there, and when the point was reached directed plaintiff to leave the train while in motion, and plaintiff, thinking that he might safely jump, under the promise of defendant's servants to slack up, attempted to step from the train, but, finding that he would be knocked against the track if he let go, retained his hold on the car, and defendant's servants negligently increased the speed of the train, though they saw plaintiff's situation, whereby plaintiff was caused to be dragged, etc., states a cause of action. Central R. Co. *v.* Smith, 69 Ga. 268.

Direction to jump under mistaken idea of danger.—Where the brakeman stationed at the brake in the cupola of a caboose car, and so able to see up and down the track, on a signal for "down brakes," excitedly and recklessly calls to the passengers in the car to "Jump! jump for your lives!" the company is liable for injuries to persons jumping from the moving train, though there is no real danger. McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170.

77. Hodges *v.* Southern R. Co., 122 N. C. 992, 29 S. E. 939.

78. England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1.

79. The words "Jump off quick, if you are going to," used by a conductor to a passenger who had resolved to get off a train after it had pulled out of a station, is not such an authoritative command as would justify an action against the railroad company for injuries received by the passenger in jumping off the train while in motion. Vimont *v.* Chicago, etc., R. Co., 71 Iowa 58, 32 N. W. 100.

A passenger injured by deliberately and for his own convenience jumping off a moving train can not recover because the conductor told him when to jump, and slackened the speed of the train a little, refusing to stop, and not being obliged to stop. Bardwell *v.* Mobile, etc., R. Co., 63 Miss. 574, 56 Am. Rep. 842.

80. Where a passenger voluntarily leaves a train of cars while in motion, it is insufficient to charge the company that the conductor advised him that he could safely jump from the train. Jeffersonville R. Co. *v.* Swift, 26 Ind. 459.

Where a conductor of a train takes a passenger to a platform of a car while the train is slackening speed, and the passenger voluntarily jumps from the platform without any direction from the conductor, he is guilty of such negligence as precludes a recovery for an injury resulting therefrom. Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Mistaking Conductor's Signals.—It has also been held that a passenger alighting on a signal from the conductor, which he erroneously supposed to be meant for him, can not recover.[81]

Where Danger Obvious.—However, where an adult passenger leaves a moving train, under the advice or direction of the conductor or trainmen in authority, he can not recover for injuries received as a result where such advice or direction is so opposed to common prudence as to make it an obvious act of recklessness or folly.[82] Thus, to jump from a rapidly moving train even though ordered or directed to do so by the carrier's agents, will preclude recovery for injury.[83]

Disregarding Directions or Warnings.—But where a passenger is expressly warned by the agents of the carrier not to alight and there is no apparent necessity for his doing so, he will be precluded from recovery.[84]

81. Mistaking conductor's directions.—Where a passenger riding on a flat car mistook the conductor's signals, not intended for him, for orders to get off while the train was slowly approaching a station, and, in getting off, was injured, he could not recover. Rickert *v.* Southern R. Co., 31 S. E. 497, 123 N. C. 255.

82. Where danger obvious.—*Alabama.*—South, etc., R. Co. *v.* Schaufler, 75 Ala. 136.

Georgia.—Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840.

Texas.—Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83.

West Virginia.—Farley *v.* Norfolk, etc., R. Co., 67 W. Va. 350, 67 S. E. 1116, 27 L. R. A., N. S., 1111.

There is a material difference between orders, directions, advice, and instructions, given by employees while in performance of the carrier's duty, and those given by such employees not in performance of such duty. If, while a train was at full speed, the conductor should direct a passenger to jump out at a point extremely hazardous, between stations, it would hardly excuse the passenger from the legal consequence of contributory negligence, where he acted voluntarily. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

83. Rapidly moving train.—The act of a passenger in jumping from a train running twenty miles an hour is such a reckless act that it will prevent him from recovering of the carrier for the injuries sustained, though the conductor may have advised him to jump. Chesapeake, etc., R. Co. *v.* Gregston, 12 Ky. L. Rep. 604.

Although a person entering a wrong train by mistake, on discovering his mistake could have safely left the train, the speed being then very slow, yet if he remained on it until the speed became greater, and then under order from the agent in charge of the train sought to leave it and was injured, the case would be one of contributory negligence. Southwestern R. Co. *v.* Singleton, 67 Ga. 306.

Though one would not be justified in jumping from a train moving rapidly to avoid paying the fare demanded, although exorbitant, yet if he refused to pay such fare and was ordered to leave the train, and in so doing was injured, such facts would constitute contributory negligence on the part both of himself and the railroad. Southwestern R. Co. *v.* Singleton, 67 Ga. 306.

84. Discharging directions or warning.—Western, etc., Railroad *v.* Goodwin, 105 Ga. 237, 31 S. E. 157.

A passenger who, incumbered with hand baggage, steps from a train, on a dark night, while it is moving at the rate of six or eight miles an hour, before its arrival at the station at which he was to get off, and with the locality of which he was acquainted, against the advice of the conductor, and without a reason to believe that the train would not stop, is guilty of contributory negligence which bars a recovery for injuries received in stepping from the train. South, etc., R. Co. *v.* Schaufler, 75 Ala. 136.

Warned to wait until platform reached.—Where a passenger was expressly warned by the conductor not to alight until the train had stopped at the platform, but instead of doing so he attempted to alight in the darkness before the train reached the platform, and fell and was injured, he could not recover. Harvey *v.* Chicago, etc., R. Co., 77 N. E. 569, 221 Ill. 242, affirming judgment in 116 Ill. App. 507, and 123 Ill. App. 442.

Direction by motorman to wait for car to stop.—Where plaintiff told that motorman to stop at a certain street, of which request he took no notice, and while crossing such street plaintiff touched the motorman, and asked him why he did not stop the car, whereon the motorman immediately proceeded to slow up, and while doing so told plaintiff not to get off until the car stopped, but plaintiff stepped off the car before it stopped, and was injured, he was not entitled to recover. Campbell *v.* Los Angeles R. Co., 67 Pac. 50, 135 Cal. 137.

After train started from station.—In an action for death of a passenger while alighting from a train after it had started from a station, defendant held entitled to an instruction that if he stepped off in defiance of the request of a flagman not

Authority to Give Order.—In an action by a passenger who alleges that he was injured while leaving a moving train in compliance with the command of the conductor or person in charge, he must show, to justify his action in leaving the train, that the person who gave the command was, in fact, the conductor or some other official of the company, having authority so to direct him.[85]

Advice or Action of Other Passengers.—If directed by a brakeman or employee, the plaintiff had a right to assume that she could get off with safety, although the train was in motion, but not so if the direction was given by another passenger, as she could have no reason to suppose the latter knew more about the safety of the act than herself.[86]

§ 2816. Slowing Up for Station as Invitation to Alight.—The slowing up of a train for a station is not an invitation to the passenger to alight while the train is in operation or moving, or for the passenger to place himself in a position of peril.[87]

to do so he assumed the risk. Louisville, etc., R. Co. *v.* Dilburn (Ala.), 59 So. 438.

Alighting against warning in nighttime.—Plaintiff was injured by falling from the upper steps of defendants' train while alighting in the nighttime. She was warned not to alight while the cars were in motion, but persisted. Held, that she was not entitled to damages. McMichael *v.* Illinois Cent. R. Co., 34 So. 110, 110 La. 18.

Train taking siding—Against conductor's warning.—In an action against a railroad company to recover damages for the crushing of a passenger's arm in getting off the train, the facts being that the train had, according to a custom not unusual, moved upon a side track, near, but not at, a station, to permit a freight train, too long to run into the side track, to pass; that, as it slackened, the plaintiff attempted to get off, after being warned by the conductor not to get off, and while the conductor took hold of his shoulder to prevent his getting off, it was held that the plaintiff, and not the defendant, was guilty of negligence. Ohio, etc., R. Co. *v.* Schiebe, 44 Ill. 460.

85. Authority to give order.—Coursey *v.* Southern R. Co., 113 Ga. 297, 38 S. E. 866.

Where the declaration fails to allege that the flagman in accordance with whose direction the plaintiff alighted from a moving train had any authority to give the order or was authorized to give it by the conductor, the plaintff can not recover even if the evidence introduced was sufficient to show that the flagman had, in fact, authority, under instructions from the conductor, to see to the plaintiff's alighting from the train and accordingly to give him the order to do so, and even if the giving of the order was, under all the circumstances, negligence. Savannah, etc., R. Co. *v.* Wall, 96 Ga. 328, 23 S. E. 197.

Brakeman under Iowa Code.—McClain's Code, § 5203, which makes it a misdemeanor to get off a moving train "without the consent of the person having the same in charge," does not apply where there is evidence that the person leaving the train acted with the consent of the brakeman. Galloway *v.* Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447.

86. Advice or action of other passengers.—Filer *v.* New York Cent. R. Co., 59 N. Y. 351.

A passenger who is injured while getting off a train while in motion, after he has been warned not to do so by other passengers, can not recover. Kilpatrick *v.* Pennsylvania R. Co., 140 Pa. 502, 21 Atl. 408.

Other passengers alighting.—The fact that passengers were coming out of the rear door of the car, as if about to alight, did not show that plaintiff in stepping from the moving cars exercised due care. England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1.

A passenger who alights from a moving car, after seeing one immediately in front of him fall in getting off, is guilty of contributory negligence, and the carrier is not liable for his injuries. Brown *v.* Barnes, 151 Pa. 562, 25 Atl. 144.

87. Slowing up for station as invitation to alight.—Sweet *v.* Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667.

Plaintiff, who started to step off the rear platform of a street car before it had reached its usual stopping place, of which plaintiff was aware, and was injured by a sudden acceleration of the speed of the car, had no right to assume that the car was slowing down to enable him to alight. Dwyer *v.* Auburn, etc., R. Co., 115 N. Y. S. 364, 131 App. Div. 477.

In an action against a railroad company for personal injuries, the declaration alleged that plaintiff, a passenger, went upon the platform of the car as the train was nearing the station at his destination and running at a low rate of speed, and intended to alight at a street crossing before the station was reached, as it was customary and proper for passengers to do; that, as he was about to alight, the engineer negligently and without warning put on great force of steam, by which a jerk was imparted to the train, throwing plaintiff to the ground; and

§ 2817. Announcing Station as Invitation.—Announcement of a train's approach to a station and the opening of the car doors before the station is actually reached is not an invitation to the passengers to alight before the train stops, and a passenger doing so while the train is in rapid motion is negligent.[88] But it has been held that where the station had been announced, and the train was moving so slowly as to appear to the passengers to have stopped, it is not contributory negligence to attempt to alight.[89] The belief, however, that the train was standing still does not rebut the presumption of contributory negligence, in the absence of evidence showing that such relief was reasonable.[90]

that the jerk was partly due to the fact that the passenger car in which he was had been negligenly attached to a freight train instead of a regular passenger train. Held, that the declaration showed the injuries to have been the result of plaintiff's own negligence, and a demurrer thereto was properly sustained. Paterson *v.* Central, R., etc., Co., 85 Ga. 653, 11 S. E. 872.

Failure of trainmen to give warning.—As defendant's open trolley car was approaching a customary stopping place, and slowing down to make the stop, plaintiff, a passenger, stepped on the running board, and then to the ground, and was injured. Defendants' conductor, who had frequently seen plaintiff alight at the same place, saw his movements at the time, and gave him no warning. Held, that plaintiff was guilty of contributory negligence. Cosgrove *v.* Consolidated R. Co. (Conn.), 68 Atl. 249.

88. Announcing station as invitation.—Walker *v.* Georgia R., etc., Co., 122 Ga. 368, 50 S. E. 121; Glascock *v.* Cincinnati, etc., R. Co., 131 S. W. 779, 140 Ky. 720; England *v.* Boston, etc., R. Co., 153 Mass. 490, 27 N. E. 1.

Where, after the porter of a railroad train had announced the last station and opened the vestibule door of the car, plaintiff, erroneously supposing that the train had stopped, stepped out into the vestibule, passed down the steps, and thence to the platform, while the train was moving, and was injured in so doing, he was guilty of contributory negligence, precluding a recover. Mearns *v.* Central R. Co., 139 Fed. 543, 71 C. C. A. 331.

As the conductor or guard, after announcing the last station, stood facing the door of the vestibule, which had not yet been opened, and the train was still in motion, plaintiff leaned against a partition, and stood waiting for half a minute, when the guard opened the vestibule door, and stepped across to the vestibule of the other car, and plaintiff, erroneously supposing the train had stopped, stepped out into the vestibule, took the rail in his right hand, passed down the steps, and thence off onto the platform. In doing so, he fell, and was injured. Held, that since the facts did not show such a direction to the plaintiff as interfered with his free agency, and diverted his attention from the danger of alighting from the train while moving, he was guilty of contributory negligence, and his complaint for damages was therefore properly dismissed. Order, Mearns *v.* Central R. Co., 48 N. Y. S. 366, 23 App. Div. 298, reversed in 57 N. E. 292, 163 N. Y. 108.

A complaint for injuries to a passenger, alleging that he alighted from a moving train on a dark, stormy night, and slipped on the wet platform, shows contributory negligence, the only excuse stated being that the station had been called; that the train appeared to have stopped; that the action of the brakeman in going down in front of plaintiff led him to believe the train had stopped; that, on account of the absence of all lights and the failure of the brakeman to have his lantern with him on the platform, plaintiff was unable to see whether the train had stopped, but believed it had; and that, the train being closely coupled together and moving noiselessly on a smooth track, the darkness led him to believe it had stopped. Pittsburg, etc., R. Co. *v.* Miller, 70 N. E. 1006, 33 Ind. App. 128.

89. Bartholomew *v.* New York, etc., R. Co., 102 N. Y. 716, 7 N. E. 623, 1 Silvernail Ct. App. 72.

One who alighted from an electric car, after the announcement of the conductor that the terminus of the road had been reached under the belief that the car had stopped, and while its motion was practically imperceptible, was not guilty of contributory negligence, in fact or in law. Elwood *v.* Connecticut R., etc., Co., 58 Atl. 751, 77 Conn. 145.

Starting slowly after stopping.—A passenger may recover for injuries received in alighting from a car, though it had started before he commenced to step off, if he did not know this, and by the exercise of ordinary care and prudence could not have known it. Merritt *v.* New York, etc., R. Co., 162 Mass. 326, 38 N. E. 447.

The question whether one who stepped with others from a train at a station was negligent is one of fact for the jury, when there is evidence that, though the train had commenced to move again, it was dark, and there was nothing to show that the train was moving. Brooks *v.* Boston, etc., Railroad, 135 Mass. 21.

90. Chicago, etc., R. Co. *v.* Landauer, 39 Neb. 803, 58 N. W. 434.

Alighting in the dark.—Plaintiff was injured in alighting in the nighttime from

Tennessee Rule.—But it is held in Tennessee that a passenger who steps from a moving train does so at his peril, and, to absolve him from all contributory negligence, he must wait until the train has in fact stopped. He can not recover upon his belief that it had stopped, or had come so near to a stop as to induce him to believe it had stopped.[91]

§ 2818. After Boarding Wrong Train.—Although a railroad company may have been negligent in causing a passenger to enter the wrong train, and be responsible to him for whatever loss or damage he sustained which could have been reasonably expected to result from such negligence, if the passenger, upon his own responsibility and without the knowledge of the company of his situation, steps from the train while it is in motion and is thrown under it and injured, he can not recover damages from the railroad company for the injury so inflicted, as his own conduct was the proximate cause of the injury complained of, even though the train was moving very slowly, and a person of ordinary care and prudence would not have apprehended any danger from alighting under like circumstances.[92]

§ 2819. Acts in Emergencies.—If through the default of the carrier or its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he receives thereby; although if he had remained in the cars, he would not have been injured.[93]

a moving train. He had been traveling with an excursion party, and the conductor had said, when taking up their tickets, "Don't be asleep when you get there." On approaching the station, the trainman was at the rear end of the car with his lantern, which plaintiff knew; but he alighted from the car at the front end, where there was no trainman, under the mistaken belief, as he claimed, that the train had stopped. The railroad had failed to provide a light at the place where plaintiff left the car to enable passengers to see the steps and to tell whether the train had stopped, and the station was not well lighted. Held, that plaintiff was guilty of contributory negligence and was properly nonsuited. Bartle *v.* New York, etc., R. Co., 105 N. Y. S. 522, 121 App. Div. 72.

91. Tennessee rule.—Townsend *v.* Nashville, etc., R. Co., 106 Tenn. (22 Pickle) 162, 61 S. W. 56; East Tennessee, etc., R. Co. *v.* Massengill, 83 Tenn. (15 Lea) 328.

Implied invitation.—A declaration alleged that plaintiff was standing on the platform of one of defendant's trains, when it went into the depot sheds, having been unable to secure a seat; that the whistle was blown and station announced, and the train slowed up for passengers to alight, so that, when it came to the usual place of stopping, plaintiff, thinking it had stopped, and being impliedly invited to alight by the conduct of the trainmen, stepped off, and as he did so the cars lurched forward, throwing him down. It was held, that a demurrer to the declaration was properly sustained, because of the absence of a definite averment that the train had stopped as a matter of fact. Townsend *v.* Nashville, etc., R. Co., 106 Tenn. (22 Pickle) 162, 61 S. W. 56.

92. After boarding wrong train.—Chesapeake, etc., R. Co. *v.* Wills, 111 Va. 32, 68 S. E. 395, 32 L. R. A., N. S., 280.

After refusal of request to stop.—A carrier is not liable for injuries sustained by a person who, having boarded the wrong train, jumped therefrom, of his own volition, while the train was in motion and after the carrier's servants had refused his request that the train be stopped. Whelan *v.* Georgia, etc., R. Co., 84 Ga. 506, 10 S. E. 1091.

93. Acts in emergencies.—*Alabama.*—Selma St., etc., R. Co. *v.* Owen, 31 So. 598, 132 Ala. 420.

District of Columbia.—Washington, etc., R. Co. *v.* Hickey, 5 App. D. C. 436.

Georgia.—Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

Illinois.—Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Beiner Livery, etc., Co. *v.* Busson, 58 Ill. App. 17.

Kentucky.—South Covington, etc., St. R. Co. *v.* Ware, 84 Ky. 267, 8 Ky. L. Rep. 241, 1 S. W. 493; Louisville, etc., R. Co. *v.* Cecil, 9 Ky. L. Rep. 402.

Louisiana.—Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185, 58 Am. Rep. 177.

Massachusetts.—Ingalls *v.* Bills (Mass.), 9 Metc. 1, 43 Am. Dec. 346.

Michigan.—Howell *v.* Lansing City Elect. R. Co., 99 N. W. 406, 136 Mich. 432.

Minnesota.—Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410.

Missouri.—Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

Duty to Notify Carrier of Desire to Alight.—A passenger who was injured by jumping from a moving street car which was about to be run over

New York.—Buel *v.* New York Cent. R. Co., 31 N. Y. 314, 88 Am. Dec. 271.

Pennsylvania.—Quinn *v.* Shamokin, etc., R. Co., 7 Pa. Super. Ct. 19.

Virginia.—Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

Washington.—Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

West Virginia.—Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

Where a passenger, seeing a collision was imminent, jumped from a moving train and was injured, she could recover, though she might not have been hurt had she not jumped, being entitled to act on a natural impulse which an ordinarily prudent person situated as she was would reasonably have been expected to do. Big Sandy, etc., R. Co. *v.* Blankenship (Ky.), 118 S. W. 315.

In an action against a railway company for personal injuries, it appeared that plaintiff took his seat in the smoking compartment of the baggage car; that he did not notice that the train had started until it was fairly under way; and then, from his knowledge of the time of running the trains, knew there was serious danger of a collision. He went into the baggage car, and stood at the door, ready to jump should there be danger of a collision, and did jump just before the trains collided. Held not contributory negligence. Cody *v.* New York, etc., R. Co., 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843.

At the crossing of a horse and a steam railway, the view of the latter's track was obstructed until within fifteen feet of it. A horse car was driven slowly upon the crossing, without warning from a gateman stationed at the crossing by the railroad company, until the horses were on the crossing, when, as an engine approached on a down grade, the gateman shouted to the driver of the horse car to stop, and commenced to lower the gates guarding the crossing, but, when they were halfway down, shouted to him to go on, and began raising the gates; others shouted contradictory directions to him. The driver stopped, or nearly so, but, before he had stopped, plaintiff, a passenger in the horse car, in apprehension of a collision, jumped from the car, and thereby was injured. Held, that the apprehension of peril was reasonable, and such jumping was not contributory negligence, though there was no real danger of a collision. Kleiber *v.* People's R. Co., 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613.

In an action for the negligent killing of a passenger on a freight car, an instruction that "if the deceased jumped from the car while the train was running at the rate of fourteen or fifteen miles an hour he was guilty of such contributory negligence as would defeat a recovery, unless at the time the circumstances were such as would reasonably have induced a man of ordinary prudence to believe that his life was in danger, or that he was in danger of suffering great bodily harm, so that he was impelled to leap from the car in order to escape reasonably apprehended danger," held proper. Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

Where conductor calls attention to danger.—A complaint in an action for injuries alleged that, just as defendant's street car on which plaintiff was a passenger went onto a railroad crossing, the driver turned to plaintiff and exclaimed, "The train is right on us!" whereupon plaintiff looked and saw an engine coming at a high rate of speed, and, it appearing that a collision was imminent, she attempted to jump off, and was injured by falling. There was in fact no collision. Held, that the complaint made a sufficient case of apparent necessity for plaintiff to leave the moving car. Selma St., etc., R. Co. *v.* Owen, 31 So. 598, 132 Ala. 420.

Motorman racing to cross ahead of railway train.—In an action against a street railway company for personal injuries, where plaintiff's evidence showed that she was injured by jumping from a cable car of defendant, upon which she was a passenger, and which was approaching a railroad grade crossing, because the gripman, after being repeatedly warned of the near approach of a train, not only failed to stop his car, although he could easily have done so, but increased its speed to make the crossing before the train, a motion for a nonsuit was properly denied. Bischoff *v.* People's R. Co., 121 Mo. 216, 25 S. W. 908.

Car becoming uncontrollable.—A passenger on an electric car which has become uncontrollable, and has broken through the safety gates at a railroad crossing while a train is passing, is not negligent in trying to jump from the car. Willis *v.* Second Ave. Tract. Co., 42 Atl. 1, 189 Pa. 430.

Electric explosion in car.—An action will lie against a street railway company for injury caused plaintiff in leaping from a car in which an electrical explosion had occurred, flames issuing in the part of the car where she was, where such explosions were of frequent occurrence and tended to excite and frighten passengers, though there was no evidence that other passengers had been excited or frightened; it being common knowledge that such explosions would tend to frighten

by a locomotive was under no duty to notify the driver that she wished to alight.[94]

Against Conductor's Warning.—And it has been held that it is not necessarily negligence for a passenger on a street car, in case of apparent imminent danger of collision with another car, to jump from the car, notwithstanding the conductor's warning not to jump.[95]

Groundless Fears.—The liability of a carrier, where a passenger jumps from one of its cars in the presence of imminent danger, is to be measured by what a prudent person would have done under like circumstances.[96] Thus, where one induced by groundless fear leaps from a car when there is no reasonable cause to apprehend danger to life or limb, and is killed, no recovery can be had against the carrier for the death, even though it was guilty of negligence.[97]

Danger Due to Act of Passenger.—Where the danger is brought about by the act of the passenger himself, he will be precluded from recovery for injuries sustained by jumping to avoid such danger.[98] But the mere fact that jumping from a car increases the danger will not prevent recovery.[99]

§§ 2820-2821. Alighting from Moving Car on Failure to Stop at Station—§ 2820. In General.—The earlier cases in many instances recognize the principle of negligence per se in alighting from a moving train,[1] but modern

passengers situated as she was, and it appearing that the motorman leaped from the car before plaintiff did. Williamson *v.* St. Louis Transit Co., 100 S. W. 1072, 202 Mo. 345.

Running rapidly down dangerous grade.—Where a street car is running rapidly down a dangerous grade, a passenger can, in view of imminent danger, jump from the car to avoid injury. Lehner *v.* Pittsburg R. Co., 72 Atl. 525, 223 Pa. 208, 16 Am. & Eng. Ann. Cas. 83.

94. Duty to notify carrier of desire to alight.—Selma St., etc., R. Co. *v.* Owen, 31 So. 598, 132 Ala. 420.

95. Against conductor's warning.—Wade *v.* Columbia Elect. St. R., etc., Co., 29 S. E. 233, 51 S. C. 296, 64 Am. St. Rep. 676.

96. Groundless fears.—Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868.

97. Woolery *v.* Louisville, etc., R. Co., 8 N. E. 226, 107 Ind. 381, 57 Am. Rep. 114; Chitty *v.* St. Louis, etc., R. Co., 148 Mo. 64, 49 S. W. 868.

Where by the fall of a broken electric wire the lights in an electric car went out, and this was immediately followed by a flash and an explosion similar to that of a fire cracker, but louder, and neither the car nor any of the passengers were injured, nor was any one frightened other than plaintiff's son, who ran to the back platform and jumped from the car, running at a high rate of speed, to the ground, and died from the injuries, in order to recover for such death, it must be shown that deceased had acted upon reasonable apprehension, and that his conduct conformed to that of an ordinarily careful and prudent man under like circumstances. Chretien *v.* New Orleans R. Co., 37 So. 716, 113 La. 761, 104 Am. St. Rep. 519.

Where plaintiff, while the train was in motion, in order to avoid a collision which she apprehended, but of which there was no danger, jumped from the train and was injured, she can not recover damages therefor. Marsalis *v.* Louisiana, etc., R. Co., 129 La. 146, 55 So. 744.

98. Danger due to act of passenger.—Also if a passenger by his own act in starting to leave a moving train is placed in such a position that he is forced to leave by reason of injury threatened by a post near the track, he is guilty of such negligence as to preclude a recovery for injuries received in thus leaving the train. Lindsay *v.* Southern R. Co., 114 Ga. 896, 41 S. E. 46.

99. Peril increased by jumping.—Where a drover died from injuries received while being transported on a stock train, an instruction, in an action for his death, that if the court finds that defendant's negligence placed deceased in a state of peril, and he had at that time reasonable grounds for supposing he would be injured by remaining on the train, plaintiffs were entitled to recover, though the fact that deceased jumped from the train increased the peril and caused his death, and he would have probably sustained little or no injury had he remained in the car, was proper. Western Maryland R. Co. *v.* State, 53 Atl. 969, 95 Md. 637.

1. Alighting from moving car on failure to stop at station.—*Georgia.*—Outen *v.* North, etc., St. R. Co., 94 Ga. 662, 21 S. E. 710; Barnett *v.* East Tennessee, etc., R. Co., 87 Ga. 766, 13 S. E. 904; Watson *v.* Georgia Pac. R. Co., 81 Ga. 476, 7 S. E. 854.

Illinois.—Illinois Cent. R. Co. *v.* Able, 59 Ill. 131; Illinois Cent. R. Co. *v.* Chambers, 71 Ill. 519; Illinois Cent. R. Co. *v.* Lutz, 84 Ill. 598; Dougherty *v.* Chicago, etc., R. Co., 86 Ill. 467.

Indiana.—Reibel *v.* Cincinnati, etc., R. Co., 114 Ind. 476, 17 N. E. 107; Jefferson-

authority to a great extent has supplanted that doctrine with broader views upon the question. It is now held that to leave a moving train at a station where, because of the negligence of the railway company, no stop was made, is not negligence as a matter of law, unless it appears further that the danger attending the attempt to alight was so great as to be obvious to a person of common prudence and ordinary intelligence. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury. The mere fact that the passenger is being carried by the station at which he wishes to alight will not excuse his act. If he is compelled to choose between incurring some risk in leaving the train or remaining and being exposed to inconveniences to which the carrier has no right to expose him, and he is injured in getting off under circumstances which would not prevent a person of ordinary prudence from doing so, the company is liable for injuries received by the passenger in alighting.[2]

Proximate Cause.—One who attempted to leave defendant's cars after they were in motion, and, finding they had started, persisted in getting off, can not maintain an action for injuries if his negligence contributed to the injury, though the defendant gave him no special notice of the time of the departure of the cars, and was guilty of negligence in starting the train, and in suddenly jerking the cars after they had started.[3]

ville R. Co. *v.* Hendricks, 26 Ind. 228; Jeffersonville R. Co. *v.* Swift, 26 Ind. 459.

Louisiana.—Damont *v.* New Orleans, etc., R. Co., 9 La. Ann. 441, 61 Am. Dec. 214; Walker *v.* Vicksburg, etc., R. Co., 41 La. Ann. 795, 6 So. 916, 17 Am. St. Rep. 417, 7 L. R. A. 111.

Michigan.—Lake Shore, etc., R. Co. *v.* Bangs, 47 Mich. 470, 11 N. W. 276; Jacob *v.* Flint, etc., R. Co., 105 Mich. 450, 63 N. W. 502.

Minnesota.—Butler *v.* St. Paul, etc., R. Co., 59 Minn. 135, 60 N. W. 1090.

Missouri.—Nelson *v.* Atlantic, etc., R. Co., 68 Mo. 593; Kelly *v.* Hannibal, etc., R. Co., 70 Mo. 604.

New York.—Scully *v.* New York, etc., R. Co., 80 Hun 197, 30 N. Y. S. 61, 61 N. Y. St. Rep. 804.

Pennsylvania.—Hagan *v.* Philadelphia, etc., R. Co., 15 Phila. 278; Pennsylvania R. Co. *v.* Aspell, 23 Pa. 147, 62 Am. Dec. 323; Rothstein *v.* Pennsylvania R. Co., 171 Pa. 620, 33 Atl. 379.

Texas.—Fordyce *v.* Allen (Tex. Civ. App.), 26 S. W. 437.

A declaration alleging that the conductor of a passenger train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade, that plaintiff paid his fare to this point, and that on reaching the same the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe, or if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off. Barnett *v.* East Tennessee, etc., R. Co., 87 Ga. 766, 13 S. E. 904.

The fact that the street car driver refused to stop when asked by a boy who was negligently riding on the front platform of the car does not excuse the latter's negligence, it not having been induced by the refusal to stop the car. Solomon *v.* Central Park, etc., R. Co., 31 N. Y. Super. Ct. 298.

2. *Georgia.*—Turley *v.* Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748, 8 L. R. A., N. S., 695.

Missouri.—Price *v.* St. Louis, etc., R. Co., 72 Mo. 414.

Texas.—Houston, etc., R. Co. *v.* Leslie, 57 Tex. 83; Galveston, etc., R. Co. *v.* Smith, 59 Tex. 406.

Wisconsin.—Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

It is not contributory negligence per se for a passenger to jump from a train which had failed to stop at the station a sufficient length of time to enable her to alight therefrom, and which had traveled less than one hundred feet when she jumped, but the question should be left to the determination of the jury. Carr *v.* Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354.

The mere fact that a train fails to stop as is its duty to do, or as the conductor has promised, does not justify a passenger in jumping off from it while moving, unless notified to do so by the carrier's agent, and the attempt is not obviously dangerous. Burgin *v.* Richmond, etc., R. Co., 115 N. C. 673, 20 S. E. 473.

3. Proximate cause.—*Indiana.*—Dresslar *v.* Citizens' St. R. Co., 47 N. E. 651, 19 Ind. App. 383.

Massachusetts.—Lucas *v.* New Bedford,

Obvious Danger.—On the other hand if the circumstances were such that an ordinarily cautious, careful and prudent person would have apprehended danger therefrom, then it would be such an act of carelessness as would relieve the carrier from responsibility.[4]

etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406.

Tennessee.—Louisville, etc., R. Co. *v.* Collier, 104 Tenn. 189, 54 S. W. 980.

Texas.—Galveston, etc., R. Co. *v.* De Castillo (Tex. Civ. App.), 83 S. W. 25.

Virginia.—Newport News, etc., Elect. Co. *v.* McCormick, 56 S. E. 281, 106 Va. 517.

When the agent and employees of a railway company negligently fail to bring the train to a stop at a station where a passenger, is entitled to leave the train, and the passenger, perceiving that he is about to be carried beyond his destination, attempts to alight from the car at the usual place, and, while doing so, is by a sudden jerk thrown from the steps of the car and injured, he is not precluded from the recovery of damages for the injury unless he was guilty of negligence himself, and his own negligence was the proximate cause of his injuries. Turley *v.* Atlanta, etc., R. Co., 56 S. E. 748, 127 Ga. 594, 8 L. R. A., N. S., 695.

Where a conductor wrongfully carries a passenger beyond his destination, it does not justify him in hazarding life and limb by leaping from a moving car; if he is injured, recovery is barred upon the principle that the negligence of the company in failing to stop the car was the remote cause, while the negligence of the passenger in leaping from the car while in motion was the proximate cause of the injury. Newport News, etc., Elect. Co. *v.* McCormick, 106 Va. 517, 56 S. E. 281.

4. Obvious danger.—Chicago, etc., R. Co. *v.* Martelle, 91 N. W. 364, 65 Neb. 540.

A passenger attempting to alight from a train while it is passing a station where it should stop to permit him to alight is not, as a matter of law, guilty of negligence, unless the attending circumstances show so clearly that he acted recklessly and imprudently that reasonable minds would not arrive at any other conclusion; but otherwise it is a question for the jury, since failure to stop the train at a station does not justify a passenger in attempting to alight under circumstances obviously hazardous. Kansas, etc., R. Co. *v.* Worthington, 101 Ark. 128, 141 S. W. 1173.

Where the agent and employees of a railway company negligently failed to bring the train to a stop at a station where a passenger is entitled to leave the train, his attempt to leave it while in motion can not be held to be negligence as a matter of law unless the danger attending the attempt was so great as to be obvious to a person of common prudence and ordinary intelligence. Turley *v.* Atlanta, etc., R. Co., 56 S. E. 748, 127 Ga. 594, 8 L. R. A., N. S., 695.

Rapidly moving train.—A passenger compos mentis who, under no emergency or constraint, jumps off at his station from a train moving at over twelve miles an hour, can not recover for resulting injuries on the ground of the trainmen's negligence in failing to stop and in slowing up at the platform, thus inducing him to make the attempt. Kansas City, etc., R. Co. *v.* Mayes, 58 Ark. 397, 24 S. W. 1076.

A passenger on defendant's train went upon the platform of the car, in anticipation of the train's stopping at a regular stopping place, and stood on the steps of the car in violation of defendant's rule (known to him) forbidding passengers to go on the platform while the train was in motion. The train ran by the regular stopping place. There was no evidence that the conductor was on the platform, or knew or had any cause to think that plaintiff was there, or invited him to go there. A sudden jerk of the train threw plaintiff off, and he was injured. The speed of the train was about eight or ten miles an hour when he fell. Held, that plaintiff was properly nonsuited. Denny *v.* North Carolina R. Co., 43 S. E. 847, 132 N. C. 340.

No slowing for station.—Where, with full knowledge that a car was running at the same speed at which it had approached the station, plaintiff stepped therefrom without being forced to do so by any emergency, there was no error in granting a nonsuit. Walker *v.* Georgia R., etc., Co., 50 S. E. 121, 122 Ga. 368.

A passenger on a freight train wished to get off at a station where the train was accustomed to slowing up, so that passengers could alight without danger. On this occasion the train did not slacken at the station, and shortly after passing it the passenger jumped therefrom, and received injuries which caused his death. Held, in an action by his administratrix, that deceased's contributory negligence would defeat a recovery. Brown *v.* Chicago, etc., R. Co., 80 Wis. 162, 49 N. W. 807.

Failure to slacken speed according to agreement.—One riding on a train under a special agreement with the conductor that the train would slack up enough for him to alight with safety at a certain place can not hold the railroad responsible for injuries sustained in alighting from the train at the place agreed upon, where he acted upon his own motion and judgment, without the knowledge or concurrence of the conductor, at a time when

§ 2821. By Direction or Invitation of Carrier.—See ante, "By Direction or Invitation of Carrier," §§ 2815-2818: Where a passenger is told to alight from a moving train by the trainmen in charge, and the passenger being suddenly put to his election whether he will be carried past his destination or alight from a car in motion, does alight and receives an injury, he is not necessarily guilty of contributory negligence.[5]

the train was in fact going too fast to permit him to alight in safety, although he used ordinary care in judging and determining that it was safe for him to alight. Judgment (Tex. Civ. App.), 84 S. W. 365, reversed in St. Louis, etc., R. Co. *v.* Highnote, 99 Tex. 23, 86 S. W. 923.

After notice that train would not stop.—Where a passenger, after being informed by the conductor that the train will not stop at his intended destination, jumps off the moving train while passing the station, the carrier is not liable for the injuries sustained by him in consequence. Owens *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 198.

Jumping from freight train not designed to carry passengers.—Plaintiff boarded defendant's freight train, which was not designed to carry passengers, and jumped off at a station, to which he had purchased a ticket, on its failure to stop, and while it was running at from six to eight miles per hour, and was injured. Held, that though defendant was guilty of gross negligence, for which only it was liable, under Code, § 3557, plaintiff's own recklessness was the proximate cause of his injury, and he could not recover. Illinois Cent. R. Co. *v.* Trail (Miss.), 25 So. 863.

5. By direction or invitation of carrier.—International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

It being a breach of a carrier's duty to fail to stop at a passenger's station, and to invite him to alight from the train while moving, and it not being negligence per se for him to alight at the carrier's invitation from a moving train, unless the circumstances are such as to make the danger obvious to one of ordinary prudence and senses, a complaint does not, as matter of law, show that defendant's negligence was not, and plaintiff's negligence was, the proximate cause of his injury, it being alleged that, as the train approached the station, the conductor ordered plaintiff to get ready and get off; that, as the train slowed up as if to stop, plaintiff followed him to the platform, where they were as the train was passing the station; but that it, instead of stopping, began to go faster, whereupon, with the knowledge of the conductor and in obedience to said order, he jumped from the train, and was struck by the passing steps, causing him to fall so that his foot was run over. Cooper *v.* Georgia, etc., R. Co., 34 S. E. 16, 56 S. C. 91.

In an action against a railroad company for injuries through defendant's negligence, plaintiff testified that she took passage on defendant's road; that as the train approached her station she passed out, with others, upon the platform; that the train was moving slowly; that a passenger who preceded her stepped off the car, and the brakeman said to her, "You had better step off, as we are not going to halt any longer;" that she thereupon stepped down to the lower step, and as she attempted to step down upon the ground the cars gave a sudden jerk, which threw her down; that her clothing caught, and she was dragged upon the ground, and injured; that the person she called the brakeman had stood upon the platform, had opened the door, and called the stations; and that, when he gave the direction to her, he stood on the platform with his hand on the brakes. She could not recognize the man, and the brakeman on the train denied the plaintiff's statements. Held, that the question of contributive negligence was for the jury. Filer *v.* New York Cent. R. Co., 68 N. Y. 124.

Direction of brakeman.—A woman sixty-two years old riding on a passenger train was not negligent in attempting to leave it at her station while the rain was yet in motion, the brakeman having told her to step off, stating that the train would not stop, although her judgment otherwise would have been not to make the attempt. Abbey *v.* New York, etc., R. Co. (N. Y.), 20 Wkly. Dig. 37.

Conductor signalling to go ahead after invitation to alight.—Where the train did not come to a full stop at plaintiff's station, and there was evidence that the conductor invited plaintiff to alight, and, while plaintiff was getting off, signaled the engineer to go ahead, whether plaintiff was guilty of contributory negligence was for the jury. Bucher *v.* New York, etc., R. Co., 98 N. Y. 128.

Alighting in the dark.—A passenger alighting from a slowly moving train, in the dark, on a depot platform, at the request of an employee, was not guilty of contributory negligence. Gulf, etc., R. Co. *v.* Shelton, 69 S. W. 653, 30 Tex. Civ. App. 72; S. C., 70 S. W. 359, affirmed in 72 S. W. 165, 96 Tex. 301.

Train not scheduled to stop.—A passenger got on a train which did not stop at the station for which he had purchased his ticket, and the conductor, on taking his ticket, told him that the train would be slowed down as the station was ap-

Obvious Danger.—Where, however, the danger of obeying such direction or invitation is so manifest that a person in the exercise of ordinary discretion would not have done so, there can be no recovery.[6]

Advice of Conductor as to Manner of Alighting.—The mere advice of a conductor as to the best manner of alighting can not be taken by the passenger as an order to alight, and a passenger injured in so doing can not excuse his negligence on the ground of a direction or invitation of the carrier.[7]

§ 2822. Alighting from Moving Car on Failure to Stop for Sufficient Time.—If a passenger voluntarily leaps from the train whilst it is in motion and is injured thereby, he can not, as a general rule, recover of the company, although the train may not have been stopped at the station long enough to afford reasonable opportunity to get off in the usual way. But where a reasonable opportunity to alight was not given a passenger, and he attempts to do so after the train has resumed its motion, but before it has become rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and, nevertheless, bodily injury follows, the passenger is entitled to recover damages for the injury, because the railway company has committed a flagrant breach of duty, and the passenger is chargeable with no appreciable negligence. He has a right to construe the momentary halt of the train at the station as an invitation to alight, and to make use of the opportunity thus afforded

proached, and he could then alight. Held, in an action against the carrier for injuries sustained in getting off the train when in motion, that the question of contributory negligence was for the jury. Schurr *v.* Houston, 10 N. Y. St. Rep. 262.

6. **Obvious danger.**—In an action to recover for injuries to a minor passenger alleged to have been caused by her jumping, in accordance with the order of the conductor, from a moving train which was going past her station without stopping, the case should turn as to the question of the defendant's liability upon whether the conductor ordered the passenger to jump from the moving train, and if so, whether she was free from plain and manifest negligence in obeying the order. If the order was not given and if it should have been disobeyed on account of the obvious danger of complying with it there can be no recovery, otherwise there may be a recovery. East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 17 S. E. 949.

In an action against a railroad company for injuries to plaintiff's daughter, seventeen years of age, caused by jumping from a train while in motion, plaintiff alleged that she was ordered so to do by the conductor, who refused to stop the train at that point, for which she had bought a ticket. Held, that there could be no recovery, though the conductor did give such order, if the danger of obeying was so manifest that a person of her age, in the exercise of ordinary discretion, would not have done so. East Tennessee, etc., R. Co. *v.* Hughes, 92 Ga. 388, 17 S. E. 949.

After boarding wrong train.—A passenger boarded a freight train to go to a station at which the train did not stop. The conductor was angry and abusive, and ordered the passenger to jump off when the train reached the station. He made no threats to put him off, however, and there was no reason to suppose that this would have been done. The passenger jumped off while the train was going ten or twelve miles an hour, and sustained injuries. Held, that his conduct precluded his recovering damages from the company. St. Louis, etc., R. Co. *v.* Rosenberry, 45 Ark. 256.

Moving elevator.—Where one attempting to leave a descending elevator which failed to stop was struck on the head by the top of the car and killed, the doctrine of the last clear chance had no application. Real Estate Trust, etc., Co. *v.* Gwyn (Va.), 74 S. E. 208.

7. The facts that a passenger was being carried past his station, and that, as he was about to alight from the moving train, the conductor told him to jump "with" the train, and not "sideways," did not justify him in jumping from the train while it was in motion. McDonald *v.* Boston, etc., Railroad, 87 Me. 466, 32 Atl. 1010.

Consent of trainmen.—Where plaintiff, a railroad passenger, on paying his fare, was informed that the train did not stop at the station to which he desired to go, but on approaching the station heard two blasts of the whistle, which he supposed was a stop signal, and told the brakeman that he desired to alight if the train stopped, and the brakeman simply answered, "All right," and opened the vestibule, and when plaintiff attempted to alight the train suddenly increased its speed, and he was thrown and injured, he was guilty of contributory negligence, precluding a recovery. Chicago, etc., R. Co. *v.* Claunts, 99 Ark. 248, 138 S. W. 332.

where not attended with apparent danger, holding the company responsible if it does not furnish reasonable time to leave the train with safety.[8] Whether he was negligent in alighting must depend upon all the surrounding circumstances and the question is usually one for the jury.[9]

Sudden Starting While Passenger in Act of Alighting.—Ordinary prudence requires that a passenger shall not alight from a moving car, but if the exit is properly begun while the car is stationary, and the car is suddenly started with undue violence before the passenger alights, the carrier may be negligent and the passenger free from negligence. Ordinarily a passenger at-

8. Alighting from moving car on failure to stop for sufficient time.—*Georgia.*—Atlanta, etc., R. Co. *v.* Dickinson, 89 Ga. 455, 15 S. E. 524.

Illinois.—Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

Missouri.—Johnson *v.* St. Joseph R., etc., Co., 128 S. W. 243, 143 Mo. App. 376.

Nebraska.—Chicago, etc., R. Co. *v.* Winfrey, 93 N. W. 526, 67 Neb. 13.

Texas.—St. Louis, etc., R. Co. *v.* Massay (Tex. Civ. App.), 76 S. W. 585.

As a general rule, passengers can not properly get off a moving train except by direction of the conductor; but when a train stops at a station without allowing a reasonable time for passengers to alight, one who gets off as it is slowly starting, and is injured thereby, is not guilty of contributory negligence. McSloop *v.* Richmond, etc., R. Co., 59 Fed. 431.

"It may therefore be affirmed, on the one hand, that when a train stops at a station to which the company contracts to carry a passenger, the company is liable if reasonable time to leave is not afforded, and the passenger is injured in an attempt to leave after it has started, and while in motion, if he does not, in getting off, incur a danger obvious to the mind of a reasonable man; and on the other hand that, although the company has failed in its duty of stopping the train at the station for a reasonable time to allow the passenger to alight, yet if he attempts to do so after the train has acquired such a rapid motion as to make it obvious to a man acting reasonably under the same circumstances, that an attempt to alight would be attended with danger, he can not make the negligence of the company a ground for recovering damages from it in case he is hurt, but his hurt will be imputed to his own negligence as the proximate cause of it. 3 Thompson Neg. 344; Hutchinson on Carriers, § 1179, et seq." Louisville, etc., R. Co. *v.* Edmondson, 128 Ga. 478, 57 S. E. 877.

Where a railway train is improperly set in motion before a person aboard, who is entitled to leave it at that place, has reasonable time to do so, and while he is in the act of leaving it, there is an implied invitation for him to alight from the moving train; and he could act upon that invitation without negligence, provided the speed of the train, his own weakness, or some other obvious danger did not render it imprudent for him to make the effect. Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

Defendant's requested instruction that the mere fact that the car started before the passenger had time to alight "would not give her the right to jump from the car while it was in motion" was modified by substituting, "would not give her the right to alight while the car was going at a rate of speed which would make it dangerous to do so." Held, that the modification was proper, as it is not true that a passenger has no right under any circumstances to attempt to get off a moving car. Indianapolis St. R. Co. *v.* Hockett, 66 N. E. 39, 159 Ind. 677.

Negligence of a railroad company in failing to stop its train at a station long enough to permit passengers to alight will not absolve a passenger from negligence in attempting to alight after the train has started. Farley *v.* Norfolk, etc., R. Co., 67 S. E. 1116, 67 W. Va. 350, 27 L. R. A., N. S., 1111.

9. Pennsylvania R. Co. *v.* Lyons, 129 Pa. 113, 18 Atl. 759, 15 Am. St. Rep. 701.

In an action by a passenger for injuries received in alighting from a train, it being contended that it failed to stop a reasonably sufficient time, it is a question for the jury whether the passenger was negligent in getting off the train where it had started while she was still on the platform of her car. Cousins *v.* Lake Shore, etc., R. Co., 96 Mich. 386, 56 N. W. 14.

In an action against a railroad company for personal injuries received by plaintiff while alighting from a train, she testified that, as the train stopped at their station, she and her husband left their seats, and went to the platform, carrying their baby and some bundles, and that her husband, having alighted, was assisting her to do the same, when the train started, and that she thought the train stopped between fifteen and thirty seconds. There was evidence on defendant's part that the train stopped two minutes, and that plaintiff negligently delayed leaving the car, and jumped off while it was moving. Held, that the case should have been submitted to the jury. Alford *v.* Chicago, etc., R. Co., 86 Wis. 235, 56 N. W. 743.

tempting to alight after a car or train has stopped may assume that it will not start until he has had a reasonable time to leave it in safety.[10]

Due Diligence in Leaving Car.—While it is true that it is the duty of the carrier to stop its train or car for a sufficient length of time to allow passengers to alight in safety, it is also true that a passenger must use due diligence in alighting. If a train stops a sufficient length of time to enable a passenger to leave it, and he neglects to leave while so stopped, but carelessly and negligently jumped from it after it was in motion, and was injured, he could not recover.[11]

10. Sudden starting while passenger in act of alighting.—*Florida.*—Florida R. Co. *v.* Dorsey, 59 Fla. 260, 52 So. 963.

Illinois.—Moore *v.* Aurora, etc., R. Co., 92 N. E. 573, 246 Ill. 56, 20 Am. & Eng. Ann. Cas. 335; Chicago, etc., R. Co. *v.* Storment, 90 Ill. App. 505, judgment affirmed in 60 N. E. 104, 190 Ill. 42; Jurkiewicz *v.* Illinois Cent. R. Co., 145 Ill. App. 44.

Michigan.—O'Dea *v.* Michigan Cent. R. Co., 105 N. W. 746, 142 Mich. 265; Burke *v.* Bay City Tract., etc., Co., 110 N. W. 524, 147 Mich. 172.

Virginia.—Richmond Tract. Co. *v.* Williams, 46 S. E. 292, 102 Va. 253.

A passenger on a street car is entitled to assume that the conductor will not start the car while the passenger is in the act of alighting, though he sees the conductor's arm raised toward the bell cord. Hurley *v.* Metropolitan St. R. Co., 96 S. W. 714, 120 Mo. App. 262.

If a passenger was proceeding to get off a car when the train suddenly started backward, and the impetus of the motion of such passenger together with the sudden starting of the car carried such passenger forward without volition upon the part of such passenger, it is immaterial whether the act of stepping off occurred an instant before or an instant after the car began to move. Lake St. Elevated R. Co. *v.* Craig, 126 Ill. App. 361.

While it is contributory negligence per se for a passenger to alight from a moving train, yet if the train was not stopped a sufficient time to enable the passenger to alight with safety, and she left the car with reasonable expedition, and did not discover that the train was in motion until she came to the steps of the platform and was descending them, and if the danger was so sudden that she had no time to deliberate and acted under the circumstances according to her best judgment in such emergency, she is not guilty of contributory negligence. Leggett *v.* Western New York, etc., R. Co., 143 Pa. 39, 21 Atl. 996.

A complaint alleging that plaintiff, a passenger, went on the platform when the train had nearly stopped at her station, and went on the step and attempted to alight when the train stopped, and was thrown therefrom by its sudden starting, does not show contributory negligence. Cincinnati, etc., R. Co. *v.* Revalee, 46 N. E. 352, 17 Ind. App. 657.

It was the duty of a motorman, when signaled by a passenger, to stop his car at a usual and customary station for stopping, a sufficient length of time to give her a reasonable opportunity to alight in safety, and it was the reciprocal duty of the passenger to use reasonable diligence in getting off, but if the motorman disregarded his duty he was guilty of the first act of negligence. Paducah St. R. Co. *v.* Walsh, 58 S. W. 431, 22 Ky. L. Rep. 532.

In an action by a passenger against a street railway company for injuries received by alighting from a car, due to its starting forward suddenly, plaintiff testified that he signaled the conductor to stop, that the car slowed up and was practically at a stop, that he did not hear the bell ring, that the car was rattling, and that he saw the conductor's hand go up as though to ring. Held, that it was error to dismiss the complaint, as it is not negligence per se to alight from a moving car. Harris *v.* Union R. Co., 74 N. Y. S. 1012, 69 App. Div. 385.

11. Due diligence in leaving car.—*Illinois.*—Illinois Cent. R. Co. *v.* Slatton, 54 Ill. 133, 5 Am. Rep. 109.

Tennessee.—Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

Texas.—Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 38 S. W. 756; Texas Mid. Railroad *v.* Ritchey, 108 S. W. 732, 49 Tex. Civ. App. 409.

A carrier is not liable for the death of a passenger who was killed by the starting of the train while he was attempting to alight, if, previous to the accident, the train remained still for a sufficient time for him to alight, and the trainmen did not know, and had no reason to believe, that he was getting off when the train started. Chesapeake, etc., R. Co. *v.* Reeves, 11 Ky. L. Rep. 14, 11 S. W. 464.

Passing through other cars to platform.—On attempting to alight at her destination from the car in which she rode, plaintiff discovered that the car had stopped before it reached the station platform, and that the ground at that place was covered with water. She then hurried through the car, and through the next car in front, in order to reach the platform; but, before she had time to alight, the train started, and, there being no one at the step to help her, she jumped off on the platform, and was injured.

§ 2823. Defective or Unlighted Platform and Obstructions Thereon.
—**Defective Platform.**—A passenger, in leaving a train, has the right to assume, in the absence of information to the contrary, that he can safely pass across the carrier's depot platform to take a conveyance to his destination.[12] If, at the time a passenger steps upon a railroad platform, he knows of its unsafe condition, he will not be required to abandon its use, and if he uses due care proportionate to the known danger, and is injured by reason of the defect, he will not be barred from recovery by such knowledge.[13] In order to make a passenger using a defective platform in alighting from a train guilty of contributory negligence, the defect must be such as would naturally suggest to one of common understanding that it was dangerous and such as to place one in peril to pass over it to and from the train.[14] But where a passenger, who has just alighted from a train, starts towards the exit of the station unaware of a step down to the platform, and falls and is injured, she is guilty of contributory negligence.[15]

Unlighted Platform.—It is the duty of a railroad company to furnish lights at its station platforms during the arrival of trains at night, sufficient to safely guide the steps of its passengers,[16] and a passenger has a right to assume that whatever light is required to make the platform safe will be provided and he is not guilty of contributory negligence in using the platform without calling for lights.[17] That a woman, injured while alighting from her train in the dark

Held, that she was not guilty of "criminal negligence," within Comp. St., c. 72, art. 1, § 3 (making every railroad company the insurer of its passengers' safety, except when the injury done arises from the criminal negligence of the passenger injured), and was hence entitled to recover. Chicago, etc., R. Co. *v.* Hyatt, 48 Neb. 161, 67 N. W. 8.

Passenger delayed by other passengers.—Plaintiff had been riding in the vestibule of defendant's street car, which was full of people and tool boxes. The car came to a full stop at the point where plaintiff desired to alight, and as soon as the car stopped he endeavored to get to the steps as fast as he could. There were others ahead of him, whom he followed in his endeavor to alight as soon as possible, and as soon as the man ahead of him got off he stepped down, and while in the act of doing so was suddenly thrown to the street by the starting of the car. Held, that plaintiff exercised reasonable dispatch in endeavoring to alight. Hurley *v.* Metropolitan St. R. Co., 96 S. W. 714, 120 Mo. App. 262.

Returning to car for packages.—Where, in an action for injuries to plaintiff in alighting from a train, it was found that the train stopped a sufficient time to have enabled her to alight with her parents, had she returned to the car for her umbrella, which she had left therein, she was not entitled to claim that the injury resulted from defendant's failure to stop the train a sufficient time to enable her to alight with safety. Dunning *v.* Lake Erie, etc., R. Co., 77 N. E. 1049, 38 Ind. App. 91.

Failing to notice when station is reached.—In an action for injuries to a passenger in attempting to alight, an instruction that if the station was distinctly called in her presence and hearing just before the train arrived, and she negligently failed to hear the same, and the train was held a reasonable time for passengers to alight, and she attempted to alight without the knowledge of defendant's employees, and was injured in such attempt, she was not entitled to recover, was improperly refused. Galveston, etc., R. Co. *v.* Mathes (Tex. Civ. App.), 73 S. W. 411.

12. Right of passenger to assume that he can safely cross platform.—Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516.

13. Effect of knowledge of unsafe condition of platform.—Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687.

14. When passenger is guilty of contributory negligence in using defective platform.—Ohio, etc., R. Co. *v.* Stansberry, 32 N. E. 218, 132 Ind. 533.

In an action for injuries received in alighting from defendant's train because of a defect in the platform, it is proper to refuse an instruction that, "if there was a hole in the platform at the point where plaintiff alighted, and if, in the exercise of ordinary care, she could have seen it, and she could, by seeing it, have avoided any injury, and she failed to see it, you must find for defendant." Ohio, etc., R. Co. *v.* Stansberry, 132 Ind. 533, 32 N. E. 218.

15. Injury caused by falling at step to platform.—Graham *v.* Pennsylvania Co., 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293.

16. Duty of railroad company to light station platform.—Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

17. Right of passenger to assume that unlighted platform is safe.—In an action

without assistance, there being none at hand, realized the risk of doing so, did not make her act the voluntary assumption of the risk, so as to charge her with contributory negligence.[18] The conduct of an elderly woman passenger once safely on a train, in attempting to alight to ascertain whether such train is the right one, where no one had entered the car for some ten minutes and there was no one in charge, is not the intervention of a new proximate cause of her injury by falling from the car platform which will relieve the carrier from liability for its negligent failure to light the station grounds properly.[19] A passenger who arrives at a railroad station on a train, intending to take another train which is expected soon to arrive, is not guilty of contributory negligence in not going out on the platform as soon as he arrives, although the platform is lighted at that time and the lights are extinguished before the arrival of the train he intends to take, if the surroundings are an implied invitation to him to remain in his car until the arrival of such train.[20] But where a passenger, while staying over at a railroad station on a dark night, goes out on the platform at a time when the lamp thereon has been temporarily removed to be trimmed, and walks to the end of it, where he falls off and is injured, he is guilty of contributory negligence and can not recover for the injury.[21]

Mail Sacks Obstructing Platform.—A carrier is not liable for injuries to a passenger resulting from her falling over mail sacks thrown to the station platform, from the train from which she alighted, if she did not anticipate the obstruction, and exercise due care in avoiding it.[22]

by a passenger against a carrier for injuries caused by a fall from a structure or walk erected by defendant over an excavation twenty feet wide and twelve feet deep for the transfer of passengers from one of its cars to another, it appeared that the walk was narrow, and that there was no protection on either side of it, and that it was insufficiently lighted. Held, that plaintiff, who was transferring in the nighttime, was not guilty of contributory negligence in using the walk without calling for lights, since he had right to presume that whatever light was required to make the passage a safe one would be provided by the company, and that passengers would not be sent out in the dark, at the risk of life and limb, to make the transit. Jamison *v.* San Jose, etc., R. Co., 55 Cal. 593.

In an action by a passenger against the railroad company for injuries caused by a hole in a platform erected near the tracks and used by passengers going to and from a hotel for meals, plaintiff testified that there were no lights except from the hotel and car windows, and that he did not see the hole until he stepped into it, though he might have done so had he looked for it. The testimony of defendant's witnesses was vague. They testified that plaintiff might have seen the hole had he "looked carefully." Held, that plaintiff was not negligent. Watson *v.* Oxanna Land Co., 92 Ala. 320, 8 So. 770.

18. Woman alighting from train in dark does not assume risk.—Teale *v.* Southern Pac. Co., 20 Cal. App. 570, 129 Pac. 949.

19. Attempt to alight from train not the intervention of a new proximate cause of injury.—Texas, etc., R. Co. *v.* Stewart, 33 S. Ct. 548, 228 U. S. 357, affirming judgment Texas, etc., R. Co. *v.* Mayer, 183 Fed. 575, 105 C. C. A. 646.

20. Passenger awaiting connecting train alighting after lights are extinguished.—A railroad built a platform as an approach to its trains which was reached from the cars by a gang plank, and from the ground by an incline. Plaintiff arrived at the platform in a coach in the nighttime, a few minutes before the arrival of a train on another road, which the coach he was on expected to await, which train he intended to take. He remained in the coach until he he heard the other train whistle; it being cold and dark outside, and there being no waiting room provided for passengers, while the coach he was in was warm and lighted. On hearing the whistle of an approaching train, he walked onto the platform, which was not lighted, and, in attempting to go down the incline, fell and was injured. The platform was lighted for ten minutes after his arrival in the coach, but the lights were extinguished before he alighted to go to his train; and there was no rule of the company forbidding passengers remaining in the coach till their trains arrived. Held, in an action for damages, that plaintiff was not guilty of contributory negligence in not passing out when the platform was lighted, since the surroundings were an implied invitation to him to remain, and hence a recovery was not precluded. St. Louis, etc., R. Co. *v.* Battle, 63 S. W. 805, 69 Ark. 369.

21. Passenger staying over at station at night walking on unlighted platform.—Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587.

22. Mail sacks obstructing platform.—Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

Where the negligence counted on by

§ 2824. Leaving Premises by Improper Course.—An alighting passenger is entitled to reasonable protection against accident in passing from the station premises, but must use proper care to avoid danger; the degree required depending upon the particular circumstances.[23] It can not be held, as a matter of law, that it is the duty of a passenger, on leaving a railroad train, to take the shortest practicable course to the nearest highway, and that if he does not he becomes a trespasser or licensee only.[24]

Leaving Depot Premises by Track.—A railroad company which provides proper and safe means of egress from its depot platforms to the public highway is not liable to one who seeks to attain the highway by way of the railroad track, and is injured by falling into a cattle guard.[25]

Child Leaving Premises through Yards Where Notices Are Posted against Trespassers.—A bright eight and a half years of age boy, was guilty

plaintiff is a failure to properly light the platform and in permitting mail bags to be thrown on it, and the defendant relies on contributory negligence, it is not proper to instruct that it was not the plaintiff's duty to expect and anticipate obstructions on the platform, that she had the right to believe the platform was safe and free of obstructions, and that if she did not discover the mail bags, and the officers and servants failed to warn her of such obstructions, then she was not guilty of negligence. Sargent *v.* St. Louis, etc., R. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

23. Protection to which passenger is entitled and care required of him.—Washington, etc., R. Co. *v.* Vaughan, 69 S. E. 1035, 111 Va. 785.

Facts held to constitute contributory negligence.—In an action against a railroad company to recover for personal injuries, it appeared that plaintiff arrived at defendant's union depot on one of its trains, and, desiring to find a certain building, made inquiry of a stranger, who pointed in the direction of the steep bank of a river, about fifty yards from the depot, and at the further end of the platform. The platform was well lighted, extending from the depot to the river, but a house intervened between where plaintiff went and the lights on the platform. Plaintiff fell down the bluff in the dark. Held, that plaintiff was guilty of contributory negligence. Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

In an action against a railroad company for personal injuries, it appeared that plaintiff alighted from defendant's train at one of its regular stations, the train having stopped in front of the depot on the middle of one of three tracks, and that the passage to and through the depot was obstructed for the time being by a freight standing on the inside track, which also prevented any light from the depot reaching the space between the two trains. Plaintiff, who was anxious to reach the town, hastened to go around the freight train, and through a cattle gap in the fence along defendant's tracks, the situation of which he knew, and, catching his foot in a stock guard there located, fell, and sprained his ankle. Held, that plaintiff's recovery was precluded by contributory negligence. St. Louis, etc., R. Co. *v.* Cox, 60 Ark. 106, 29 S. W. 38.

A passenger on a caboose alighted at a roundhouse, and, instead of keeping on the main track, over which he had been accustomed to go in safety, he went behind a car on a side track, on a sudden personal necessity, and while there standing was killed by the backing of the train against the car. Held, that his contributory negligence precluded a recovery. Van Schaick *v.* Hudson River R. Co., 43 N. Y. 527.

It was negligence for a passenger leaving a train at night, where there was no light, to walk only three feet from the train, when he knew that it would soon be in motion. Louisville, etc., R. Co. *v.* Ricketts, 52 S. W. 939, 21 Ky. L. Rep. 662.

Plaintiff, having alighted at night from a railroad train at the side of the track where there was no platform nor lights, was injured by the train running over one of his arms by reason of his stumbling over some obstruction and falling so that his arm extended across the track. Held, that it was negligence on the part of the plaintiff to attempt to leave the depot grounds by going so near as he did to the train, which he knew would soon be in motion. Louisville, etc., R. Co. *v.* Ricketts, 96 Ky. 44, 27 S. W. 860, 16 Ky. L. Rep. 281.

Plaintiff, a passenger, who had previously been in defendant's station, by mistake opened a door, which was not marked as a place for use by passengers, which led into the basement. Although it was daylight, she entered without looking where she was going and fell. Held, that she could not recover for resulting damages. Speck *v.* Northern Pac. R. Co., 122 N. W. 497, 108 Minn. 435, 24 L. R. A., N. S., 249.

24. Passenger not obligated to take shortest course to nearest highway.—Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, 7 N. E. 874.

25. Leaving depot premises by track.—Sturgis *v.* Detroit, etc., R. Co., 72 Mich. 619, 40 N. W. 914.

of contributory negligence, where, while leaving defendant's passenger platform after alighting from its train, he ran ahead of adults who accompanied him, and attempted to cross through the yards, where notices were posted against trespassers, instead of by the regular way provided, and ran before a switch engine as it moved from behind cars, the danger from which was apparent to those in the vicinity.[26]

Failure to Use Steps in Leaving Platform.—Where a passenger on alighting from a car at night, instead of walking along the platform to the end steps, voluntarily steps off the side into a cattle guard, although knowing where the highway crosses the railroad track, he does not exercise due care and can not recover for the injury sustained.[27]

Using Dark Stairway Where Lighted Ones Are Provided.—Where there are four flights of stairs leading from a station platform, and three of these are sufficiently lighted, while the other is in the dark, all of them being used by passengers indiscriminately, if a passenger who alights from a train at the station, and who knows the premises, passes the three lighted stairs, and, missing his calculation in approaching the other, falls and is injured, he is not in the exercise of ordinary care, and is guilty of contributory negligence.[28]

Using Obstructed Passageway Where There Is Another Free from Obstruction.—A passenger alighting from a train at a meal station, who attempts, under circumstances apprising him of the risk, to reach the eating house by passing so close to the baggage car, while the baggage is being unloaded, as to be injured by a trunk falling on his foot, has no claim for damages, though the passage is used by passengers, there being another, free from obstruction.[29]

Voluntarily Leaving Ferry Boat in Dense Crowd.—If a person, in leaving a ferryboat, voluntarily joins a crowd which is so dense as to prevent him from seeing where he treads, and voluntarily proceeds with such crowd, and is injured by his foot being caught between the boat and the dock, such conduct per se manifests contributory negligence, and he should be nonsuited.[30]

Leaving Street Cars.—After a passenger has alighted from a street car, so as to be free from injury from its forward movement, the company owes him no further duty, except to use ordinary care to avoid injuring him; and if he is injured by his movement toward the car, and the company's employees, exercising ordinary care, can not prevent the injury after discovering his danger, the company is not liable.[31] A street car passenger discharged into a dark, strange place between stations, who is ignorant of the fact that he has been carried by his station, must use ordinary care for his safety in proceeding to his destination; but he is not required to walk on the right of way to the next station.[32]

§§ 2825-2828. Crossing Other Tracks—§ 2825. In General.—A passenger, in alighting from a train at a regular stopping place, may assume that a safe means of passage from the train has been provided.[33] A carrier owes a

26. **Child leaving premises through yards where notices are posted against trespassers.**—Perego *v.* Lake Shore, etc., R. Co., 158 Mich. 225, 122 N. W. 535.

27. **Failure to use steps in leaving platform.**—Forsyth *v.* Boston, etc., R. Co., 103 Mass. 510.

28. **Using dark stairway where lighted ones are provided.**—Bennett *v.* New York, etc., R. Co., 57 Conn. 422, 18 Atl. 668.

29. **Using obstructed passageway where there is another free from obstruction.**—Duvernet *v.* Morgan's Louisiana, etc., Co., 49 La. Ann. 484, 21 So. 644.

30. **Voluntarily leaving ferry boat in dense crowd.**—Dwyer *v.* New York, etc., R. Co., 48 N. J. L. 373, 7 Atl. 417.

31. **Leaving street cars.**—Louisville R. Co. *v.* Meglemery, 78 S. W. 217, 25 Ky. L. Rep. 1587, rehearing denied in 79 S. W. 287, 25 Ky. L. Rep. 2032.

32. Cossitt *v.* St. Louis, etc., R. Co., 224 Mo. 97, 123 S. W. 569, 19 Am. & Eng. Ann. Cas. 1210.

33. **Right of passenger to assume that carrier will keep tracks safe.**—Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Chicago, etc., R. Co. *v.* Schmelling, 197 Ill. 619, 64 N. E. 714. See, also, St. Louis, etc., R. Co. *v.* Johnson, 59 Ark. 122, 26 S. W. 593.

duty to passengers alighting at a regular station that while making their egress they be not struck by other cars, and though a passenger must exercise care for his safety, he may assume that the tracks between the alighting place and the station will be kept safe while he is crossing.[34] A passenger, under such circumstances, is chargeable only with the exercise of reasonable care to avoid danger.[35] He is not required to exercise the same high degree of care which would be required of him if he were not a passenger, but a traveler crossing the railway at a public crossing.[36] But if it is not necessary for a passenger to cross the tracks to reach the station, or a way of exit therefrom, there being another safe means of egress provided, he is guilty of contributory negligence if he crosses the tracks without taking care to ascertain if another train is approaching.[37] If, however, the only means of egress from the station, other than crossing the tracks, is unsafe, and it is the universal custom for persons going across the railroad to cross over the tracks, a passenger is not guilty of contributory negligence in crossing such tracks.[38] Where a passenger is required by the railroad company to leave the train and cross the track for the purpose of entering another train, he has the right to suppose the track to have been made safe by the company.[39] But where a passenger in passing from one train to another, negligently fails to heed warnings given, and is injured in attempting to cross the track in front of an approaching train, he can not recover for such injuries, although the employees of the railroad company may have been guilty of gross negligence.[40] In the appended notes will be found cases in which the crossing of railroad tracks, by a passenger arriving at a station on a train, to reach the station house or platform, was, under all the circumstances, held not to constitute contributory negligence as a matter of law;[41] and cases in which the crossing of a street car track by a passenger

34. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198. See, also, Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

35. Passenger only required to exercise reasonable care.—Graven *v.* MacLeod, 92 Fed. 846, 35 C. C. A. 47.

36. Degree of care required of traveler at crossing not required of passenger.—A passenger alighting from a railroad train by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company, is is necessary to cross intervening tracks, while not absolved from the duty of exercising care to avoid danger, may be justified in presuming, in the absence of circumstances of warning, that the trains of the company will not be so operated as to impose on him the same high degree of care which he would be required to exercise if he were not a passenger, but a traveler crossing the railway at a public crossing. Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102.

37. Crossing tracks where there is another safe means of egress provided.—Bancroft *v.* Boston, etc., R. Corp., 97 Mass. 275; Flanagan *v.* Philadelphia, etc., R. Co., 181 Pa. 237, 37 Atl. 341.

An arriving passenger was negligent in attempting to cross a west bound track in the rear of his departing train on the east bound track, which hid the other track from view, in order to reach a way of exit from the station which he saw on the further side of the tracks, there being an exit on his own side which was new, and which he did not see, and though the west bound train was run at an excessive speed. Bancroft *v.* Boston, etc., R. Corp., 97 Mass. 275.

38. Crossing tracks where only other means of egress is unsafe.—A flight of steps descended from a railroad station about fifteen feet to an unimproved street, passing under the tracks, with uneven surface, being a natural ravine, down which ran a large stream, making the ground marshy. It was the universal custom for persons going across the railroad to cross over the tracks. Held, that there was no absolute obligation upon a passenger, alighting from a train on a dark night, the street being unlighted, to use it in crossing the railroad to reach his home. Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131.

39. Passenger required to cross track to enter another train.—Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

40. Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

41. Facts held not to constitute contributory negligence as a matter of law.—After the name of a station has been called, and the train brought to a standstill, a passenger is entitled to assume that the company will not expose him to unnecessary danger; and his failure to discover an approaching train on an intervening track while on his way to the

alighting from a street car was held not to constitute such negligence.[42]

§ 2826. Application to Passengers of Requirement to Stop, Look, and Listen.—The rule requiring that one crossing a railroad over a highway should stop, look, and listen is not to be rigorously applied to a passenger at a station going from his train.[43] Where a carrier so operates its trains at a

depot is not contributory negligence, as a matter of law, where the night was dark, and no signals were given, but the question is for the jury. St. Louis, etc., R. Co. *v.* Johnson, 59 Ark. 122, 26 S. W. 593.

Where a notice posted in a car provides that passengers leaving by the forward end should turn to the right, a passenger who passes out at the forward end and turns to the left, which necessitates his crossing a track before reaching the platform, while if he had turned to the right he would have landed on the platform, is not guilty of contributory negligence as a matter of law. Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

At a station, a passenger was deposited from a train directly opposite the depot, the two tracks being between her and it. Along the side of the track was a path which led to a road which crossed the tracks one hundred feet away. The space from the platform to where she alighted was filled and leveled up by the railroad company. She started directly across the tracks, and as she was stepping onto the depot platform was struck by a train. There was evidence that the space in front of the platform was filled and leveled up to enable passengers to cross going to and from the trains and the depot, and that this was the usual and customary way for them; also that the train, coming rapidly and without signal, did not come in sight round a curve near at hand, till she had started across the last track. Held, that the case could not be taken from the jury on the ground that she was guilty of contributory negligence. Girton *v.* Lehigh Valley R. Co., 199 Pa. 147, 48 Atl. 970.

In an action against a railroad company for death by wrongful act, plaintiff's testimony was that deceased, after leaving a train at a small way station, stopped to help a family, including two small children, to alight from the car, and started towards the station, purposing to spend the night there. In so doing he stepped upon an intervening track, which had been leveled up with earth for crossing, and was struck by a train which was moving rapidly without ringing a bell. The family that deceased had assisted barely escaped, and two members thereof testified that they did not know that they were walking upon a track, and had no idea that an engine was approaching. There was no light except a bonfire and the locomotive headlights. There was some conflicting testimony as to these facts, but the jury gave a verdict for plaintiffs. Held, that defendant was not entitled to an instruction that deceased was guilty of contributory negligence. Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642.

A passenger, having arrived at a station, alighted upon a platform adjoining the track, stepped from the end of it down upon the highway, a few feet in the rear of the train, as it departed, and endeavored, by crossing the tracks, to reach the station house. There was nothing to obstruct her view along the tracks except the departng train. In attempting to cross the track she was struck by an approaching train coming from the direction from which the other train was departing. Held, in an action for the injuries sustained, that she was not guilty of contributory negligence as a matter of law in attempting to cross the tracks at a time when her view was partially obstructed by the departing train. Mayo *v.* Boston, etc., Railroad, 104 Mass. 137.

42. Where a person, after alighting from a street car at night, and while proceeding across the company's track to her destination, looking for cars on such track to make certain that she would not cross the track in front of an approaching car, falls into a hole on the cross walk between the tracks, she is not negligent, as she had a right to assume the crossing was safe, and it was her duty to look before crossing the track for approaching cars. Mahnke *v.* New Orleans, etc., R. Co., 29 So. 52, 104 La. 411.

A passenger on a street car, which entered a switch to wait for the passing on the main track of a car running in the opposite direction, alighted therefrom intending to pass around the rear of the car and walk across the main track. The street was not paved, and she stumbled and fell headlong across the space between the two tracks, and at almost the same instant the car on the main track passed, and its fender struck her. It did not appear that her stumbling resulted from any negligence on her part. Held, that the accident was not caused by her contributory negligence. Bloom *v.* Sioux City Tract. Co. (Iowa), 122 N. W. 831.

43. Requirement to stop, look and listen not rigorously applied to passengers.—Struble *v.* Pennsylvania Co., 226 Pa. 118, 75 Atl. 17.

The rule that it is the duty of a person about to cross a railroad track to stop, look, and listen is not always applicable

station that a passenger is impliedly invited to cross an intervening track in leaving his train, he is chargeable only with the exercise of reasonable care to avoid danger, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing such track.[44] And where a passenger is required by the railroad company to leave the train and cross the track for the purpose of entering another train, he has the right to suppose the track to have been made safe by the company, and, in a suit to recover for injuries sustained by being struck by another train while crossing the track, he is not bound to show that he looked, stopped, and listened before crossing.[45] So where it is the custom—known and consented to by the railroad company—of passengers to alight from a train on the side where the company operates a parallel track, a passenger so alighting need not stop to look and listen for approaching trains.[46]

Crossing Track Lying between Station and Train or Car.—In consonance with these rules it has been held that a duty to look and listen for trains, before stepping on a railroad track lying between the station and a train or car discharging passengers at a regular stopping place, is not chargeable, as a matter of law, on a passenger alighting from such train or car and proceeding at once towards the station.[47] And this has been held to be the rule, even

to passengers leaving a train and crossing the track to reach the depot at the point of destination; and hence, in a suit by a widow to recover for the killing of her husband, held that, where a local train, according to rule, stopped to give preference to an express train, a little short of the passenger platform, and a passenger, seeing the name of the station as his destination, which, after leaving the last station, had been announced by the brakeman as "the next station," stepped off the car and was killed by the express train, the question of contributory negligence was properly submitted to the jury. Pennsylvania R. Co. *v.* White, 88 Pa. 327.

44. Graven *v.* MacLeod, 35 C. C. A. 47, 92 Fed. 846.

A passenger, in alighting from a train at a regular stopping place, may assume that a safe means of passage from the train has been provided, and is not required to stop, and look and listen, to see whether a train is approaching on a parallel track, before attempting to cross it. Judgment, 99 Ill. App. 577, affirmed in Chicago, etc., R. Co. *v.* Schmelling, 64 N. E. 714, 197 Ill. 619.

Plaintiff's decedent, in alighting at night from a car on a dummy line, with the operation of whose trains he was familiar, was struck by a train on the opposite track, and killed. The train on which he rode had just passed his station, but was coming to a stop when he got off. The conductor, however, lighted him off at the steps. Held, that decedent was not, as a matter of law, guilty of contributory negligence, though, if he had looked, he might have seen the approaching train. McDonald *v.* Kansas, etc., R. Co., 127 Mo. 38, 29 S. W. 848.

45. Baltimore, etc., R. Co. *v.* State, 60 Md. 449.

46. Judgment 68 Ill. App. 635, affirmed in Pennsylvania Co. *v.* McCaffrey, 50 N. E. 713, 173 Ill. 169.

47. Crossing track lying between station and train or car.—Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198; Atlantic City R. Co. *v.* Goodin, 42 Atl. 333, 62 N. J. L. 394, 45 L. R. A. 671, 72 Am. St. Rep. 652.

Where a train stops at an eating station, and there is a track between the train and the station, a passenger alighting from the train has the right to assume that the railroad company will so regulate its trains that its tracks between the car and the eating station platform will be safe for him to pass over in going to and returning from the eating house, and his failure to look and listen for an approaching train is not negligence. Atchison, etc., R. Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

Where one gets off a train at a station and starts to go to the ticket office, taking the usual and only course thereto across an intervening track, he is not, on reaching it, bound to "stop, look, and listen." Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

When testator attempted to cross the track, escaping steam from the engine of his train prevented him from hearing the approaching train. For a few moments before he turned to cross the track, he had walked towards the approaching train, but, owing to obstructions, was unable to see it. If he had looked at the instant he stepped on the track, he could probably have seen the train. Held, that he was not guilty of contributory negligence. Parsons *v.* New York, etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 10 Am. St. Rep. 450, 3 L. R. A. 638, affirming 85 Hun 23, 33 N. Y. S. 598,

though the passenger knows that a fast train is due on the intervening track.[48] But in Massachusetts it has been held that a passenger alighting from a train at a station is not warranted in assuming that trains will not cross each other there, and is guilty of contributory negligence if he crosses a track intervening between his train and the station house without looking for an approaching train.[49]

Crossing Track after Alighting on Platform.—A passenger, who, after alighting at the east platform of a double-track railroad, attempts to cross to the west platform, and is struck by a train on the west track, where he has an unobstructed view for 1,200 feet, is guilty of contributory negligence.[50] And if a passenger in leaving a railroad depot steps from the platform on the track and starts to walk along the same without looking out for a train, which he knows is due at the station, and is struck by such train and injured, he is guilty of contributory negligence which will preclude his recovery, if the carrier's servants are not guilty of negligence after discovering his peril, though the noise of an engine standing nearby prevents his hearing the approaching train.[51] But if, in such case, the engineer of the train, after discovering the passenger's perils, fails to use the greatest precaution to avoid injuring him, the carrier will be liable, notwithstanding the passenger's contributory negligence.[52]

Crossing Track after Alighting on Space between Tracks.—A passenger who, knowing that cars are running frequently, alights from an electric car in the space between the two tracks, where he is safe, and starts to cross the other track without looking to see whether a car is approaching, is guilty of contributory negligence as a matter of law.[53]

Crossing Tracks Where There Is Another Safe Means of Egress Provided.—If a passenger who is familiar with the carrier's depot grounds, and who knows that there is an overhead passageway across the tracks, and that a safe platform has been provided on the side next to the depot, alights from the other side of the train, and, without stopping to look or listen, starts across the tracks, towards a point opposite the depot, and is struck by a train on another track, he is guilty of contributory negligence and can not recover for his injuries.[54]

Passenger Passing Behind Car from Which He Alights Onto a Parallel Track.—Where a passenger alights from an electric car at a place where there are platforms along the tracks, and goes behind the car from which he alights,

48. Atlantic City R. Co. *v.* Goodin, 42 Atl. 333, 62 N. J. L. 394, 45 L. R. A. 671, 72 Am. St. Rep. 652.

49. Rule in Massachusetts.—Connolly *v.* New York, etc., R. Co., 158 Mass. 8, 32 N. E. 937.

In an action against a railroad company for personal injuries, defendant's negligence was admitted, and the only question was as to the due care of plaintiff. It appeared that plaintiff came in on a train on the west track, and attempted to cross the east track towards the station and his home, as passengers were accustomed to do who lived on that side of the station, when he was run down by a train on the east track. The night was dark, but there was a headlight on the incoming engine. The gates at the end of plaintiff's car were not in use. There was a rule of the road that a train should not pass another which was discharging passengers at a station, but it did not appear that plaintiff knew of it. When plaintiff came down the steps of the car, he looked around, and did not see anything. There was no evidence of any further looking, and it appeared that, had he looked again before stepping on the east track, he would have seen the approaching train in time to avoid the danger. Held, that the court properly directed a verdict for defendant. Connolly *v.* New York, etc., R. Co., 158 Mass. 8, 32 N. E. 937.

50. Crossing track after alighting on platform.—Weisenberg *v.* Lackawanna, etc., R. Co., 237 Pa. 33, 85 Atl. 74.

51. Sanchez *v.* San Antonio, etc., R. Co., 88 Tex. 117, 30 S. W. 431, affirming 27 S. W. 922.

52. Sanchez *v.* San Antonio, etc., R. Co., 88 Tex. 117, 30 S. W. 431, affirming 27 S. W. 922.

53. Crossing track after alighting on space between tracks.—McLeod *v.* Graven, 73 Fed. 627, 19 C. C. A. 616.

54. Crossing tracks where there is another safe means of egress provided.—Flanagan *v.* Philadelphia, etc., R. Co., 181 Pa. 237, 37 Atl. 341.

and is struck by a car on the next track, he is guilty of contributory negligence and can not recover, where he did not look for the car, and took the chance of crossing in front of it.[55]

Passengers on Freight Train on Which Their Live Stock Is in Transit.—Passengers on a freight train on which their live stock is in transit, in going between a caboose and the depot, are required to look and listen when about to cross an intervening track, their obligation being greater than that of persons passing between a station platform and a passenger train at a stop for passengers.[56]

Passengers Alighting from Street Cars.—A passenger, in alighting from a street car that has stopped at a street crossing for the purpose of letting him off, is not guilty of contributory negligence as a matter of law in alighting on a parallel track without first looking to see if a car is approaching.[57] But a passenger who, after alighting from a street car, goes behind it, and, while attempting to cross a parallel track, is struck by a car from the other direction, there being no obstruction to prevent him seeing the approaching car, is guilty of contributory negligence.[58] But it has been held that the passenger, under

55. Passenger passing behind car from which he alights onto a parallel track.—Yersack *v.* Lackawanna, etc., R. Co., 70 Atl. 837, 221 Pa. 493, 18 L. R. A., N. S., 519.

56. Passengers on freight train on which their live stock is in transit.—Coon *v.* Atchison, etc., R. Co., 82 Kan. 211, 108 Pac. 85, 27 L. R. A., N. S., 1013.

57. Passenger alighting on parallel track.—Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41; Chicago City R. Co. *v.* Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126, affirming 27 Ill. App. 26.

58. Passenger passing behind car from which he alights onto a parallel track.—Birmingham R., etc., Co. *v.* Oldham, 141 Ala. 195, 37 So. 452; Metropolitan St. R. Co. *v.* Ryan, 69 Kan. 538, 77 Pac. 267; Baltimore Tract. Co. *v.* Helms, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; Eagen *v.* Jersey City, etc., St. R. Co., 74 N. J. L. 699, 67 Atl. 24, 11 L. R. A., N. S., 1058.

Where a person alighting from a trolley car passes behind it onto another track and is struck by a car coming in the opposite direction, he having failed to look before passing upon the track, whether the duty which the company owed to him as a passenger just discharged exceeded that which it owed to any other person attempting to cross its track is not involved; that he had been a passenger not relieving him from the duty to take reasonable care for his safety. Eagen *v.* Jersey City, etc., St. R. Co., 67 Atl. 24, 74 N. J. L. 699, 11 L. R. A., N. S., 1058.

One who steps off a west bound street car, looks towards the west, then towards the east, sees a car following on the same track, waits till it stops, then passes behind the car he has gotten off, and when two-thirds the way across the track on which it is looks towards the car following, and hurries forward on hearing a warning shout from such car, and is then struck by an east bound car on the next track, is guilty of contributory negligence. Gray *v.* Fort Pitt Tract. Co., 47 Atl. 945, 198 Pa. 184.

A woman, on alighting from a street car, waited for the car to start, and then passed in the rear to a parallel track, where she was struck and injured by a car coming in the opposite direction and running about ten miles an hour. She was familiar with the place, and knew that a car might pass at any moment. The track was practically straight and unobstructed for several hundred yards, and one looking up the track for the coming car could not have failed to see it. It was not possible for the car to traverse the space along which it was visable, between the time she should have looked for it, as she passed from one track to the other, and the moment when she stepped on the rail and was struck. Held, that she was guilty of contributory negligence per se, precluding recovery, though she testified that she did look to see whether a car was approaching along the track where she was struck, and did not see one coming. Harten *v.* Brightwood R. Co., 18 App. D. C. 260.

Plaintiff alighted from a cable car on the side where it was entirely safe. The view in the direction from which any danger was to be expected was unobstructed for a square or more, except for a space nearest to him where the car from which he had just descended would obstruct it. If he had waited a moment for the car to move on again, there would have been nothing to obstruct his view. He neither looked nor waited, but, turning sharply around the rear of the car, started to cross the street. The space between the two sets of tracks was four and one-half feet, and the overhang of the car less than a foot on each side, leaving room to stand in safety, where a turn of his head would

such circumstances, may recover for his injuries, notwithstanding his contributory negligence, if the operatives of the approaching car could, by the exercise of ordinary care, have discovered his peril and stopped the car in time to have avoided the injury.[59]

§ 2827. Passenger Alighting from Train or Car before It Stops.—A passenger who alights from a train before it stops, and attempts to cross a track between the train and the station, is bound to use the same degree of care as though crossing a track on a highway.[60] Where a passenger jumps from a moving train, and, though perfectly familiar with the dangerous character of the locality, walks on an adjoining track, where he is struck by another train, he is guilty of contributory negligence.[61] But it has been held that where a passenger, on a crowded street car, after signaling the conductor to stop, stepped off while the car was in motion, and was struck by a car going in the opposite direction, he was not guilty of contributory negligence as a matter of law, although the conductor did not see the signal, and the accident happened in an unobsructed street in daylight, if at the time he stepped off the car he was prevented from seeing down the track by reason of the crowded condition of

have shown him the whole track on which he was about to step. He did not look, and was struck by a car which was upon him when he set foot on the track. Held, that he was negligent, and a nonsuit was properly ordered. Buzby *v.* Philadelphia Tract. Co., 126 Pa. 559, 17 Atl. 895, 12 Am. St. Rep. 919.

At a point in a city three different car lines intersected; their tracks forming a triangle in the street. A blind passenger upon the first line wished to transfer to the second. After being assured by the conductor of the car he left that the "road was clear," he proceeded to cross the triangle, and was struck by a car going in the opposite direction, but upon the line to which he wished to transfer. This car had already crossed the point of intersection with the third line, and struck the passenger just as he was leaving the triangle. The passenger was familiar with this locality, and made no particular effort to listen for the car which struck him. Held, that he was, as a matter of law, guilty of contributory negligence, and could not recover, despite the negligence of those in charge of the car which struck him. Wilson *v.* Detroit United Railway, 167 Mich. 107, 132 N. W. 762.

Where plaintiff, upon alighting from a street car at a street crossing, passed around behind it, and upon a parallel track, without looking to see whether there was a car approaching thereon, and was struck and injured by a car going in the opposite direction, the question of his contributory negligence is not affected by the fact that the rules of the company required the car to stop on meeting another, which had stopped to take on or discharge passengers, and also to sound the bell at crossings, which was not done; it not appearing that such rules were customarily observed, or that plaintiff relied upon or knew of them. Birmingham R., etc., Co. *v.* Oldham, 37 So. 452, 141 Ala. 195.

But in Ohio it has been held that where a passenger stepped off an electric car, crossed the track behind it, and, in attempting to cross the parallel track, was struck by a car running in the opposite direction, and the conductor on whose car he had ridden knew of his intention to alight, but gave no warning of the approach of the other car, and the bell of that car was not rung, though it was running at the usual speed of twenty miles per hour, the passenger was not guilty of contributory negligence, as a matter of law, in failing to stop and look down the track before attempting to cross. Cincinnati St. R. Co. *v.* Snell, 54 O. St. 197, 43 N. E. 207, 32 L. R. A. 276.

59. Louisville City R. Co. *v.* Hudgins, 30 Ky. L. Rep. 316, 98 S. W. 275, 7 L. R. A., N. S., 152; Louisville R. Co. *v.* Mitchell (Ky.), 127 S. W. 770.

60. Passenger alighting from train or car before it stops.—Parsons *v.* New York, etc., R. Co. (N. Y.), 37 Hun 128.

61. Lenix *v.* Missouri Pac. R. Co., 76 Mo. 86.

A passenger on a railway train, on which he frequently traveled, stepped from a car, before the train had reached its stopping place, where there was a platform, and, according to several witnesses, while it was in motion, and on the side towards the other track. The moment he touched the ground an express train came by, and he fell or was knocked under the wheels of his own train and killed. The track was straight, and the view unobstructed for 500 feet from the place of the accident in the direction whence the express train came. Held, that the company was entitled to a nonsuit. Gonzales *v.* New York, etc., R. Co., 38 N. Y. 440, 98 Am Dec. 58, reversing 29 N. Y. Super. Ct. 93, 297.

the car and he heard no bell or other warning.[62]

§ 2828. Attempting to Crawl between Cars of Freight Train.—Where a passenger, on getting off a passenger train at a small station, attempts to crawl between two cars of a long freight train standing on a side track, and is killed by the starting of the train without proper signals, he is guilty of contributory negligence, and his administratrix can not recover of the carrier for the killing.[63]

§§ 2829-2968. Procedure—§§ 2829-2835. Pleading—§ 2829. Petition or Complaint.—See post, "Negativing Contributory Negligence," § 3129 and § 3136.

§§ 2830-2834. Plea or Answer—§ 2830. Proof under General Denial.—In some states the fact of contributory negligence can properly be proved under the general denial. In such states a special plea or answer alleging that plaintiff's injuries resulted from his own carelessness or contributory negligence, is unnecessary and properly stricken out on motion. This is the rule of pleading in Indiana.[64]

§§ 2831-2832. Special Plea of Contributory Negligence—§ 2831. Necessity.—In an action against a carrier for injuries to a passenger where the facts relied on as a defense only go to show that it was the plaintiff's own negligence, and nothing more, that caused the accident, those facts can be proven under the general denial, because, if it was the plaintiff's negligence only, it was in no part the defendant's negligence, and a plea of contributory negligence is unnecessary, as where the plaintiff's injury resulted solely from his voluntary riding upon the platform of the car.[65] But, strictly speaking, contributory negligence is an affirmative defense, and to enable a defendant to introduce proof of it, he must plead it. Where an affirmative defense is offered, it logically carries the idea that a cause of action once existed, but has ceased because of the facts pleaded in the answer, or that a cause of action would have arisen out of the facts set out in the petition, but for the additional contemporaneous facts pleaded in the answer.[66] It would seem, in reason, that any plea of contributory negligence must be a plea of confession and avoidance.[67] The reason why it is necessary to set forth in the answer the defense of contributory negligence on the part of the plaintiff is because the testimony showing such constributory negligence does not disprove the allegation of the complaint that the injury was caused by the negligence of the defendant. The defendant, by setting up in his answer the defense of contributory negligence on the part of the plaintiff, does not attempt to escape liability by showing a

62. Smith *v.* Union Trunk Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169.

63. Attempting to crawl between cars of freight train.—Memphis, etc., R. Co. *v.* Copeland, 61 Ala. 376.

64. Proof under general denial.—Evidence that the plaintiff's negligence contributed to the injury sued for may be given under a general denial. Indianapolis, etc., R. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

65. Injury from voluntary riding on platform.—The petition in an action by a street car passenger for injuries alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve. The answer consisted of a general denial and a plea of contributory negligence, in taking a dangerous position on the step of the platform of the car, outside of the gate, and on the side next to the other track. Held, that an additional plea alleging that the passenger knew, or by ordinary care might have known, the situation of the tracks, and that the danger of riding on the step was known, or by ordinary care might have been known, to the passenger, and that he assumed the risk, if intended to charge that his injuries resulted solely from his voluntary act of riding on the step, was covered by the plea of general denial. Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

66. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

67. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

failure of negligence on his part, but because the plaintiff has done that which prevents a recovery against him, although he (the defendant) may have been guilty of negligence. Such facts would constitute an affirmative defense, of which the defendant could not get the benefit unless it was set up in the answer.[68] Indeed, the defense of contributory negligence, so far from tending to deny or disprove negligence on the part of the defendant, necessarily involves, by the very meaning of the term "contributory negligence," an admission of defendant's negligence, but that the plaintiff's negligence, combining and concurring with the negligence of the defendant, as a proximate cause thereof, has produced the injury complained of.[69] The rules of pleading as they relate to the defense of contributory negligence are not very definite on the particular point here referred to.[70] If the plaintiff, in his effort to prove his own case, shows that he was guilty of negligence that contributed to the injury complained of, the defendant may avail himself of that showing, although no plea of contributory negligence has been filed.[71] This seems to be the rule in most states, among which are Alabama,[72] Arkansas,[73] Kentucky,[74] Missouri,[75] South Carolina,[76] Texas and Washington.[77]

Instances.—A carrier to avail itself of contributory negligence of a passenger sustaining injury, in that plaintiff stepped on the platform on a weak limb and was careless in doing so,[78] or in wearing insufficient clothing,[79] or in leaving a train in reliance on the call of his station,[80] must plead it. Nor can a carrier avail itself of contributory negligence of one sustaining injuries while waiting at a depot to see passengers off, unless it plead it.[81]

Effect of Statutes.—Perhaps, under the provision of the Missouri Code, § 626, Rev. St. 1899, authorizing a party to plead alternatively, it would be proper for a defendant carrier in his answer to deny the cause of action and yet say that because of certain other facts, if the plaintiff ever had a cause of action, it has ceased, or that he would have had a cause of action, but for the facts stated in the answer.[82]

Pleading Special Statutes.—Where a railroad company relies on Act 1850 (New York Railroad Act), § 46, providing that the company shall not be liable

68. Kennedy *v.* Southern R. Co., 59 S. C. 535, 38 S. E. 169; Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

69. Kennedy *v.* Southern R. Co., 59 S. C. 535, 38 S. E. 169; Cooper *v.* Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16; Bowen *v.* Southern R. Co., 58 S. C. 222, 36 S. E. 590, and Simms *v.* South Carolina R. Co., 26 S. C. 490, 2 S. E. 486.

70. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

71. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

72. Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

73. St. Louis, etc., R. Co. *v.* Grimsley, 90 Ark. 64, 117 S. W. 1064.

74. Coe *v.* Louisville, etc., R. Co., 25 Ky. L. Rep. 1679, 78 S. W. 439.

75. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142; Parks *v.* St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

76. Kennedy *v.* Southern R. Co., 59 S. C. 535, 38 S. E. 169; Wilson *v.* Charleston, etc., R. Co., 51 S. C. 79, 28 S. E. 91.

77. Bailey *v.* Seattle, etc., R. Co., 31 Wash. 685, 71 Pac. 1134.

78. Carelessness in stepping on platform on weak limb.—In an action for injuries to a passenger by stepping on a defective plank in a platform, in the absence of a plea of contributory negligence, evidence tending to show that plaintiff stepped on the platform on a weak limb, and was careless in so doing, was inadmissible. Bailey *v.* Seattle, etc., R. Co., 71 Pac. 1134, 31 Wash. 685; S. C., 73 Pac. 679, 32 Wash. 640.

79. Wearing insufficient clothing.—In an action by a railroad mail clerk for damages by illness because of a railroad company's failure to heat the mail car in which plaintiff worked, defendant could not rely on plaintiff's contributory neggence in wearing insufficient clothing unless it was pleaded. Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

80. That a passenger was himself neggent in leaving a train in reliance on the call of his station by the trainmen is a matter of defense in an action for consequent injuries. Coe *v.* Louisville, etc., R. Co., 78 S. W. 439, 25 Ky. L. Rep. 1679.

81. St. Louis, etc., R. Co. *v.* Grimsley, 90 Ark. 64, 117 S. W. 1064.

82. Effect of statutes.—Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

for injury to a passenger while on a car platform in violation of printed regulations posted in a conspicuous place inside the car, such statute should be specially pleaded.[83]

§ 2832. Sufficiency of Plea of Contributory Negligence.—A carrier's plea of contributory negligence to a passenger's complaint for injury, which, by its averment of facts, without reference to the conclusion of the pleader deduced therefrom, discloses a state of facts to which the law attaches the conclusion, that the plaintiff was guilty of negligence proximately contributing to his injury, is sufficient and not subject to demurrer.[84]

When Detailed Plea Unnecessary.—A carrier's plea of contributory negligence in an action for injuries in attempting to board a street car that there was negligence in matter of each item for which plaintiff claimed to recover is a sufficient plea to admit evidence of contributory negligence.[85] There would have been necessity for a full, detailed plea of negligence if defendant had relied upon some separate facts other than those at issue under plaintiff's petition.

Denial of Negligence.—A carrier's plea of contributory negligence to a passenger's complaint for injury need not deny the negligence charged by him.[86] Where a passenger is injured by his own act in jumping from a stage coach, through fear of an injury by reason of the violent conduct of the horses, no presumption of negligence arises from the accident itself; and if the complaint states that he so acted through fear of great bodily harm, without stating that he exercised the degree of care and prudence that a reasonable person would have exercised in the same circumstances, the complaint is defective as not stating a cause of action, a plea of contributory negligence is unnecessary and a demurrer should be sustained.[87]

Absence or Want of Care.—A carrier's plea of contributory negligence to a passenger's complaint must allege the plaintiff's failure to exercise reasonable or ordinary care. The want or absence of such care is one of the essential facts necessary to such defense and must be averred in some form. Thus in an action against a carrier for injuries caused by the presence of a hole in a depot platform, an answer alleging that plaintiff had full knowledge of such defect, and "with his eyes wide open, and in open, broad daylight, walked into said hole," does not state facts which of themselves constitute negligence, it not being alleged that plaintiff acted intentionally or negligently.[88]

Manner of Boarding Car.—A plea setting up plaintiff's contributory negligence, in boarding or negligently attempting to board defendant's car, must set out the manner in which he boarded or attempted to board it; otherwise it is demurrable as too general.[89]

Failure to Use External Supports.—A carrier's plea of contributory negligence, that while its car was in motion plaintiff failed to exercise reasonable care to support himself, must show facts requiring him to use such external supports as were afforded.[90] The plea, in an action for injury to a passenger from the sudden starting of the train while she was on the car platform, pre-

83. Pleading special statutes.—Vail *v.* Broadway R. Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626.

84. Sufficiency of plea of contributory negligence.—Osborne *v.* Alabama Steel, etc., Co., 135 Ala. 571, 33 So. 687; Birmingham R., etc., Co. *v.* Mindler, 3 Ala. App. 444, 57 So. 113.

85. When detailed plea unnecessary.—Pitard *v.* New Orleans R., etc., Co., 120 La. 925, 45 So. 943.

86. Denial of negligence.—Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

87. Kermon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

88. Absence or want of care.—Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82, 3 Ky. L. Rep. 576.

89. Manner of boarding car.—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 79, 45 So. 292.

90. Failure to use external supports.—Birmingham R., etc., Co. *v.* Gonzalez (Ala.), 61 So. 80.

paratory to alighting, alleging that in the nighttime plaintiff had gone on the steps of the car while it was going too rapidly for a woman to attempt to alight, that she had nothing in her hand, and could easily have held the railing of the car, and, had she done so, the sudden starting of the car without warning would not have thrown her off, is good.[91]

Negligence in Alighting from Car.—And in an action against a street railway company for injuries received by a passenger on alighting from a car, a plea attempting to set up contributory negligence by alleging that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that the plaintiff could have seen the alleged lumber and débris before he stepped thereon by the exercise of ordinary and reasonable care, is defective in not alleging that the plaintiff failed to exercise ordinary and reasonable care, or that he saw the lumber.[92]

Alighting from Moving Car.—Where a carrier's plea of contributory negligence to a passenger's complaint shows, by its averments of fact, that in the plaintiff's attempt to alight from a moving car there was an absence of such care, prudence or forethought on his part as, in the circumstances stated, such a venture reasonably called for, and that this failure of duty on the part of the plaintiff was a contributory cause of the result complained of, it discloses facts to which the law attaches the conclusion that plaintiff's negligence proximately contributed to his injury and is good against a demurrer.[93] But such a plea which alleges that decedent was guilty of contributory negligence, in that he alighted from a moving train in the nighttime without requesting the train to stop, is bad, because requiring the jury to find that decedent was guilty of contributory negligence in alighting while the train was in the slightest motion, though the motion was such as to involve the risk a man of ordinary prudence would take under the circumstances.[94] Such a plea must show the speed of the train.[95]

Injury by Projection from Passing Train.—Where a complaint against a railroad company alleged that plaintiff's intestate went to a regular station for receiving and discharging passengers, and while standing on the platform, waiting for a train, he was struck by a projection from a passing freight train, knocked under the train, and killed, a plea that he was guilty of negligence contributing proximately to his injury, in that he negligently took a position too near to the passing train, is no answer to the complaint, as it does not negative the fact that he was standing on the platform, where defendant's servants were

91. Failure to use supports while on platform of moving train.—Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195.

92. Negligence in alighting from car.—Montgomery St. Railway *v.* Mason, 133 Ala. 508, 32 So. 261.

93. Alighting from moving car.—Watkins *v.* Birmingham R., etc., Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; Hunter *v.* Louisville, etc., R. Co., 150 Ala. 594, 43 So. 802, 9 L. R. A., N. S., 848; Nashville, etc., Railway *v.* Casey, 1 Ala. App. 344, 56 So. 28; Birmingham R., etc., Co. *v.* Mindler, 3 Ala. App. 444, 57 So. 113.

In an action for injuries to a passenger while alighting from one of defendant's cars, defendant pleaded that plaintiff was herself guilty of contributory negligence in that she negligently attempted to alight from the car while it was moving at a rate of speed, with her hands incumbered with bundles, and that she was injured in such attempt, and would not have been injured had she used one of her hands as any reasonably prudent person would have done, and also in that she negligently attempted to alight without using her hands as she might have done and thereby avoided the injury, and as any reasonably prudent person would have done, and in negligently attempting to alight from the car while it was moving. Held, that both of such pleas disclosed facts to which the law attached the conclusion that plaintiff was guilty of negligence proximately contributing to her injury, and were not demurrable. Birmingham R., etc., Co. *v.* Mindler, 3 Ala. App. 444, 57 So. 113.

94. Kansas, etc., R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207.

95. Speed of train.—It not being necessarily negligence for a passenger to alight from a moving car, even by stepping in the opposite direction to the movement of the car, a plea of contributory negligence in so doing, which does not show the speed of the car, is insufficient. Birmingham R., etc., Co. *v.* Dickerson, 154 Ala. 523, 45 So. 659.

accustomed to receive and discharge passengers, or charge him with knowledge of the projection.[96]

Notice of Rules of Carrier and Connection between Violation and Injury.—A plea of contributory negligence of a passenger, injured in alighting from an electric car, which alleges that she was guilty of negligence proximately contributing to her injuries, in that she rode on the platform in violation of a rule published in the car in such a way that she could have seen it, is insufficient as failing to show notice of the rule and casual connection between its violation and the injury.[97]

§ 2833. Plea of Assumption of Risk.—Where the answer to the petition in an action by a street car passenger for injuries which alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve, consisted of a general denial and a plea of contributory negligence, in taking a dangerous position on the step of the platform of the car, outside of the gate, and on the side next to the other track, an additional plea, called a plea of assumption of risk, alleging that the passenger knew, or by ordinary care might have known, the situation of the tracks, and that the danger of riding on the step was known, or by ordinary care might have been known, to the passenger, and that he assumed the risk, if the pleader intended to allege that the position was so dangerous that injury to the passenger could not have been avoided by the exercise of the care incumbent on the carrier, and that the danger was obvious or known to the passenger, the plea is defective for failing to so allege.[98] And where, in an action against a carrier, it appears that plaintiff was thrown from the platform, where he had stopped while going from one car to another in search of a seat, it was not error to sustain an exception to that part of defendant's answer which alleged that the train was an excursion train, and that plaintiff took passage in consideration of the reduced fare, and with knowledge of the probable inconvenience incident thereto, and therefore assumed the risk, but did not allege that the plaintiff knew that he would not be provided with a seat, since leaving the car in search of a seat was not negligence in itself.[99]

§ 2834. Construction, Operation and Effect.—A plea intending to allege that the complainant passenger's negligent act of riding on the step of the street car contributed to his injury, is covered by the plea of contributory negligence.[1]

§ 2835. Reply.—In an action for injuries to plaintiff while traveling on a stock pass, where the defendants alleged that at the time of the injury they had promulgated a rule prohibiting passengers from riding on their engines, that plaintiff disregarded the rule, and negligently and against defendants' consent went on the top of the cars, and in and upon the engine of the train on which he was riding, and was thereby injured, the allegation that defendant companies "promulgated a rule," should be construed as alleging that the rule was in force at the time of the accident, and was therefore sufficient to raise an issue as to whether the rule was then existing under Texas Rev. St. 1895, art. 1193, declaring that plaintiff need not deny any special matter of defense

96. Injury by projection from passing train.—Metcalf *v.* St. Louis, etc., R. Co., 156 Ala. 240, 47 So. 158.

97. Notice of rules of carrier and connection between violation and injury.—Birmingham R., etc., Co. *v.* Girod, 164 Ala. 10, 51 So. 242.

98. Parks *v.* St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

99. Galveston, etc., R. Co. *v.* Morris (Tex. Civ. App.), 60 S. W. 813, judgment affirmed in 94 Tex. 505, 61 S. W. 709.

1. Construction, operation and effect.—Parks *v.* St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

pleaded, but that the same shall be regarded as denied unless expressly admitted.[2]

§ 2836. Issues, Proof and Variance.—Disproving Contributory Negligence under Denial of Negligence in Complaint.—Where, by the allegations of a passenger's petition in an action against the carrier, all negligence on part of the plaintiff is denied, he is entitled to prove under them, if he can, that the injury was not reasonably to be apprehended from his act; as, for instance, where he alights from a moving train and is injured.[3]

Under General Denial and Special Plea or Answer.—In an action against a carrier for injury to a passenger, the defendant carrier may under a general denial controvert the allegation that plaintiff's injury was caused by defendant's negligence by showing that they were in fact caused by the plaintiff's own negligence and therefore were not caused by the defendant's negligence.[4] It would seem, on reason, that any plea of contributory negligence must be a plea of confession and avoidance. If the facts stated in the plea only go to show that it was the plaintiff's own negligence, and nothing more, that caused the accident, those facts could be proven under the general denial, because, if it was the plaintiff's negligence only, it was in no part the defendant's negligence. Under a general denial, the defendant may prove any fact which shows that the plaintiff never had any cause of action.[5] But, where an affirmative offense

2. Reply.—Judgment, 41 Tex. Civ. App. 72, 91 S. W. 877, affirmed in Missouri, etc., R. Co. *v.* Avis, 100 Tex. 33, 93 S. W. 424.

3. Disproving contributory negligence—Under denial of negligence in complaint.—In an action to recover damages for injuries received in alighting from defendant's train, plaintiff alleged that she received her injury in jumping from the train while in motion, but that she was guilty of no negligence contributory thereto. Held that, under the latter averment, plaintiff was entitled to prove that she jumped from the train with the consent of the person in charge thereof, which fact would relieve her of any liability under Acts 16th Gen. Assem., c. 148, § 2, providing that if any person, not an employee or officer of the law, in discharge of his duty, shall get upon or off any locomotive or car while in motion, without the consent of the person in charge, he shall be guilty of a misdemeanor. Raben *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621.

4. Under general denial and special plea or answer.—Kennedy *v.* Southern R. Co., 59 S. C. 535, 38 S. E. 169.

Where, in an action for injuries to a passenger caused by the unsafe condition of the place furnished him to alight, there was a general denial, it was error to refuse to charge that plaintiff could not recover if he was guilty of contributory negligence, since such negligence could be shown under a general denial. Kennedy *v.* Southern R. Co., 38 S. E. 169, 59 S. C. 535.

Where, in an action for injuries to a passenger caused by the unsafe condition of the place furnished him to alight, the only defense set up was a general denial, it was error to charge that, in the absence of any plea of contributory negligence, the jury could not consider whether plaintiff's negligence was the sole cause of his injury. Kennedy *v.* Southern R. Co., 38 S. E. 169, 59 S. C. 535.

Attempting to get on freight train.—Where a complaint claimed that plaintiff's intestate was killed by being struck by a projection from a passing freight train while he was standing on a platform, waiting for a passenger train, contributory negligence in attempting to get onto the freight train was provable under the plea of the general issue. Metcalf *v.* St. Louis, etc., R. Co., 156 Ala. 240, 47 So. 158.

5. In an action against a street railroad for injuries to a passenger, received while attempting to get a seat in a car by way of a footboard, next to a car line on which cars ran in the opposite direction, one of which struck plaintiff, defendant filed a plea of contributory negligence, asserting that plaintiff unnecessarily went on the side of the car on which he was injured, that he failed to look or listen for an approaching car, and that he leaned out, when by standing erect he could have avoided injury. Held, that the answer meant no more than that the plaintiff did not use the appliances provided by defendant with ordinary care, and hence a contention that the plea assumed that the arrangement or plan of the car was a dangerous contrivance, admitting defendant's negligence in putting it into service, was untenable. Allen *v.* St. Louis Transit Co., 81 S. W. 1142, 183 Mo. 411.

"The answer in this case does not go to the extent of admitting that the arrangement of the car was in itself, or when used with proper care, a dangerous contrivance, but that the danger arose from the manner in which the plaintiff used it. The idea is that in the first

is offered, it logically carries the idea that a cause of action once existed, but has ceased because of the facts pleaded in the answer, or that a cause of action would have arisen out of the facts set out in the petition, but for the additional contemporaneous facts pleaded in the answer.[6]

Relevancy—Instances.—In an action against a railroad company for personal injuries resulting from stepping from a passenger coach onto a defective footstool, where the defendant averred that plaintiff negligently stepped on the stool after discovering its condition, evidence that plaintiff did not discover the condition of the stool in time to avoid stepping on it was relevant on the issue of contributory negligence.[7] And in an action for injuries to a passenger, though the negligence charged was the premature announcement of the station, the jury could consider whether plaintiff knew when he went on the lower step of the car that the point for alighting had not been reached.[8]

§§ 2837-2853. Presumption and Burden of Proof—§ 2837. Doctrine Placing Burden on Plaintiff.—In several states the rule is that a passenger injured by the negligence of a common carrier must, in order to recover damages, show affirmatively that he was free from contributory negligence. All the circumstances under which a passenger received an injury being proved, if they show nothing in the conduct of the passenger, either of acts or neglect, to which the injury may be attributed, in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault.[9] This is the rule in Connecticut,[10] Iowa,[11] Maine,[12] Massachusetts,[13] Mississippi,[14] Michigan[15] and New York,[16] and formerly in Indiana.[17] Aliter under Indiana Statute, Burn's Ann. St. 1901, § 359a.[18]

Collision with Street Car.—In an action against a street railway company for death caused by collision of a street car with plaintiff's intestate while awaiting the car to take passage thereon, the plaintiff assumes the burden of showing

place there was no necessity for his going on that side of the car; second, that he incurred danger by attempting to use the footboard in the face of a car coming from the opposite direction; and, third, that, instead of using reasonable care to hold himself erect when on the footboard, he leaned outward toward the danger. The answer is not susceptible of the construction that the appliance was dangerous, if used with ordinary care. It only means that the plaintiff did not use it with ordinary care." Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

6. Allen *v.* St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

7. Relevancy—Instances.—Atlanta, etc., Railway *v.* Wheeler, 154 Ala. 530, 46 So. 262.

8. Macon, etc., R. Co. *v.* Anderson, 121 Ga. 666, 49 S. E. 791.

9. Doctrine placing burden on plaintiff.—Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 21 N. W. 495, overruling 17 N. W. 923.

10. Kruck *v.* Connecticut Co., 84 Conn. 401, 80 Atl. 162.

11. Raymond *v.* Burlington, etc., R. Co., 65 Iowa 152, 21 N. W. 495.

12. See Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905, quoting from 2 Thomp. Trials, § 1679.

13. Fuller *v.* Boston, etc., R. Co., 133 Mass. 491.

In an action brought, not under St. 1874, c. 372, § 164, but at common law, to recover damages for personal injuries sustained by reason of the negligence of a railroad, due care on the part of the person injured must be alleged and proved. Fuller *v.* Boston, etc., R. Co., 133 Mass. 491.

14. See Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905, quoting from 2 Thomp. Trials, § 1679.

15. See Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905, quoting from 2 Thomp. Trials, § 1679.

16. Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418.

A street car passenger, suing for injuries by being thrown from the running board of a car as it struck a curve in the track, must establish by a fair preponderance of the evidence his freedom from contributory negligence. Maercker *v.* Brooklyn Heights R. Co., 122 N. Y. S. 87, 137 App. Div. 49.

17. In an action for injuries to plaintiff's wife owing to the alleged negligence of defendant carrier, the burden of proof did not shift to defendant to prove that the injured party was guilty of contributory negligence, because of proof raising a presumption of negligence on the part of defendant. Wahl *v.* Shoulders, 43 N. E. 458, 14 Ind. App. 665.

18. *Indiana.*—Union Tract. Co. *v.* Keiter, 175 Ind. 268, 92 N. E. 982.

by a preponderance of the evidence that her intestate was not guilty of contributory negligence.[19]

Boarding Moving Train.—Under Hurd's Rev. St. Ill. 1891, c. 114, § 79, forbidding any person to board a moving train except in compliance with law, or by permission, under the lawful rules and regulations of the company, the burden is on one injured while making such attempt to show that the permission or direction of the conductor of the train relied on as justifying the attempt was in accordance with the rules and regulations of the company.[20]

Riding in Place of Danger.—When it appears that a passenger is riding on a car in a place of danger, his negligence is prima facie proved, and the onus is on him to rebut the presumption.[21]

Person Assisting Passenger on or Off Car.—A person who enters the cars of a railroad company, not as a passenger, but for the purpose of assisting an aged and infirm passenger to a seat, must, in order to recover of the company for an injury sustained while leaving the car, show that he exercised due care, and that the company was wanting in ordinary care, and that the carrier's negligence was the cause of the injury.[22]

Alighting from Moving Train.—In an action against a railroad for injuries received while alighting at a station from a train after it has started, the burden is on plaintiff to show that he was carefully trying to alight safely.[23]

§§ 2838-2853. Doctrine Placing Burden on Carrier—§ 2838. In General.—Where, in an action for injuries to a passenger, the facts stated in the petition do not raise a legal presumption that the injured person was guilty of contributory negligence, and negligence of the carrier resulting in injury to the passenger is established, and the undisputed evidence does not establish a prima facie case of contributory negligence, the burden is on the carrier to show such negligence, by a preponderance of the evidence, and not on the plaintiff to prove that his own negligence was not the cause of his injury.[25] There is a corollary, rather than an exception, to this rule, the corollary being to the effect that whenever the plaintiff's own case raises a presumption of contributory negligence the burden of proof is immediately upon him. In such a case, it devolves upon the plaintiff, as, of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and where the circumstances attending the injury were such as to raise a presumption against him, in respect to the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault.[26] In other

19. **Collision with street car.**—Kruck *v.* Connecticut Co., 84 Conn. 401, 80 Atl. 162.

20. **Boarding moving train.**—Young *v.* Chicago, etc., R. Co., 100 Iowa 357, 69 N. W. 682.

21. **Riding in place of danger.**—Clark *v.* Eighth Ave. R. Co., 36 N. Y. 135, 93 Am. Dec. 495, 34 How. Prac. 315.

22. **Person assisting passenger on or off car.**—Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406.

23. **Alighting from moving train.**—Brown *v.* New York, etc., R. Co., 181 Mass. 365, 63 N. E. 941.

25. **Burden of proof as to contributory negligence.**—Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905; Wall *v.* Helena St. R. Co., 12 Mont. 44, 29 Pac. 721.

Instruction correctly stating rule.—In an action for death of a passenger struck by the train on which he was about to take passage, instructions that a preponderance of the evidence showing that he was killed by defendant's train would make a prima facie case of negligence, and to escape liability the burden was on defendant to show by a preponderance of the evidence that it was not negligent or that decedent was guilty of contributory negligence; that the burden was on defendant to show by preponderance of all the evidence that decedent was guilty of contributory negligence; and that defendant was not bound to prove contributory negligence if it appeared from plaintiff's evidence, taken together, correctly stated the rule as to burden of proof as to contributory negligence. St. Louis, etc., R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527.

26. Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905; Wall *v.* Helena St. R. Co., 12 Mont. 44, 29 Pac. 721; Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

In an action for injuries by a passen-

words where the pleading and the evidence of the plaintiff show prima facie contributory negligence on his part, he has the burden of proof to free himself from negligence. In such case it is necessary for the plaintiff to plead and prove such other facts as will rebut this legal presumption.[27] So also, where

ger against a carrier, where an act of plaintiff was the primary cause of the injury, the burden is on plaintiff to prove want of contributory negligence. Taillon *v.* Mears, 29 Mont. 161, 74 Pac. 421; Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21; Missouri Pac. R. Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

27. St. Louis, etc., R. Co. *v.* Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089; Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Texas, etc., R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058.

Where the legal effect of the facts stated in the petition is such as to establish prima facie negligence on the part of the plaintiff as a matter of law, then he must plead and prove such facts as will rebut such legal presumption. Gillum *v.* New York, etc., Steamship Co. (Tex. Civ. App.), 76 S. W. 232; Gulf, etc., R. Co. *v.* Booth (Tex. Civ. App.), 97 S. W. 128; Selman *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 101 S. W. 1030.

Plaintiff's wife, who was in feeble health, was injured in getting off one of defendant's trains at a place about 150 feet from the station. The complaint in an action for such injuries alleged that the place was dangerous for one to attempt to get off at. Defendant pleaded contributory negligence in failing to get off at the station, and introduced no testimony as to the passenger's negligence in getting off at the place in question. Held, that the pleadings and evidence placed the burden of proving the want of contributory negligence on the plaintiff. St. Louis, etc., R. Co. *v.* Martin, 63 S. W. 1089, 26 Tex. Civ. App. 231.

Pleading held not to show contributory negligence as matter of law.—Where the petition alleged that plaintiff had been aboard the train in order to seat his wife and children, and that he jumped from the train while it was moving rapidly, in the dark, but that the train was still at the station where passengers got on and off, and that he believed it was moving slowly, and that no lights were placed whereby he could estimate the speed, the petition did not show contributory negligence as a matter of law. Texas, etc., R Co. *v.* Crockett, 66 S. W. 114, 27 Tex. Civ. App. 463.

In an action against a railroad for injury to a boy ten years old, the petition alleged that the boy made a contract with the company to carry him to a certain flag station, where he lived; that on the train's approach to the station it was signaled to stop; that the company negligently disregarded the signal, and did not stop the train; that the boy being frightened and confused by being so carried past the station, jumped from the train and was injured. Held, that the petition did not show on its face that the boy was guilty of contributory negligence, since whether the mind of a boy of that age is mature enough to make him responsible is a question for the jury. Avey *v.* Galveston, etc., R. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809.

Plaintiff alleged that his wife, while a passenger on defendant's train, prepared to alight as the train neared her destination, and that immediately after the train stopped, and without delay, she proceeded to alight, and while leaving the train, and without any warning, it moved suddenly forward, throwing her to the depot platform, by the negligence of defendant and its employees, etc. Held, that the petition was not demurrable, though alleging that the train was in motion when plaintiff's wife attempted to alight. San Antonio, etc., R. Co. *v.* Jackson, 38 Tex. Civ. App. 201, 85 S. W. 445.

In an action for injuries to plaintiff while alighting from defendant's train, a petition alleging that with the consent of defendant and its conductor plaintiff was riding in a caboose, ingress to and egress from which was much more difficult than from a regular caboose, which fact, as well as the fact that plaintiff was to alight therefrom in the night time at a certain station, was known to those in charge of the train; that plaintiff was assured by the conductor that the train would stop at the station long enough for him to alight; that when the train stopped, and while plaintiff was undertaking in a prompt and prudent manner to alight, with the knowledge of the conductor, but before he had time to do so in safety, the train was carelessly and recklessly started in wanton disregard of plaintiff's safety, which caused plaintiff to fall, in doing which his foot was run over by the wheels of the caboose, etc., did not show contributory negligence as against a general demurrer. Gulf, etc., R. Co. *v.* Walters, 49 Tex. Civ. App. 71, 107 S. W. 369.

In an action against a railroad for damages sustained through passenger alighting from a moving train, a petition alleging that plaintiff was inexperienced in alighting from moving trains, that owing to darkness he was unable to judge the speed of the train, and that he relied on the direction of the conductor in attempting to alight, is not demurrable as disclosing contributory negligence. International, etc., R. Co. *v.* Rhoades, 21 Tex. Civ. App. 459, 51 S. W. 517, 52 S. W. 979.

the undisputed evidence adduced on the trial establishes prima facie, as a matter of law, contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury, upon the whole case, may find him free from negligence.[28] This is the doctrine of the federal courts,[29] the courts of the District of Columbia,[30] and of the state courts[31] in Alabama,[32] Arkansas,[33] California,[34] Colorado,[35] Delaware,[36] Kansas,[37] Mary-

28. Gillum *v.* New York, etc., Steamship Co. (Tex. Civ. App.), 76 S. W. 232; Gulf, etc., R. Co. *v.* Booth (Tex. Civ. App.), 97 S. W. 128. See, also, Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Lee *v.* International, etc., R. Co., 89 Tex. 583, 36 S. W. 63, reversing 34 S. W. 160; Lewis *v.* Houston Elect. Co., 39 Tex. Civ. App. 625, 629, 88 S. W. 489, 112 S. W. 593; St. John *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 80 S. W. 235; Selman *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 101 S. W. 1030; Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977; S. C., 102 Tex. 100, 113 S. W. 521.

Evidence held not to raise question of contributory negligence.—Evidence of plaintiff in an action for injuries due to a caboose on which he was a passenger being struck by an engine held not to raise the question of contributory negligence so as to impose on him the duty to remove the suspicion of his own negligence. Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed in 102 Tex. 100, 113 S. W. 521.

In an action for personal injuries sustained in being thrown from a seat of a passenger coach because of the derailment of the train, evidence examined, and held not to show contributory negligence. Ft. Worth, etc., R. Co. *v.* Walker, 48 Tex. Civ. App. 86, 106 S. W. 400.

29. Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 262.

Evidence of a contract of carriage between plaintiff and defendant, and that plaintiff was injured while a passenger under such contract, casts the burden on defendant to show that plaintiff was guilty of contributory negligence. Texas, etc., R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142.

30. Washington, etc., R. Co. *v.* Chapman, 26 App. D. C. 472.

Where, in an action for injuries, it is shown that the accident which caused the injury occurred while the plaintiff was a passenger, the burden of proof is on the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent, and his negligence caused or contributed to the injury. Washington, etc., R. Co. *v.* Chapman, 26 App. D. C. 472.

31. "Mr. Beach, in his work on Contributory Negligence, says (§ 157) that it is a rule that contributory negligence is a matter of defense in the states of Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont, and Colorado, and in England and the United States supreme court. To this list, Sherman and Redfield add Arizona, Oregon, and Dakota. As above noticed, Montana belongs in the same category. See, also, the collection of cases holding the two different rules, as found in 2 Thomp. Trials, § 1679. That author names the following courts as opposed to the rule which has been adopted in Montana, Massachusetts, Maine, Iowa, Mississippi, Michigan, and Indiana." Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905.

32. Alabama, etc., R. Co. *v.* Ventress, 171 Ala. 285, 54 So. 652.

33. Where negligence of a carrier, resulting in injury to a passenger, is established, the burden is on it to prove the contributory negligence of the passenger. St. Louis, etc., R. Co. *v.* Gilbreath, 87 Ark. 572, 113 S. W. 200.

34. May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

In an action by a passenger against a carrier for personal injuries the burden is on defendant to prove want of ordinary care on plaintiff's part. May *v.* Hanson, 5 Cal. 360, 63 Am. Rec. 135.

The proof of the injury to a passenger casts on defendant the burden of proving that it was occasioned by contributory negligence of the passenger, unless the evidence on his part tends to show that the injury was due to his negligence. Boone *v.* Oakland Transit Co., 73 Pac. 243, 139 Cal. 490.

35. Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

36. Elliott *v.* Wilmington City R. Co. (Del.), 6 Pen. 570, 73 Atl. 1040.

37. In an action for injuries to a passenger, where the answer is a general denial only, contributory negligence not being pleaded, plaintiff, to sustain the action, is not bound to prove that she did no act, or that she did not omit to do anything, which contributed to her injury; but if her evidence shows that she negligently did something or failed to exercise reasonable care for her own safety, which act or omission was the proximate cause of her injury, she can not recover. Altwein *v.* Metropolitan St. R. Co., 120 Pac. 550, 86 Kan. 220.

land,[38] Montana,[39] Missouri,[40] Nebraska,[41] Texas,[42] Virginia,[43] Washington [44] and West Virginia.[45] This is the rule under the statutes of Indiana.[46]

Instances.—In a suit for injuries to a passenger carried beyond his station,[47] and in an action proceeding out of an accident by the overturning of a stage-coach,[48] and in an action for injury to a passenger at a railroad station through being struck by an approaching train,[49] the onus probandi is upon the carrier to prove contributory negligence or want of ordinary care on behalf of the injured passenger. In all such cases, in the absence of evidence to the contrary the law presumes that, at the time of the accident, the injured passenger exer-

38. Jones *v.* United R., etc., Co., 99 Md. 64, 57 Atl. 620.

39. Taillon *v.* Mears, 29 Mont. 161, 74 Pac. 421.

40. Harmon *v.* United R. Co., 163 Mo. App. 442, 143 S. W. 1114.

41. St. Joseph, etc., R. Co. *v.* Hedge, 44 Neb. 448, 62 N. W. 887.

42. In an action by a passenger against a carrier for personal injuries, the burden is on the carrier to show that the passenger was guilty of contributory negligence, where there is nothing in the evidence of the injuries and negligence of the carrier that will justify an implication that the passenger was guilty of contributory negligence. Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297; Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636; Missouri Pac. R. Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; Gulf, etc., R. Co. *v.* Pendery, 87 Tex. 553, 556, 29 S. W. 1038, 47 Am. St. Rep. 125, reversing 27 S. W. 213; Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; St. Louis, etc., R. Co. *v.* Parks, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 7 S. W. 88.

In an action for injuries to a passenger, where plaintiff's evidence did not show negligence on his part, as matter of law, the burden was on the defendant to establish its plea of contributory negligence. Lewis *v.* Houston Elect. Co., 88 S. W. 489, 112 S. W. 593, 39 Tex. Civ. App. 625, 629.

Erroneous instructions as to burden of proof.—In a personal injury action against a carrier, an instruction which requires the jury to believe that plaintiff was not guilty of contributory negligence in order to find for her places the burden of proving the absence of contributory negligence on her, and is reversible error. Selman *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 101 S. W. 1030.

A charge that if, while plaintiff was a passenger on a caboose of a freight train, the same was struck by an engine with unusual force and violence and by reason thereof plaintiff was thrown down and injured, and it was negligence to permit the caboose to be so struck, and if plaintiff was not guilty of any contributory negligence, and did not assume the risk, then plaintiff was entitled to recover, was erroneous, as requiring plaintiff, in addition to proving defendant's negligence, to prove that he had not been guilty of contributory negligence, and had not assumed the risk, and its vice was intensified by a succeeding paragraph that the burden of proof was on plaintiff to establish his case by a preponderance of the testimony. Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed in 102 Tex. 100, 113 S. W. 521.

43. Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71.

44. Northern Pac. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

45. Hoylman *v.* Kanawha, etc., R. Co., 65 W. Va. 264, 64 S. E. 536, 17 Am. & Eng. Ann. Cas. 1149, 22 L. R. A., N. S., 741.

46. The burden of proving contributory negligence of a passenger suing for a personal injury received while attempting to alight from a car rests, under the statute, on the carrier. Indiana Union Tract. Co. *v.* Keiter, 175 Ind. 268, 92 N. E. 982.

A defendant in an action for personal injuries not being bound to affirmatively prove plaintiff's contributory negligence, relied on as a defense, if such negligence is shown by the complaint or appears from the plaintiff's evidence, notwithstanding Burns' Ann. St. 1901, § 359a, makes the existence of contributory negligence a matter of defense, an instruction that if plaintiff had proved the material allegations of his complaint, etc., he would be entitled to recover, unless defendant has proven by a fair preponderance of all the evidence that plaintiff's negligence contributed to his injuries, was erroneous. Indianapolis, etc., R. Co. *v.* Barnes, 74 N. E. 583, 35 Ind. App. 485.

47. Missouri, etc., R. Co. *v.* Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724.

48. Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

49. Passenger struck by approaching train at station.—In the absence of any evidence to the contrary, the law presumes that at the time of an accident occurring to a passenger at a railroad station through being struck by an approaching train, such passenger exercised reasonable care and caution to prevent injury. MacFeat *v.* Philadelphia, etc., R. Co. (Del.), 62 Atl. 898, 5 Pen. 52.

cised reasonable care and caution to prevent injury. But where a passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door and it was injured by the brakeman's entering the car and closing the door, the burden was on plaintiff to show negligence on the part of such brakeman, and, failing to show this, the evidence would not support a verdict for him.[50]

Absence of Negligence on Part of Third Person.—The burden of proving that contributory negligence of a daughter was the sole cause of an injury to her mother is on the railway company, sued for injuries.[50a]

§§ 2839-2842. Boarding and Alighting from Train or Street Car—§ 2839. In General.—Burden of proof as to contributory negligence of passenger injured in boarding train is on the railroad company.[51] No presumption of negligence by a street car passenger arises from the mere fact of injury while alighting; the burden of proving such negligence being on the party asserting it,[52] unless it otherwise appears from the evidence in the case.[53]

Boarding or Alighting from Moving Train or Car.—Boarding or alighting from a moving train[54] or street car[55] is evidence of contributory negligence and imposes on one injured in so doing the burden of proving that he was justified by the circumstances of the case.[56]

§ 2840. Train or Car Prematurely Started.—Where the passenger claims damage for an injury alleged to have resulted from the premature starting of the car,[57] or train,[58] while he was endeavoring to alight or from a sudden move-

50. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

50a. Absence of negligence on part of third person.—Lang *v.* Interborough Rapid Transit Co., 134 N. Y. S. 627, 76 Misc. Rep. 195.

51. Boarding or alighting from train or street car.—Missouri Pac. R. Co. *v.* Foreman (Tex. Civ. App.), 46 S. W. 834.

52. Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001; Elliott *v.* Wilmington City R. Co. (Del.), 6 Pen. 570, 73 Atl. 1040.

53. File *v.* Wilmington City R. Co. (Del.), 80 Atl. 623.

54. Boarding or alighting from moving train or car.—Hoylman *v.* Kanawha, etc., R. Co., 65 W. Va. 264, 64 S. E. 536, 17 Am. & Eng. Ann. Cas. 1149, 22 L. R. A., N. S., 741.

55. The burden is on a person injured by stepping on or off a moving street car and receiving an injury thereby to show why the case should go to the jury. Hunterson *v.* Union Tract. Co., 55 Atl. 543, 205 Pa. 568.

In an action against a street car company for injuries to plaintiff's son, defendant alleged that he was injured by his own negligence in that he negligently hung his foot down from the running board whereupon it was caught by the wheel of the car, or that he recklessly and negligently jumped from the running board and back to the running board while the car was in motion, and in so jumping threw his foot in front of the wheel and in some manner it was injured. Held, that an instruction that, if the boy's negligence caused or contributed so directly and proximately to the accident as alleged by defendant in its answer, and that but for his own negligence he would not have been injured, defendant was not liable, etc., was not objectionable as imposing too great a burden on defendant. El Paso Elect. R. Co. *v.* Kitt (Tex. Civ. App.), 99 S. W. 587.

56. Hoylman *v.* Kanawha, etc., R. Co., 65 W. Va. 264, 64 S. E. 536, 17 Am. & Eng. Ann. Cas. 1149, 22 L. R. A., N. S., 741.

57. Train or car prematurely started.—File *v.* Wilmington City R. Co. (Del.), 80 Atl. 623.

Where a street car passenger claims damages for an injury alleged to have resulted by the premature starting of the car as she was endeavoring to alight, there was no presumption of negligence on the part of plaintiff arising from the mere fact that she was injured while alighting from the car. Coyle *v.* People's R. Co. (Del.), 80 Atl. 638.

A passenger on a street car was injured while attempting to alight from a car in consequence of its sudden starting. The passenger testified that the car came to a standstill at a place where cars were in the habit of stopping for the purpose of receiving and discharging passengers; that she proceeded down the steps to alight; that she reached the lower step, and was in the act of stepping off, the car suddenly started with a jerk, throwing her to the ground. Held to establish a prima facie case of freedom from contributory negligence. Wegeschiede *v.* St. Louis Transit Co., 94 S. W. 774, 118 Mo. App. 295.

58. Where plaintiff sued for injuries

ment while he was in the act of boarding it at a station,[59] the burden is on the defendant carrier to show contributory negligence on behalf of the passenger, although the petition alleged that he exercised ordinary care.[60] Where plaintiff sued a railroad company for injuries caused by the negligence of the defendant in allowing a train to start while he was going on board, the burden of proof as to contributory negligence on the part of the plaintiff does not shift when it is shown that he had gone close to the train, to be ready to board it, and, when notified by a brakeman to get on, and that he would have plenty of time, attempted to do so;[61] and evidence that plaintiff made a misstep is not necessarily even prima facie evidence of negligence, requiring a special instruction to the jury on the subject of contributory negligence.[62]

§ 2841. Jumping from Train, Car or Coach.—Jumping from Coach.—When the proximate cause of the injury is plaintiff's own act, as jumping from a coach, he must allege and prove that he exercised reasonable care.[63]

Jumping to Avoid Collision.—The mere fact that a street car passenger was injured while jumping to avoid a collision did not raise a presumption of negligence on the part of such passenger.[64]

§ 2842. Obeying Order or Direction of Conductor.—Where a passenger seeks to recover for injuries alleged to have been received by leaving the train in accordance with the orders of the conductor, a charge that the burden of establishing this fact is on the plaintiff and that it must be shown to make out his case is sufficient.[65]

§§ 2843-2844. Riding in Wrong Car or Place Not Intended for Passengers.—§ 2843. Railway Trains.—Where a passenger, who knows of a rule requiring him to ride in the passenger cars, rides in an express car or other place on the train which can not be regarded as intended for the accommodation of passengers, but naturally suggests that it was not intended for

sustained in alighting from defendant's train, which did not stop a reasonable time to let on passengers, the burden of proof was on defendant to show contributory negligence, and not on plaintiff to show his want thereof, notwithstanding his petition alleged he exercised ordinary care and diligence in alighting. Pares *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 57 S. W. 301.

59. In an action by a passenger for injuries resulting from a sudden forward movement of the train while he was on a step of the car in the act of boarding it at a station, the burden of proof is on the defendant to show contributory negligence. St. John *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 80 S. W. 235.

In an action by a passenger for injuries, an instruction that, to warrant a verdict for plaintiff, the jury must believe not only that defendant railroad company's servants in charge of the train failed to stop a reasonable length of time at the station to allow plaintiff to board it, and that while he was on the lower step of a coach, attempting to get thereon, the train was started with a jerk, resulting in his injuries as alleged but that in attempting to take passage on the train plaintiff exercised reasonable haste and dispatch, and used that high care which a person of ordinary prudence would have used under the same circumstances to avoid injury, and was not guilty of contributory negligence, is erroneous, as casting the burden of disproving contributory negligence on the plaintiff. St. John *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 80 S. W. 235.

60. Pares *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 57 S. W. 301.

61. Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636.

62. Texas, etc., R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142.

63. Jumping from coach.— Kennon *v.* Gilmer, 4 Mont. 433, 2 Pac. 21.

64. Jumping to avoid collision.—Eaton *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 435, 75 Atl. 369.

65. Obeying order or direction of conductor.—Southern R. Co. *v.* Coursey, 115 Ga. 602, 41 S. E. 1013.

When it is shown by the evidence that a person was in possession of a lantern and went through a passenger car taking up tickets from the passengers, the question whether such person was in fact conductor of the train or other person in charge is for the jury to determine. No other person being apparently in charge, proof of such facts places on the railroad company the burden of showing that such person was not in charge of the train. Coursey *v.* Southern R. Co., 113 Ga. 297, 38 S. E. 866.

them, the burden is upon him to prove that he was justified in riding in such prohibited place.[66] The relation of carrier and passenger is created only by contract, express or implied, and the presumption is that one riding out of the place provided by a railroad company for passengers is not a passenger, or, if such, that he has assumed the increased risk from riding there.[67] It has been so held as to passengers injured in the baggage room.[68]

Passenger Crossing Platform in Search of Seat.—Where plaintiff alleged that defendant negligently failed to provide him with a seat in its railway car, and while in search of one it became necessary for him to cross the platform from one car to another, and that in doing so he stopped for a short while on the platform, and was thrown by a sudden jerk of the train, the basis of the action was that he was rightfully on the platform, and that his presence there was the result of defendant's negligence, and therefore it was not error to place the burden of proof on defendant to establish contributory negligence.[69]

On Freight Train.—If a person enters a freight train forbidden to take passengers, though habitually accustomed to do so, the burden of proof is upon him to show the custom and justify his action.[70]

Caretaker of Stock.—Where a rule established by certain carriers prohibited persons riding on stock passes from riding in other parts of the train than in the caboose, and declared that a failure to comply with the rule should be prima facie evidence of negligence on the part of the passenger if injured, a violation of the rule did not necessarily preclude a recovery, but only shifted the burden of proof on the question of plaintiff's contributory negligence.[71]

§ 2844. Riding on Platform of Street Car.—No presumption of negligence arises from the use by a passenger of the platform of a street railway car, even though there are seats to be had inside, so long as such use is not forbidden by a rule kept in active operation.[72] That a street car passenger was riding on the platform when injured in a collision raises a presumption of contributory negligence, so as to require him to show in an action for resulting injuries that his position there did not contribute to his injury.[73]

§ 2845. Standing in Car.—In an action by a passenger injured while away from his seat and standing,[74] the burden is on the carrier to show contributory negligence on behalf of such passenger.

66. Railway trains.—Florida, etc., R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

A passenger injured by derailment of the train, in order to recover, must show not only that he was a passenger, but that at the time of the accident he was also in a place where he had a right to be, or, at least, that the place where he was, if he was not in the right place, did not affect the result. Winters *v.* Baltimore, etc., R. Co., 163 Fed. 106.

67. Chicago, etc., R. Co. *v.* Thurlow, 178 Fed. 894, 102 C. C. A. 128, 30 L. R. A., N. S., 571.

68. Injury in baggage room.—In an action against a railroad for injuries to a passenger in an alleged dangerous baggage room, the burden of proving that plaintiff must have seen and ought to have avoided the danger was on defendant. Bates *v.* Chicago, etc., R. Co., 122 N. W. 745, 140 Wis. 235.

69. Passenger crossing platform in search of seat.—Galveston, etc., R. Co. *v.* Morris (Tex. Civ. App.), 60 S. W. 813, judgment affirmed in 61 S. W. 709, 94 Tex. 505.

70. On freight train.—Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491.

71. Caretaker of stock.—Judgment, 41 Tex. Civ. App. 72, 91 S. W. 877, affirmed in Missouri, etc., R. Co. *v.* Avis, 100 Tex. 33, 93 S. W. 424.

A caretaker of stock, riding in a cattle car, instead of in the caboose, has the burden of showing that he was justified in riding where he did. Lake Shore, etc., R. Co. *v.* Teeters (Ind.), 74 N. E. 1014, affirmed in 77 N. E. 599, 166 Ind. 335, 5 L. R. A., N. S., 425.

72. Riding on platform of street car.—Hart *v.* Capital Tract. Co., 35 App. D. C. 502.

73. Alabama, etc., R. Co. *v.* Ventress, 171 Ala. 285, 54 So. 652.

74. Passenger standing when injured.—A bare admission of a passenger on a freight train that he was standing up in the caboose when injured does not create a prima facie case of contributory negligence, so as to cast on him the bur-

§ 2846. Elbow Resting on Rail at Side of Street Car.—Where a passenger in an open street car was entirely within the car, though his elbow rested on a rail at the side, his injury by a collision with a passing wagon raised a presumption of negligence on the part of the street car company, and placed on it the burden of showing contributory negligence.[75]

§ 2847. Violation of Carrier's Rules.—Since negligence on the part of a railroad company is presumed from the fact of an injury to a passenger, the burden is on the company to prove that the injury occurred through violation of its rules by the passenger;[76] but it is not necessary that notice of the rule be shown to have been given to the plaintiff.[77]

Riding in Wrong Place.—See ante, "Riding in Wrong Car or Place Not Intended for Passengers," §§ 2843-2844.

§ 2848. Resisting Ejection.—Where a passenger, on being ordered to leave the car, uses violence beyond what is necessary to prevent blows or protect himself from excessive force, the burden is on him, in an action against the carrier, to prove that his illegal acts did not contribute to the injury.[78]

§ 2849. Incapacity to Appreciate Danger.—In an action against a railway company for injury to a minor the burden is upon plaintiff to show by affirmative proof that he was not of such discretion as to realize the danger of placing himself in a position where he was likely to be injured.[79]

§ 2850. Assumption of Risk.—In an action by a passenger against a carrier for negligent injuries, defendant has the burden of proving assumption of risk.[80] An experienced shipper, traveling on a freight train, who was familiar with the operations of such trains, must be presumed to have known that they do not always stop at the exact point intended, but must often be moved backwards or forwards after having stopped, in order to reach the point at which the final stop is to be made.[81]

§ 2851. Waiver of Provision in Stock Pass.—In order to establish a waiver by a conductor of a provision in a contract for the shipment of stock requiring the shipper to ride in the caboose, the shipper must affirmatively show, in the absence of evidence of express authority on the part of the conductor to waive such provision, that such action was within the apparent scope of the conductor's authority, and that the shipper did not know or have reasonable ground to believe that the conductor was exceeding his authority.[82]

den of proving his freedom therefrom. St. Louis, etc., R. Co. *v.* Gilbreath, 87 Ark. 572, 113 S. W. 200.

Injury by falling berth while standing by stove.—In an action by a passenger against a railroad company for injury received by the falling of a berth while she was away from her seat and standing by the stove, it is not necessary for her to allege and prove necessity for her absence from her seat, contributory negligence being a batter of defense. Northern Pac. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

75. Elbow resting on rail at side of street car.—Jones *v.* United R., etc., Co., 99 Md. 64, 57 Atl. 620.

76. Violation of carrier's rule.—St. Joseph, etc., R. Co. *v.* Hedge, 44 Neb. 448, 62 N. W. 887.

77. Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 38 L. R. A., N. S., 689.

78. Resisting ejection.—Jackson *v.* Old Colony St. R. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A., N. S., 1046, 19 Am. & Eng. Ann. Cas. 615.

79. Intelligent appreciation of danger.—Walling *v.* Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417; Cockrell *v.* Texas, etc., R. Co., 36 Tex. Civ. App. 559, 82 S. W. 529.

A fifteen year old boy is presumed to be sufficiently intelligent to appreciate the danger of riding upon the platform of a railway car; and the burden is upon him in an action for injuries sustained while so riding to show he lacked such intelligence and discretion. Walling *v.* Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417.

80. Assumption of risk.—Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935.

81. Young *v.* Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175, affirmed in 88 S. W. 767, 113 Mo. App. 636.

82. Waiver of provision in stock pass.—Illinois Cent. R. Co. *v.* Jennings, 217 Ill. 140, 75 N. E. 457, reversing judgment 119 Ill. App. 317.

§ 2852. Imputed Negligence.—Death of Child Due to Parent's Contributory Negligence.—Even if the parent's contributory negligence was a defense to an action for a child's death while a passenger by its administrator, the burden of proving contributory negligence was on the railroad company.[83]

§ 2853. Last Clear Chance.—An action by a passenger against a carrier for personal injury where the contributory negligence of the passenger was established, the burden of proof that the carrier could, by reasonable care, have avoided the accident after discovery of the peril to the passenger, is on the plaintiff.[84]

§§ 2854-2880. Admissibility of Evidence—§ 2854. In General.—In an action against a carrier by a passenger for personal injuries, every circumstance that would probably affect the action of a person of ordinary caution and prudence when in the situation of the injured person is admissible in evidence.[85]

§ 2855. Surroundings of Place of Injury.—Evidence as to the surroundings at the place of the injury and injured person's familiarity or lack of it therewith is admissible.[86]

§ 2856. Res Gestæ.—In an action against a carrier for personal injuries to a passenger where contributory negligence is relied on as a defense, the res gestæ is admissible.[87]

Conduct and Exclamations of Other Persons Exposed to Same Danger.—In an action against a railway company for personal injuries to a passenger when the prudence of the person injured is in question, evidence of the conduct and exclamations of other persons exposed to the same danger is competent,[88] to show what they, being in the same dangerous situation, deemed prudent conduct. They, having an equal interest in protecting themselves, will be presumed to have done what appeared to them to have involved the least hazard.[89] Thus, where in such action it appeared that the plaintiff was injured while on the platform of the car and he testified that he went upon the platform to escape the consequences of an accident which he feared would result from the unusual speed of the train, evidence that the other passengers remained seated in the

83. Death of child due to parent's contributory negligence.—Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

84. Last clear chance.—In an action for death of a person at a station while he was crossing the track in front of the approaching train to get to a place where he could board the train, caused by his being struck by the engine, deceased being negligent, the burden of proof was on plaintiff to show that the employees of the train discovered his perilous position in time to have avoided injury, and negligently failed to use proper means to avoid injuring him after discovering his peril. St. Louis, etc., R. Co. *v.* Watson, 97 Ark. 560, 134 S. W. 949.

In an action by a passenger for injuries received in alighting from a street car, where the contributory negligence of plaintiff was established, the burden is on her of proving that defendant could, by reasonable care, have avoided the accident after the peril to the passenger was discovered. Richmond Passenger, etc., Co. *v.* Allen, 43 S. E. 356, 101 Va. 200.

85. Admissibility of Evidence.—Great Falls, etc., R. Co. *v.* Hill, 34 App. D. C. 304.

86. Surroundings of place of injury.—Louisville, etc., R. Co. *v.* Dilburn (Ala.), 59 So. 438.

87. Res gestae.—Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

88. Conduct and exclamations of other persons exposed to same danger.—Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

In an action against a railroad company to recover injuries caused by jumping from a train to avoid a threatened injury by collision from the rear, evidence of what other passengers said and did under the excitement of the moment is admissible as showing the situation of plaintiff and that he acted prudently in jumping from the train. Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32.

89. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

car and were not injured, is admissible, as their actions were part of the res gestæ, and tended to show what they regarded as prudent conduct under the circumstances.[90] And on an issue as to whether plaintiff's decedent, killed by defendant's train coming in on a track between the station platform and a low, narrow, crowded platform, on which deceased had just alighted from another of defendant's trains, was negligent, testimony of a person who alighted from the same train at the same time, and had attempted to pass over to the station platform, that just as he was about to step on the station platform he became conscious that an engine was near him, and that he was dragged from the track onto the platform, and the engine just brushed him as it passed,—this being the engine on the train by which deceased was killed,—is admissible.[91]

Remarks of Trainmen.—In an action for negligently killing a passenger while attempting to alight from a moving train, the brakeman's remark, "Come on; hurry up!" is admissible as part of the res gestæ, and tending to rebut contributory negligence.[92]

§ 2857. Opinion Evidence.—The general rule that witnesses, who are not required to testify as experts, must state facts, and not conclusions, applies in actions by passengers against carriers for personal injuries. Thus, testimony of a witness in an action against a street-railway company for damages for personal injuries, to the effect that he did not think it was dangerous to get on certain cars by the front platform, when they were running slowly, is inadmissible as determining a question within the exclusive province of the jury.[93]

§ 2858. General Custom or Usage.—In an action against a carrier for personal injuries to a passenger, a custom may sometimes be proven for the purpose of showing that the passenger, under given circumstances, was not guilty of that want of ordinary care which the law terms negligence;[94] instances are not wanting where such proof has been admitted. Thus, proof of a custom of carrier to stop train or car at the place where the injury occurred,[95] custom of passengers at station in question to board[96] or alight[97] from moving train or street car[98] or to leave the trains on the wrong side from which they were likely

90. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

91. Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

92. Remarks of trainmen.—Waller *v.* Hannibal, etc., R. Co., 83 Mo. 608.

93. Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

94. General custom or usage.—Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 5 C. C. A. 551.

95. Custom to stop car at place of injury.—In an action for injuries to a street car passenger while attempting to board a car, evidence of a custom to stop cars at the place where the injury occurred is relevant to support the passenger's claim that the car stopped at the time of the accident. Norfolk, etc., Terminal Co. *v.* Rotolo, 115 C. C. A. 183, 195 Fed. 231.

96. Custom of passengers as to boarding and alighting from cars.—Where plaintiff alleged that after he had secured a firm footing on the steps of defendant's car as a passenger one of defendant's employees negligently and violently closed the door of the vestibule, thereby knocking plaintiff from the train, causing the injury complained of, evidence was admissible that plaintiff and others had frequently boarded trains at the same station when in as rapid motion as the train at the time under consideration, as tending to show whether plaintiff was using the degree of caution and prudence required of him. Malone *v.* Texas, etc., R. Co., 49 Tex. Civ App. 398, 109 S. W. 430.

97. In an action against a street railroad company by a passenger to recover damages for injuries received in stepping off a car from its side opposite a station platform, evidence is admissible as bearing upon plaintiff's contributory negligence of a custom of passengers to get off cars from that side at such station, although it was unknown to plaintiff. Great Falls, etc., R. Co. *v.* Hill, 34 App. D. C. 304.

98. In an action for personal injuries, it is competent for the plaintiff to show that it was customary, at the crossing where he was injured, for people to board the street cars while in motion, as bearing on the question as to whether he was in the exercise of ordinary care for his personal safety. South Chicago City R. Co. *v.* Dufresne, 102 Ill. App. 493, judgment affirmed in 65 N. E. 1075, 200 Ill. 456.

to go upon a dangerous platform not intended for such use;[99] a custom of the carrier to transport its stock passengers on top of its trains,[1] a custom of stockmen as to going on[2] or to walk on top of freight trains,[3] a custom requiring passengers having baggage put on at stations, where there was no agents, to go to the baggage car to arrange about their baggage after boarding the train,[4] the rigid rules as to proving the existence of general customs not being applicable to the situations, have been admitted in actions by passengers against carriers for personal injuries.

Custom to Cross from One Car to Another.—In a suit against a carrier for an injury to a passenger from being precipitated from a moving train while crossing from one coach to another, testimony of a known usage or custom of passengers to cross is competent evidence, not to justify or excuse the passenger from attempting to cross when it would be an obviously hazardous act, but as illustrating the character and nature of the act as bearing on the passenger's alleged contributory negligence in crossing.[5]

99. Alighting from wrong side of train.—Where plaintiff, leaving defendant's railroad train, and going onto a platform of insufficient width, provided by the company, was caught between two trains passing on the nearest tracks on either side of such platform at a high rate of speed, and injured thereby, evidence to show that theretofore passengers had been accustomed to leave the trains on that side is admissible as bearing on the question of contributory negligence. Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306, certioari denied in 17 S. Ct. 994, 166 U. S. 719, 41 L. Ed. 1186.

1. Where plaintiff's husband, a stockman, while riding on top of defendant's train, was thrown therefrom and killed by the sudden jar caused by the locomotive removing the slack of the train, held that, in order to rebut contributory negligence, plaintiff might show that it was the custom of the company to transport its stock passengers on top of its train. Tibby *v.* Missouri Pac. R. Co., 82 Mo. 292.

2. Evidence of what was customary among stockmen as to going on the tops of cars was admissible, as tending to prove that deceased, who was killed by an overhanging snowshed, was simply in discharge of his duty, as indicated by a usage among stockmen known by railroad men, and not guilty of contributory negligence. Nelson *v.* Southern Pac. Co., 55 Pac. 364, 18 Utah 244.

3. Plaintiff, who was in charge of stock on a freight train, went forward while the train had stopped to examine his stock. The train started suddenly, and, finding that from its speed he could not board the caboose from the ground, he got upon the top of the train to walk back to the caboose, as it was customary for cattle men to do under the circumstances. He did not look towards the front of the train, and was struck by a bridge. Held, that evidence was admissible that it was customary for cattle men, under such circumstances, to walk on the top of the cars, and that the railroad company was aware of such custom, and acquiesced in it. Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 5 C. C. A. 551.

4. In an action for injuries to a passenger who boarded a train at a station where there ws no depot or agent, and was injured in closing the door of the baggage car, whither he had gone to make arrangements as to his baggage, testimony as to the custom and requirement of the railroad company that passengers having baggage put on at stations where there were no agents were required to go to the baggage coach to arrange about their baggage after boarding the train, and that the conductor had told witnesses to go to the baggage coach for that purpose, was admissible, the rigid rules as to proving the existence of general customs not being applicable to the situation. Creason *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 445.

5. Custom to cross from one car to another.—Auld *v.* Southern R. Co., 136 Ga. 266, 71 S. E. 426, 37 L. R. A., N. S., 518.

On a cold night plaintiff was a passenger on defendant's train. The car he was in was not properly heated. While it was in rapid motion, he attempted to pass from such car to one in front; and when on the platform he slipped, and fell to the ground. Held, that it was harmless error to exclude evidence that it was customary for passengers to pass over the platforms of the cars in going from one coach to the other, and that they habitually did so, where there was no contest on such point, and the court charged that plaintiff had the right to pass from one coach to another in quest of a warmer one, and that it was not an act in itself that showed negligence, but the conditions and circumstances that surrounded the act in itself that showed negligence, but the conditions and circumstances that surrounded the act would indicate its its character. Sickles *v.* Missouri, etc., R. Co., 13 Tex. Civ. App. 434, 35 S. W. 493.

Use of Running Board to Go from One Part of Car to Another.—Where plaintiff was injured while passing along the running board of a street car used to permit ingress and egress of passengers, evidence that the usual and ordinary use of the board was for passengers to go from one part of the car to another was admissible, since defendant's knowledge of the use of the board became material in determining the question of plaintiff's contributory negligence.[6]

Custom to Ride on Running Board of Street Car.—In an action for personal injuries inflicted while riding on the running board of a street car, it is proper to admit evidence tending to show that it was the custom for people to ride on the running board of the street car toward the sidewalk, and that the other running board was turned up, so that no one could stand on it.[7]

Usage Tending to Show Negligence of Passenger.—Evidence of a usage of a railroad company known to the injured passenger is admissible as bearing on the question whether he exercised due care for his own safety; as, for instance, where an engineer of defendant's train, on which plaintiff was a passenger, stopped his train, just after entering a station, to allow another train, discharging passengers, to move out, and then moved forward to the part of the station in which passengers were regularly discharged, and the plaintiff, who was accustomed to travel on the road, started to alight during the first stop, and was injured by the starting of the train without any warning; evidence of the usage of the road that one train should not enter a station while another was delivering passengers was competent on the questions whether the train was properly managed, and whether plaintiff, if she knew of such usage, used due care in alighting.[8] Evidence that the injured passenger had frequently used that part of railroad is evidence from which the jury may find that she knew of the usage. Hence, the evidence of the usage was rightly admitted.[9]

§ 2859. Habits or Customs of Injured Passenger.—The custom or habit of a passenger injured in boarding[10] or departing[11] from cars on other occasions, either before or after the injury, is not admissible for the purpose of illustrating his conduct at the time of the injury.[12] But when the point of fact to be determined is whether or not the passenger did a certain thing, or did it in a particular way, where the direct testimony as to the fact is conflicting, evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. Thus, in an action to recover for injuries received in alighting from a train, where it was in dispute whether plaintiff carelessly jumped from the train while it was in motion, the defendant carrier may show that, during the year preceding the accident, plaintiff had frequently traveled over the same route, had frequently jumped off the cars while in motion, and had been warned of the danger of doing so.[13]

6. Use of running board to go from one part of car to another.—Citizens' St. R. Co. *v.* Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

7. Custom to ride on running board of street car.—Chicago Union Tract. Co. *v.* Kallberg, 107 Ill. App. 90.

8. Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797.

9. Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797; O'Neill *v.* Lynn, etc., R. Co., 155 Mass. 371, 29 N. E. 630.

10. Habits or customs of injured passenger.—Where, in an action against a street railway company by a passenger for personal injuries, the defense is that plaintiff was guilty of contributory negligence in attempting to get upon the car while in motion, evidence that plaintiff was in the habit of jumping on cars while in motion is inadmissible. Eppendorf *v.* Brooklyn, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171.

11. Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41.

Where, in an action for injuries to a street car passenger, defendant claimed that she attempted to get on the car while in motion, evidence that plaintiff had been frequently seen to get off and on street cars while in motion was inadmissible. Lexington R. Co. *v.* Herring, 96 S. W. 558, 29 Ky. L. Rep. 794, rehearing denied in 97 S. W. 1127, 30 Ky. L. Rep. 269.

12. Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41.

13. Craven *v.* Central Pac. R. Co., 72 Cal. 345, 13 Pac. 878.

§ 2860. Character for Negligence or Prudence.—Evidence is not admissible that deceased was usually careful in getting on and off steam and street cars, where the only issue involved was whether the attempt of deceased to alight from defendant's railroad train while it was moving was an act done in the exercise of due care.[14]

§ 2861. Previous Experience in Traveling on Trains or Cars.—Evidence that the injured passenger had no previous experience in traveling on a train or in an electric car, is admissible, not for the purpose of affecting the measure of the carrier's diligence, but to enable the jury in looking at the facts and circumstances to classify the particular passenger, not alone by his age, but also by his experience, or the want of it, in handling himself, as a passenger on trains or electric cars. Familiarity with these modes of transportation will qualify him to see and appreciate danger which he would not be likely to observe if he was wholly without experience. With experience he might be charged with fault; without it, with none. Thus, the fact that a passenger had never before ridden upon an electric car is admissible in evidence, in an action against the company, to show the cause of his failure to alight from the car in safety.[15]

§ 2862. Injuries to Other Passengers.—In an action for injury from being thrown from a car by its coming to a sudden stop, by reason of a defective switch, while being run at a high rate of speed, evidence that other persons than plaintiff were thrown from the car and injured is admissible to overcome the claim of defendant that plaintiff's injuries were caused by his negligence in jumping from the car when in motion.[16]

§ 2863. Rules of Carrier and Violation Thereof.—Proof by Parol.—The rule of a railroad that no passenger shall stand on the platform while the cars are in motion may be shown by parol in an action for injuries received while violating such rule.[17]

As to Existence and Notice of Rules of Carrier.—In an action against a common carrier for personal injuries received by a passenger, rules of the defendant for the conduct of its employees, and notices placed in the cars making reasonable regulations for the safety of its passengers, are admissible in evidence where the defendant seeks to justify the conduct of its servant without showing to what extent either the rule or the notice was known to the plaintiff. It is only when it has attempted to charge a person with a liability created by a rule or notice that it is necessary to bring knowledge of it to him. But the fact that the plaintiff had ridden upon the defendant carrier's car is some evidence that he had knowledge of the notice.[18] In an action against a horse-car company for personal injuries received by a passenger while attempting to get upon the front platform of a car, where there is evidence tending to show that he was intoxicated at the time, a rule of the company directing its drivers to exclude intoxicated persons from the front platform under all circumstances, and a placard posted in the car, notifying all persons that they are forbidden to be on the front platform of the car, and that the company will not be responsible for their safety there, are admissible in evidence, even though it is not shown that the plaintiff had any knowledge of them.[19]

14. **Character for negligence or prudence.**—Eaton *v.* Boston, etc., Railroad, 67 N. H. 422, 40 Atl. 112.

15. **Previous experience in travelling on trains or cars.**—Augusta R. Co. *v.* Glover, 92 Ga. 132, 18 S. E. 406.

16. **Injuries to other passengers.**—Fogel *v.* San Francisco, etc., R. Co., 110 Cal. xvii, 42 Pac. 565.

17. **Proof by parol.**—Yonge *v.* Kinney, 28 Ga. 111.

18. **As to existence and notice of rules of carrier.**—O'Neill *v.* Lynn, etc., R. Co., 155 Mass. 371, 29 N. E. 630.

19. O'Neill *v.* Lynn, etc., R. Co., 155 Mass. 371, 29 N. E. 630.

Evidence That Existence of Rule Unknown and Not Enforced.—In an action by a passenger against a railroad company for injuries from a collision while the passenger was riding in the cupola of a freight train in violation of a rule of the company, evidence was admissible to show that no rule prohibiting passengers from riding in the cupola was known to the public generally, and that no such rule was enforced, but that the public generally occupied the cupolas in freight train cabooses at will, with the knowledge of trainmen and conductors.[20]

Violation of Rules against Riding on Platform.—Evidence that decedent, a passenger, was in the habit of riding on the platform of the car with knowledge that so riding was contrary to the carrier's rules and was on the platform at the time of the accident, which resulted from the carrier's negligence, was not admissible on the degree of culpability of decedent, since it had no bearing as to any physical circumstance to which the accident was in any part due, nor upon the degree of care due from the defendant.[21]

As to Putting Head or Arms Out of Car.—Where the plaintiff, in an action against a railway company for injuries, while traveling in a railroad car, permitted his hand to extend outside of the window, whereby his arm was broken in passing a bridge, the defendants might introduce evidence that printed notices were put up in the cars, warning passengers not to put their arms or heads out of the windows, and that their agent had warned a passenger sitting near the plaintiff, and within hearing, of the danger of doing so.[22]

Custom to Disregard Rule against Passengers Riding on Freight Trains.—It being alleged by plaintiff that the rule of defendant forbidding the carrying of passengers on its freight trains was habitually violated, and the evidence showing that the rule was promulgated several years before plaintiff's husband was killed while riding on a freight train, evidence of persons having so ridden at times varying from six months to three years previous to the accident is admissible.[23] But it was error to admit testimony of the custom of carrying passengers on such trains after the road was placed in charge of a receiver, since the company could not be held responsible for what the receiver may have permitted.[24]

§ 2864. Ordinances.—In an action against a street railway for injuries to a passenger caused by an electric shock which threw him from the car while he was preparing to disembark, the car being within a few feet of the crossing at which he expected to leave, and moving slowly, evidence of a city ordinance making it an offense for a passenger to jump off a moving street car is admissible.[25]

§§ 2865-2872. Evidence as to Specific Acts of Negligence—§ 2865. Acts Unconnected with Injury.—Evidence that plaintiff was seen to swing

20. Evidence that existence of rule unknown and not enforced.—Reed *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

21. Violation of rules against riding on platform.—Jones *v.* Boston, etc., R. Co., 205 Mass. 108, 90 N. E. 1152.

22. As to putting head or arms out of car.—Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533.

23. Custom to disregard rule against passengers riding on freight trains.—San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

24. San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

25. Ordinances.—Where plaintiff, a minor, was injured while alighting from a street car, and he claimed that he got off on the demand of the motorman, who testified that plaintiff and others entered the car without his permission, and that, on his stating to them that they must ride inside the car or get off, plaintiff jumped from the car, and was injured, as it was slowing up, evidence of a city ordinance making it a misdemeanor for any person other than an employee or officer of the railroad company to jump from a street car while in motion was admissible on the issue of plaintiff's contributory negligence. Judgment (Tex. Civ. App.), 79 S. W. 320, reversed in Dension, etc., R. Co. *v.* Carter, 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

from the car and tap on the window a short time before being thrown off the step is properly excluded, where the uncontradicted evidence showed that when thrown off he was not doing anything which could have contributed to the accident.[26]

§ 2866. Drunkenness.—In an action for injuries to a passenger, his condition of sobriety or drunkenness at the time of the alleged injury is a legitimate inquiry, but [27] the fact of intoxication can not be proved by hearsay or declarations of third persons,[28] and evidence of prior or habitual acts of drunkenness is inadmissible, on the question of his sobriety at the time of the alleged injury.[29]

§ 2867. Boarding Moving Train.—In an action by a passenger against a railroad company, for injuries alleged to have been caused by defendant's negligence in starting the train while plaintiff was getting upon it without giving him sufficient time for that purpose, where the answer alleges that plaintiff was negligent in getting upon the train when he did, evidence as to defendant's negligence in other respects than that alleged, and not tending directly to produce the injuries, is admissible if it tended to show that it was not negligent, under the circumstances, for plaintiff to board the train at the time and in the manner proved.[30] Thus, evidence that some officer or employee of the railway, having apparent authority, directed the passengers waiting at the station "to go to the hind cars and get aboard;" evidence that the car doors were locked until just before starting;[31] and that the passenger had repeatedly seen the gateman

26. Acts unconnected with injury.—South Covington, etc., R. Co. *v.* Hardy, 152 Ky. 374, 153 S. W. 474, 44 L. R. A., N. S., 32.

27. Drunkenness.—Houston, etc., R. Co. *v.* Waller, 56 Tex. 331, 8 Am. & Eng. R. Cas. 431; Southwestern R. Co. *v.* Hankerson, 61 Ga. 114; Herring *v.* Wilmington, etc., R. Co., 32 N. C. 402, 51 Am. Rep. 395; Cleveland, etc., R. Co. *v.* Sutherland, 19 O. St. 151; Alger *v.* Lowell (Mass.), 3 Allen 402; Cramer *v.* Burlington, 42 Iowa 315; Thorp *v.* Brookfield, 36 Conn. 320; Detchett *v.* Spuyten Duyvil, etc., R. Co., 5 Hun (N. Y.), 165; Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570; Gulf, etc., R. Co. *v.* Evansich, 61 Tex. 3; Gulf, etc., R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96.

In Wynn *v.* Allard (Pa.), 5 Watts & S. 524, the court said: "The evidence of intoxication ought to have been received; not because the legal consequences of a drunken man's acts are different from those of a sober man's acts, but because where the evidence of negligence is nearly balanced, the fact of drunkenness might turn the scale, inasmuch as a man partially bereft of his faculties would be less observant than if he were sober, and less regardful of the safety of others."

An action by passenger against a street railroad company was defended on the ground that plaintiff received her injuries while intoxicated, and on account thereof. It appeared that she was arraigned in court the next morning on the charge of intoxication, and the record showed a plea of guilty. She denied having pleaded guilty. The officer who escorted her to the court testified that she asked him to plead for her, which he did; but he was not permitted to testify as to the plea he made, nor to admissions made to him by plaintiff as to her condition the night before. Held, that the exclusion of the officer's testimony was error. Link *v.* Brooklyn Heights R. Co., 72 N. Y. S. 75, 64 App. Div. 406.

28. Hearsay evidence of drunkenness not admissible.—In Lake Erie, etc., R. Co. *v.* Zoffinger, 107 Ill. 199, 15 Am. & Eng. R. Cas. 371, the plaintiff had been struck by a moving train at a street crossing, the defence was that plaintiff was intoxicated, and the railroad company offered to prove that just before the accident, the plaintiff, in a saloon, called for a drink of liquor, and the barkeeper told him he had enough; the court rejected the offer. Held, that the evidence was properly refused, as the fact of plaintiff's intoxication could not be proved by the declaration of a third person.

29. Mason *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 151 S. W. 356.

30. Boarding moving train.—Curtis *v.* Detroit, etc., R. Co., 27 Wis. 158.

31. Where a passenger was injured while attempting to enter a railway train after a signal had been given to start it, evidence that the car doors were locked until just before starting was admissible as bearing on the question of due care on the part of the passenger in not attempting to enter the train sooner, and also on defendant's negligence in not having the doors opened sooner. Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

close the platform gates with which the train was equipped, before leaving the station,[32] is admissible in such actions.

§ 2868. Standing in Train.—Notification to Passenger as to Nature of Road and Character of Train.—In an action by a passenger against a railroad company for injuries caused by being thrown down by a violent jolt in switching while plaintiff was standing or walking in the aisle, evidence that plaintiff had been told that the train was composed of both freight and passenger cars, and that the road was rough, so that it was dangerous to walk in the aisle, was improperly excluded.[33]

§ 2869. Riding on Platform.—Violation of Rule against Riding on Platform.—See ante, "Rules of Carrier and Violation Thereof," § 2863.

§ 2870. Riding on Running Board.—In an action for wrongful death of one killed by being struck by a trolley pole while riding on the running board of an open car, defendant claiming that before deceased was struck he had ridden for some distance, and was chargeable with knowledge of the proximity of the pole that struck him, it was proper to show that the poles passed prior to the accident were placed at a safe distance.[34]

Custom.—See ante, "General Custom or Usage," § 2858.

Construction of Cars.—See post, "Construction and Equipment of Cars," § 2877.

§ 2871. Putting Heads or Arms Out of Car.—Violation of Rule against Putting Head and Arms Out of Car.—See ante, "Rules of Carrier and Violation Thereof," § 2863.

§ 2872. Alighting from Moving Train or Car.—In an action against a carrier for injuries to a passenger in alighting from a moving train or car, evidence showing his reasons for so doing;[35] evidence of the acts and conduct of the injured passengers in alighting;[36] evidence that other persons jumped off the same train at the same time;[37] evidence of a custom to alight from moving

32. Custom to close platform gates before train left.—Where a passenger was injured in attempting to board a moving train, which was equipped with gates leading to the platform, which were to be closed while the train was in motion, evidence that the passenger had repeatedly seen the gateman close the gates before leaving stations is admissible, with evidence that the gates were opened when he attempted to get on, as bearing on the character of his attempt to enter the train. Judgment (Tex. Civ. App.), 57 S. W. 291, reversed in Mills *v.* Missouri, etc., R. Co., 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

33. Notification to passenger as to nature of road and character of train.—Yazoo, etc., R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154.

34. Riding on running board.—Hesse *v.* Meriden, etc., Tramway Co., 75 Conn. 571, 54 Atl. 299.

35. Alighting from moving train or car.—Where plaintiff was charged with contributory negligence in alighting from a train in motion, his testimony that he thought it safe to attempt it, and that the platform was lighted and the place smooth, is admissible as showing his reasons for so doing. International, etc., R. Co. *v.* Satterwhite, 47 S. W. 41, 19 Tex. Civ. App. 170.

Alighting from train to avoid arrest—Knowledge of warrant.—Where, in an action for injuries to a passenger while in the act of alighting from defendant's train, there was no proof that she had knowledge of the existence of a warrant for her arrest, evidence that a deputy marshal held a warrant for plaintiff was inadmissible as bearing on defendant's contention that plaintiff undertook to get off the train before it reached the station to avoid arrest. St. Louis, etc., R. Co. *v.* Smith, 79 S. W. 340, 34 Tex. Civ. App. 612.

36. Acts and conduct in alighting.—Evidence that a passenger injured while getting off a street car while in slow motion hesitated before starting to get off, and that he failed to hold to the railings of the car, is admissible in an action against the company on the issue of plaintiff's contributory negligence. Root *v.* Des Moines City R. Co., 83 N. W. 904, 113 Iowa 675.

37. Fact that other persons jumped off train.—It was not error to admit evidence that other persons who had attended ladies on the train jumped off just before and in the presence of plain-

cars at the station in question;[38] evidence of an ordinance forbidding anyone except employees or officers of the carrier to jump from a moving street car;[39] and evidence that he knew that he could not recover if he got off the car while it was in motion,[40] is admissible.

§§ 2873-2880. Evidence Disproving or Excusing Contributory Negligence—§ 2873. Evidence of Absence of Negligence.—There is a class of cases in which due care may be inferred from the absence of negligence as well as from positive acts of diligence. Thus, the fact that the conductor, in collecting fares, failed to notice a passenger, is evidence that the latter was in a proper place, and conducting himself as a prudent passenger.[41] Otherwise, he would have been likely to attract the attention of the conductor, or of others on the train through whom the conductor would have received information of his conduct.[42]

§ 2874. Reason for Injured Person's Actions.—In an action for injuries to a passenger, evidence showing the reason for the injured person's conduct[43] and evidence tending to show grounds for the belief[44] upon which he professed to act are relevant. For instance, in an action for injuries caused a stockman, while standing in a detached caboose, by the train backing against it, testimony by him that he did not leave the caboose while the cars were being switched because he "did not see very well" and it was dark, and he did not feel safe in going out, is admissible.[45] And evidence that, after plaintiff, who was traveling with cattle, reached the car top, and was sitting down, the conductor sent for him to come to the caboose to sign a statement that the cattle were in good order at the end of defendant's line, which they were then nearing, is admissible, where plaintiff is injured in so doing, as having some bearing on the question of contributory negligence.[46]

§ 2875. Following Directions of Conductor or Trainmen.—Directions to Board Moving Train.—Where a passenger, injured in attempting to remount the car steps, alleges that he proceeded with ordinary care, evidence that he acted at the direction of the conductor is relevant to show such care.[47]

tiff, and that they were not injured, as tending to produce a conclusion in plaintiff's mind he too might jump with safety. Texas, etc., R. Co. *v.* Crockett, 66 S. W. 114, 27 Tex. Civ. App. 643.

38. Custom.—See ante, "General Custom or Usage," § 2858.

39. Ordinances.—Denison, etc., R. Co. *v.* Carter. 98 Tex. 196, 82 S. W. 782, 107 Am. St. Rep. 626.

40. Knowledge of effect of act on right of recovery.—In an action against a street railway company by a passenger for personal injuries received in alighting, plaintiff having testified on his own behalf in rebuttal, it was error to refuse to permit him on cross examination to answer a question as to whether he knew that, if he got off the car while it was in motion, he could not recover in the action. Grabenstein *v.* Metropolitan St. R. Co., 84 N. Y. S. 261.

41. Evidence as absence of negligence.—Copson *v.* New York, etc., R. Co., 171 Mass. 233, 50 N. E. 613.

42. Copson *v.* New York, etc., R. Co., 171 Mass. 233, 50 N. E. 613.

43. Reason for injured person's actions.—Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 38 S. W. 3, 18 Ky. L. Rep. 735.

Alighting from moving train.—See post, "Alighting from Moving Train or Car," § 2898.

44. In an action against a street railway for injuries sustained by plaintiff in attempting to alight from a car while it was in motion, in consequence of the motorman's failure to stop the car when signaled to do so, plaintiff offered evidence that before arriving at the point where he wished to alight he had a misunderstanding with the motorman, who also acted as conductor, as to the payment of plaintiff's fare, and that the motorman appeared angry. Plaintiff testified that when he got off the car had passed the point at which he wished to alight; that he got off because he thought the motorman would carry him still further. Held, that the evidence was relevant as tending to show ground for plaintiff's belief that the motorman would carry him further unless he got off at the time he did. Fuller *v.* Denison, etc., R. Co., 74 S. W. 940, 32 Tex. Civ. App. 399.

45. Louisville, etc., R. Co. *v.* Bell, 100 Ky. 203, 38 S. W. 3, 18 Ky. L. Rep. 735.

46. Missouri Pac. R. Co. *v.* Callahan (Tex.), 12 S. W. 833.

47. Directions to board moving train.—Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224.

The passenger's evidence that, as he attempted to remount the car steps, a voice, coming from a place where a moment before he had left the conductor alone, cried, "Hurry up! Get on there!" with the testimony of another witness that it was the conductor who spoke, is admissible.[48]

Alighting from Moving Train.—Where a passenger had been instructed and directed by an employee to leave a moving train, evidence that no one offered to stop the train, or cautioned him not to alight, was admissible on the question of contributory negligence.[49]

Res Gestæ.—See ante, "Res Gestæ," § 2856.

§ 2876. Failure to Warn Passenger of Danger.—In a death action against a street railway company, where the car from which decedent alighted on the side adjacent to a parallel attack, was not equipped with bars, and car upon parallel track caused his death, evidence that decedent was not warned by defendant's servants, as they saw him alight, of the dangers thereof, is admissible on the issue of decedent's care.[50]

§ 2877. Construction and Equipment of Car.—Where a passenger on a street car, who, while passing along the outside running board, was injured by being struck by a passing car, offered to show that the car which struck him was one of several new ones, which were of greater width than the other cars, and that on previous occasions he had been on the running board next to passing cars and had not been injured. The evidence was properly excluded, because it had no tendency to show that plaintiff did not assume the risk, or that he was in the exercise of due care.[51]

Street Cars Not Equipped with Bars.—In a death action against a street railway company, evidence that the car from which decedent had alighted on the side adjacent to a parallel track, a car upon which had caused his death, was not equipped with bars, is admissible on the issue of the decedent's care.[52]

§ 2878. Absence of Conductor.—Where it was claimed that plaintiff was negligent in standing at the front door of a street car, he had a right to show that there was no conductor on the car, as in that event there was no person but the driver to whom a passenger's inquiries could properly be addressed.[53]

§ 2879. Mode of Handling Trains at Point in Question.—The controversy being whether defendant's street-railway train, which ran over plaintiff's intestate as he attempted to board it, was moving slowly, as testified by plaintiff's witnesses, or rapidly, as testified by defendant's witnesses, plaintiff can not show that it was defendant's custom to stop its cars near the point of the

48. Chicago, etc., R. Co. *v.* Gore, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224.

49. Alighting from moving train.—Gulf, etc., R. Co. *v.* Shelton, 69 S. W. 653, 30 Tex. Civ. App. 72; S. C., 70 S. W. 359, affirmed in 72 S. W. 165, 96 Tex. 301.

Passengers directed to jump for their lives.—Where plaintiff jumped from a moving street car to avoid what he thought was an impending peril resulting from the explosion of the controller, evidence that the conductor told the passengers to "Jump for your lives" was admissible as bearing on the question whether, as a reasonable man, plaintiff was justified in jumping from the car. Waniorek *v.* United Railroads, 118 Pac. 947, 17 Cal. App. 121.

Passenger's act voluntary.—In an action to recover for injuries received by plaintiff, who alighted from defendant's train while it was in motion, evidence that the conductor told him to get off the train as quickly as possible, without attempting to stop the train for that purpose, but that in jumping off plaintiff acted voluntarily and without compulsion, was admissible as bearing on the question of plaintiff's negligence. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

50. Failure to warn passenger of danger.—Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902.

51. Construction and equipment of car.—Moody *v.* Springfield St. R. Co., 182 Mass. 158, 65 N. E. 29.

52. Street cars not equipped with bars.—Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902.

53. Absence of conductor.—Farrell *v.* Houston, etc., R. Co., 51 Hun 640, 4 N. Y. S. 597, 21 N. Y. St. Rep. 84.

accident to take on passengers; this not being competent to corroborate plaintiff's evidence, and furnishing no excuse for attempting to mount a rapidly moving street car.[54]

§ 2880. Similar Negligence of Other Persons.—In an action against a street car company for injuries to a passenger received in boarding a moving car, evidence of the mere fact that other persons boarded the defendant's cars at that point while in motion, is not admissible for the purpose of establishing a standard of ordinary care regardless of whether those persons were reasonably prudent or negligent in so doing. It is not competent to show as an excuse for an act of negligence that others are accustomed to be equally negligent; this is not evidence of a general custom of the public to get upon the cars in that way.[55]

§§ 2881-2904. Sufficiency of Evidence—§ 2881. In General.—In an action against a carrier for injuries to a passenger in which contributory negligence is relied on as a defense, the objection that there is no evidence to support a finding is not well taken, when there is evidence from which the jury may reasonably infer the necessary fact, nor is it any objection that more than one inference may be drawn from the testimony.[56]

Degree of Proof.—In an action by a passenger against a carrier for personal injuries, where the evidence on part of the plaintiff does not tend to establish contributory negligence on his part, the evidence of the defendant carrier must establish it by a preponderance of evidence.[57]

Testimony on Direct Contradicted on Cross-Examination.—One can not recover for a negligent injury where he is the only witness, and his testimony on cross-examination shows that his own negligence caused the accident, though his testimony given on direct examination would justify a recovery.[58]

Testimony of Plaintiff Conflicting with Previous Written Statement.—A verdict for plaintiff is not against the weight of evidence, where the issue was whether defendant's street car was in motion when plaintiff attempted to board it, and plaintiff testified that it was not, though his testimony was contradicted by that of the conductor and a passenger, and by a statement signed by plaintiff, made to a person employed by defendant to prepare the defense in its accident cases, who testified that he wrote the statement at plaintiff's dictation, and read it to him before he signed it, plaintiff testifying that he did not know what was put in the statement.[59]

Verdict of Successive Juries.—Although an appellate court is strongly impressed with the idea that plaintiff in an action against a carrier for personal injuries received while a passenger was negligent, it will not hold as a matter of law against the verdicts of two juries, and the opinion of the trial judges

54. Mode of handling trains at point in question.—West Chicago St. R. Co. *v.* Torpe, 187 Ill. 610, 58 N. E. 607.

55. Similar negligence of other persons.—Where, at the transfer station from defendant's electric line to their cable cars, the latter were started by the car barn cable, and were carried by their own momentum a distance of fifty feet, to where the down town cable was picked up, and the plaintiff, who had run after a car while it was moving slowly of its own momentum, and stepped on the platform, was thrown and injured by the sudden jerk occasioned by the picking up of the down town cable, evidence that passengers during the crowded travel of the morning hours were in the habit of running after the cars and jumping on them at that point was incompetent for the purpose of establishing a standard of ordinary care. Judgment 85 Ill. App. 316, affirmed in North Chicago St. R. Co. *v.* Kaspers, 57 N. E. 849, 186 Ill. 246.

56. Sufficiency of evidence.—Lenner *v.* Pittsburg R. Co., 223 Pa. 208, 72 Atl. 525, 16 Am. & Eng. Ann. Cas. 83.

57. Degree of proof.—Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898.

58. Testimony on direct contradicted on cross-examination.—Taylor *v.* Dry Dock, etc., R. Co., 9 N. Y. St. Rep. 498.

59. Testimony of plaintiff conflicting with previous written statement.—Pohle *v.* Second Ave. R. Co., 161 N. Y. 666, 57 N. E. 1122.

who presided at the respective trials in the court below. Plaintiff's contributory negligence must clearly appear to justify such a holding. Although not necessarily controlling, yet the fact that two successive juries have, under proper instruction as to the law, exonerated the plaintiff from the charge of contributory negligence, is entitled to some weight as tending to show that, at least, there is reasonable ground for a difference of opinion on the question.[60]

§§ 2882-2886. Entering Car or Conveyance—§ 2882. Disregarding Carrier's Provisions for Safety.—In an action against a carrier for injuries sustained while plaintiff was on his way to take a car, evidence that he disregarded the plans and arrangements made by the carrier for the safety of its passengers for his own convenience, is sufficient to show that he did not exercise due care for his own safety.[61]

§ 2883. Injury on or Near Station Platform.—In an action for injuries to a passenger on a platform having a hole in it, used while attempting to board a train, evidence from which it may be inferred that the passenger's heel became fastened in the hole in the platform or that stepping in the hole caused his foot to turn and lose his balance, thereby causing him to fall, is sufficient to support a finding of freedom from contributory negligence.[62]

§ 2884. Boarding Moving Train or Car.—Evidence of the act of a passenger in attempting to board a moving train or car is not of itself conclusive evidence of contributory negligence on his part.[63] In order to show contributory

60. Verdict of successive juries.—Buenemann *v.* St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379.

Plaintiff, being about to enter defendant's passenger train at night, the platform at which the train had stopped to receive passengers being only imperfectly lighted, preferring to ride in the rear car of the train, and thinking there might be one behind the car which stood opposite the waiting room, walked towards the rear to see if there was another car, and, seeing that there was none, was in the act of turning around, when he fell off the platform upon the ground, and was injured. Held, that contributory negligence on his part was not so clearly shown as to justify the court in holding him guilty thereof, as a matter of law, against the verdicts of two juries at successive trials and the opinion of the trial judge, who refused to set aside the last verdict. Buenemann *v.* St. Paul, etc., R. Co., 32 Minn. 390, 20 N. W. 379.

61. Disregarding carrier's provisions for safety.—In an action against a carrier for injuries sustained while plaintiff was on his way to take a car, evidence showing that he started to take a car which was about 150 feet away from the lighted platform intended for passengers, that he did this on a dark night, passing over a course which was not lighted and with which he was not familiar, that he did not look to see where he was stepping, that he knew he was not regarding the plans and arrangements made for the accommodation of passengers, and with no other purpose than to relieve himself from the inconvenience attendant upon the presence of a large number of other passengers; is sufficient to show that he was guilty of contributory negligence. Boden *v.* Boston Elev. R. Co., 205 Mass. 504, 91 N. E. 879.

62. Injury on or near station platform.—Arkansas Mid. R. Co. *v.* Robinson, 96 Ark. 32, 130 S. W. 536.

It was undisputed that there was a hole in the platform at the place where the injured passenger began to fall. A witness testified that he was looking at him as he walked along; that, as he placed his right foot on the top step, he began to fall with a curious kind of twisting move; that at the time his left foot was on the platform, and that there was a hole in the platform there. Other evidence shows that the hole was sufficiently large for the heel of his shoe to have become caught, or to have turned in it, that his foot was nine inches long, and that the top step extended only eight inches out beyond the platform, and was only three and a half or four inches below it. Under these facts and circumstances, reasonable men might have inferred that his left heel became fastened in the hole in the platform, or that stepping in the hole caused his foot to turn as he was in the act of stepping off of the platform; that the movement of his body being forward and downward, when his foot got caught or turned, caused the "curious twisting" movement described by the witness, and that the swaying of his body caused him to lose his balance and to fall headlong to the bottom of the steps. Arkansas Mid. R. Co. *v.* Robinson, 96 Ark. 32, 130 S. W. 536, 537.

63. Boarding moving train or car.—Gannon *v.* Chicago, etc., R. Co., 141 Iowa 37, 117 N. W. 966, 23 L. R. A., N. S., 1061.

That a passenger attempted to board a

negligence as a matter of law, evidence of the injured passenger's attempt to board a moving car must be accompanied by proof of special circumstances, such as the party's infirmity,[64] or being incumbered with articles;[65] the icy condition of the platform,[66] or the speed of the train,[67] as where the overwhelming weight of the evidence shows that plaintiff ran after and attempted to board a rapidly moving car,[68] a car moving around a curve,[69] or a car which had slowed down partially for a crossing.[70]

Sudden Jerks and Increase of Speed of Conveyance.—In an action against a carrier to recover for personal injuries to a passenger received in boarding a car or other conveyance, contributory negligence on part of the passenger is established by evidence showing that the injury resulted from the cars being started with a sudden jerk,[71] or a sudden increase of its speed,[72]

street car, which he had signaled to stop, while it was moving slowly, was not negligence per se. Nilson *v.* Oakland Tract. Co., 101 Pac. 413, 10 Cal. App. 103.

Attempt to reboard train.—Evidence that a passenger who after alighting from the train during a temporary stop attempted to reboard the train while it was in motion, is insufficient to show such contributory negligence on part of the injured passenger as warrants the taking of the case from the jury. Gannon *v.* Chicago, etc., R. Co., 141 Iowa 37, 117 N. W. 966, 23 L. R. A., N. S., 1061.

64. Infirmity of passenger.—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

65. Passenger incumbered with parcels.—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

66. Icy condition of platform.—Evidence showing that the injuries to a passenger resulted through slipping on an icy station platform while attempting to catch a moving train, is sufficient to show that the passenger was guilty of contributory negligence. Kemp *v.* New York, etc., R. Co., 119 N. Y. S. 845, 135 App. Div. 773.

67. Speed of train.—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

68. Running after and attempting to board car.—In an action against a street railroad company, plaintiff testified that when the car stopped to take on passengers he attempted to get on, but the car suddenly started without a signal, and threw him to the ground. Plaintiff's only other witness as to the accident was a boy sixteen years old, who testified to numerous details, which seemed improbable for him to have remembered, the accident having occurred a year before the trial. Five witnesses for defendant, who were passengers on the car at the time of the accident, testified that plaintiff ran after the car and attempted to board it when in rapid motion. Held, that a verdict for plaintiff could not be sustained. Chicago City R. Co. *v.* Delcourt, 33 Ill. App. 430.

69. Car moving around curve.—In an action against a street railway company for injuries received in boarding a car, where the evidence of all the witnesses except that of the plaintiff was that he was injured in attempting to get on the car while moving around a curve, a verdict for plaintiff was set aside as against the weight of the evidence. Wolf *v.* Metropolitan St. R. Co., 81 N. Y. S. 257, 82 App. Div. 629.

70. Car slowed down for crossing.—Plaintiff testified that he signaled defendant's car to stop, and, though he did not see the driver look at him, the car slowed down nearly to a standstill, so that he took hold of a handle, put his foot on the step, and attempted to board it, but that just as he did so the conductor gave two short blasts of his whistle, as a signal to go ahead, and the car started with a jerk, throwing him on the track, so that the car ran over his leg. Six witnesses for defendant, four of whom were disinterested, testified that the car only slowed down partially for a crossing; that plaintiff tried to board the car while it was moving, and approached it from a point back of the car, out of the range of vision of the driver; and that the conductor did not give the signal to go ahead, but blew one blast, to stop the car, when he saw plaintiff fall. Held to show, as a matter of law, that plaintiff's injury resulted from his own negligence, so that the complaint was properly dismissed at the close of the evidence. Ebling *v.* Second Ave. R. Co., 69 N. Y. S. 1102, 60 App. Div. 616.

71. Evidence showing that a passenger attempted to board a standing street car in sight of the conductor, but that before he got fairly aboard, as soon as he had put his foot on the second step, the conductor signaled to start and the car started with a sudden, violent jerk which threw him, although he had his hands on the handle of the door, is sufficient to justify a finding that the passenger, in boarding the car, was in the exercise of due care. McCarthy *v.* Boston Elev. R. Co., 208 Mass. 512, 94 N. E. 749.

Where the evidence on the part of plaintiff tended to show that defendant's

72. Howard *v.* Forty Second St., etc., R. Co., 110 N. Y. S. 125, 125 App. Div. 776.

when such passenger was in the act of boarding or entering the car, etc., in accordance with the instructions or directions of the conductor or driver.[73] Thus, evidence that a woman with a child in her care boarded a street car, and while she was still standing, facing partly forward and partly sideways, and helping the child to move over from the end of the seat, the car, which was standing at the beginning of the curve, started with a sudden jerk, causing her to fall, was sufficient to warrant a finding that she was in the exercise of due care.[74]

§ 2885. Injury by Automatic Car Doors.—Evidence showing that the injury to a passenger by being struck by the automatic door of the street car, resulted from him attempting to enter a car which he knew was liable to be closed at a given signal, by a man standing where he could not see him in time to warn him after it had begun to close, without paying any attention to whether the signal had been given or to noticing whether the door had begun to close before he began to step on the car, is sufficient to show contributory negligence, precluding a recovery.[75]

§ 2886. Elevators.—Evidence that the injured passenger's injuries were caused by his stepping into a moving elevator, with other circumstances, is sufficient to show contributory negligence.[76]

car, as it approached a crossing, was brought nearly or quite to a stop, to allow plaintiff's intestate to step aboard; that, after he had partially entered, the car, without any notice to him, was suddenly started with a jerk, throwing him to the ground, causing the injuries complained of, it was not error to refuse to dismiss. Wallace *v.* Third Ave. R. Co., 55 N. Y. S. 132, 36 App. Div. 57.

In an action for injuries sustained while attempting to enter a street car, after having signaled the driver to stop, plaintiff and some of his witnesses testified that the car had stopped, but started suddenly, as he was mounting the platform, and threw him down. Other witnesses for plaintiff testified that the car had not stopped, but had slackened its speed so that a person could enter it without risk. Defendant's witnesses testified that the car was moving at its usual speed when plaintiff attempted to enter it. The court charged that, if the car had not stopped when the plaintiff attempted to enter it, the verdict must be for defendant. Held, that a verdict for plaintiff would not be disturbed on appeal. Seitz *v.* Dry-Dock, etc., R. Co., 10 N. Y. S. 1, 16 Daly 264, 32 N. Y. St. Rep. 56.

73. In an action for injuries sustained attempting to board one of defendant's street cars, plaintiff's testimony showed that, as the car approached with the horses in a trot, he signaled twice to stop; that, when near to him, they had slowed up to a walk, and, as he placed foot on the step, by direction of the conductor, the horses were suddenly started, throwing plaintiff to the ground. The conductor testified that he warned plaintiff against attempting to board the car at that place. The question of negligence was referred to the jury under proper instructions, and they found for plaintiff. Held, that the verdict would not be set aside on appeal. Butler *v.* Glens Falls, etc., St. R. Co., 49 Hun 610, 2 N. Y. S. 72, 17 N. Y. St. Rep. 565, affirmed in 121 N. Y. 112, 24 N. E. 187.

74. Hamilton *v.* Boston, etc., St. R. Co., 193 Mass. 324, 79 N. E. 734.

75. Injury by automatic car doors.—Bentson *v.* Boston Elev. R. Co., 202 Mass. 377, 88 N. E. 437.

76. Elevators.—The fifth floor of defendant's building, where the elevator passed, was cut away too much, and to prevent passengers from stepping into the space between the elevator and the floor an iron plate was attached to the floor, thus closing the space when the elevator was flush with the floor, but not when it was a few inches lower. Plaintiff was injured while leaving the elevator on the fifth floor, the heel of her shoe being wrenched off and the shoe otherwise torn, and her foot being badly bruised on top, and when found, immediately after the accident, she was lying on the floor immediately in front of the elevator door. Plaintiff's testimony, which was her only evidence as to how the accident occurred, tended to show that the elevator stopped and the boy opened the door, but that when she started out the elevator moved upward, catching her foot, and that then by her direction the elevator was moved down again, releasing her foot, and she fell, she thought, inside the elevator. Held, that in view of plaintiff being seventy years old, of her position being almost over the open space in which her foot was caught, and of her testimony that she did not suppose the elevator was moving when she started to get out, the evidence did not show any contributory negligence. Bullock *v.* Butler Exch. Co., 52 Atl. 122, 24 R. I. 50.

§§ 2887-2895. In Transit—§ 2887. Knowledge of Dangerous Position.—In an action against a carrier for personal injury to a passenger, evidence showing conclusively that he was of such discretion that he realized the danger of his act, makes him subject to the charges of contributory negligence. Thus, evidence that plaintiff was a bright, smart boy, over 16 years of age, had attended school seven years, was familiar with trains and had ridden in freight cars before, and the further fact that on the occasion of his injury when he got on top of the box car he took the precaution to brace his feet against the handhold and to grasp the running board with his hands, held sufficient, to show knowledge of the danger of riding thus and of falling asleep in that position, and to justify the court in refusing to submit to the jury the question of his knowledge and realization of his danger.[77]

§ 2888. Riding on Freight Train.—In an action by a passenger on a freight train for personal injury, undisputed or conclusive evidence that plaintiff, without necessity, left the passenger car and rode on top of the caboose.[78] or that he unnecessarily stepped up in the caboose while switching was being done,[79] is sufficient to show contributory negligence on his part. But evidence that plaintiff was injured by coming in collision with a switch engine while changing trains, [80] or that an engine struck caboose on which plaintiff was riding while it was standing still and injured him,[81] is not sufficient to show contributory negligence or shift the burden of proof to the plaintiff to remove suspicion of his own negligence.

77. **Knowledge of dangerous position.**—Cockrell *v.* Texas, etc., R. Co., 36 Tex. Civ. App. 559, 82 S. W. 529.

78. **Riding on top of caboose.**—In an action for the death of a passenger while riding on a caboose car, evidence held to show that decedent's negligence contributed as a proximate cause to his death, so as to bar a recovery. McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 1071, 81 S. C. 100, 18 L. R. A., N. S., 763.

79. **Stepping while switching being done.**—A freight train, in the caboose of which plaintiff was a passenger, having stopped to do some switching, plaintiff, without necessity, left his seat, where he would have been safe, and walked to the door, when he was knocked off his feet by a jolt caused by the making of a coupling, and was injured. The evidence showed that, when such couplings were being made, jolts, such as might throw persons standing in the caboose off their feet, might be looked for, and that a warning of this danger, in large, glaring letters, was posted on the wall of the caboose, and that the plaintiff was in the habit of riding in the caboose. Held that, both from his having ridden before in the caboose, and from the posting of the notice, plaintiff must be presumed to have known of the danger, and that, even though the coupling was negligently made, yet plaintiff can not recover, because his act in standing up was one of the proximate causes of the accident, and was negligent, constituting contributory negligence. Shamblin *v.* New Orleans, etc., R. Co., 114 La. 467, 38 So. 421.

80. **Collision with switch engine while changing trains.**—In an action for damages for negligence against a railway company for personal injury to a shipper of stock, riding in a freight train, by coming in collision with a moving switch engine in the yards of the defendant company, it is made to appear that the train on which the plaintiff was being carried came into the defendant freight yards about midnight, and that he was required to change way cars before proceeding further on his journey. The way car on which he had been riding was left about thirty car lengths from the place where he was required to take another one. To reach the other way car, the plaintiff and other passengers were required to walk the length of the train between the track on which it stood and another track eight feet distant. The distance between cars or engines on these two adjacent tracks was four feet. While walking along the train and toward its head, where the other way car was supposed to be, a switch engine passed the plaintiff on the adjacent track, going in an opposite direction; and about the time he reached the head of the train, on his way to the other way car, the same switch engine returning, and moving in the same direction, overtook and struck him, inflicting an injury which is sought to be compensated in damages. Evidence held insufficient to show plaintiff guilty of contributory negligence, precluding recovery. Judgment, 70 Neb. 287, 97 N. W. 308, affirmed in Chicago, etc., R. Co. *v.* Troyer, 70 Neb. 293, 103 N. W. 680.

81. Herring *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977, writ of error dismissed in 102 Tex. 100, 113 S. W. 521.

Derailment Exploding Powder Car—Assumption of Risk.—In an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite exploded thereby, evidence that he expressly agreed to assume the risk of riding on the flat car and a conflict of testimony as to whether his attention was called to the powder car and whether he also said he would take the risk from it, is sufficient to show that the passenger assumed the risk of falling off the flat car on which he was riding, but did not assume the risk arising from the car loaded with dynamite.[82]

§ 2889. Riding on Crowded Street Car.—That one rides on a crowded street car, on the invitation of the company, is not negligence per se.[83]

§ 2890. Riding on Platform of Train.—In an action against a carrier by a passenger for personal injuries, evidence showing that the injuries resulted from the plaintiff's unnecessarily taking a position upon the platform of the car upon which he was riding as a passenger,[84] is sufficient to show that plaintiff was guilty of contributory negligence precluding a recovery.

Effort to Find Standing Room Inside.—Undisputed evidence, in action for injuries to a passenger while riding on platform of car, that the conductor warned the injured passenger of the danger of standing on the platform and ordered him to go inside the car and that he wholly disregarded the warning does not warrant a finding that plaintiff made proper effort to find standing room inside.[85]

§ 2891. Riding on Platform Steps or Running Board of Street Car.—Standing upon the platform or step of a traction street car when it is in motion is not prima facie evidence of negligence.[86] Certainly not, where there is conflicting evidence as to whether there was standing room in the car.[87] Thus, the evidence was held to sustain a finding that the passenger was free from contributory negligence when his injury, while riding on the steps or platform of a street car, was caused by striking a trolly pole at the side of the track,[88]

82. Derailment exploding powder car—Assumption of risk.—Roberts *v.* Sierra R. Co., 14 Cal. App. 180, 111 Pac. 519, rehearing denied in 111 Pac. 527.

83. Riding on crowded street car.—Lobner *v.* Metropolitan St. R. Co., 79 Kan. 811, 101 Pac. 463, 21 L. R. A., N. S., 972.

84. Riding on platform of train.—Southern R. Co. *v.* Strickland, 130 Ga. 779, 61 S. E. 826; Sterling, etc., R. Co. *v.* Wise, 128 Ill. App. 632.

85. Effort to find standing room inside.—Rolette *v.* Great Northern R. Co., 91 Minn. 16, 97 N. W. 431.

86. Riding on platform steps or running board of street car.—Wendling *v.* Chicago City R. Co., 170 Ill. App. 374.

One who rides on the platform of a crowded street car on the invitation of the company, is not negligence per se. Lobner *v.* Metropolitan St. R. Co., 79 Kan. 811, 101 Pac. 463, 21 L. R. A., N. S., 972.

87. Where a passenger was standing on the platform of defendant's car at the time when the car was derailed, and he was killed, the finding in his favor will not be disturbed where there was conflicting testimony on the issues as to whether or not there was standing room within the car, as to whether or not the employees had requested the deceased to go inside, and as to whether or not such passenger had knowledge of the rules of the company against passengers standing on the platform. Cincinnati, etc., St. R. Co. *v.* Lohe, 27 O. C. C. 138.

88. Striking trolley pole.—In an action for injuries to a trolley car passenger standing on a step within the vestibule, caused by his being forced outward by the crowd on the car and by the swinging motion of the car so as to collide with a trolley pole at the side of the track, evidence in substance that when he stepped onto the lower step of the platform he had no intention of riding on such step, or of riding at all unless he could get in a safe place on the car, that the car started immediately after he got on the step, and that he was obliged either to ride in this position or jump off the moving car; that he grasped the stanchions on either side of the steps and was struck before the car came to a stop and before he had any opportunity to get off, and that plaintiff was seventy-five years of age justifies a finding of freedom from contributory negligence. Tolleman *v.* Sheboygan, etc., R. Co., 148 Wis. 197, 134 N. W. 406.

and by being thrown from the platform by the swaying or jar of the car[89] while rounding a curve;[90] on the other hand, the testimony has been held to show contributory negligence where the injury was caused by plaintiff's being knocked from the platform of the car by the handlebar of another.[91] And the fact that the passenger was thrown from the front platform by a sudden jolt of the car does not show freedom from contributory negligence under the New York rule.[92]

Knowledge of Rule as to Riding on Front Platform.—Where a passenger knew that on certain cars of a street railway company there was a notice stating that passengers choosing to ride on the front platform did so at their own risk, it was not necessary for the company, in order to defeat an action by the passenger for injuries received while alighting from the front platform of a car, to prove that he also had seen such notice on the particular car on which he was riding.[93]

Riding on Running Step or Running Board of Street Car.—Evidence that an injured passenger was riding on the running board of a street car does not, of itself, show lack of due care, as a matter of law; and the rule is the same whether the car is a horse car, or an electric car. Whether or not the car is crowded is perhaps the most important consideration in determining the question of the passenger's due care. Where the car is crowded, and the passenger rides on the running board without objection from those in charge of the car, he is held not to be guilty of lack of due care, as a matter of law, while, if there is plenty of room inside, he assumes all the risks arising from the po-

89. Passenger thrown to ground by swaying of car.—At the trial of an action against a street railway company under St. 1886, c. 140, to recover for the death of the plaintiff's intestate by reason of the gross negligence or carelessness of its servants or agents, with a count at common law to recover for the injury and conscious suffering of the intestate, it appeared that the plaintiff's intestate was standing on the rear platform of a short car of the defendant; that there were no gates on the car; that, as the car was passing from a turnout to the main track at a rate of speed of from three and a half to four miles an hour, there was a swaying or jar, and the plaintiff's intestate fell or was thrown from the car, was found unconscious beside the track and died within twenty-four hours. Held, that the evidence would not justify a finding that the accident was due to negligence of the defendant or of its servants. Byron *v.* Lynn, etc., R. Co., 177 Mass. 303, 58 N. E. 1015.

90. Thrown from car while rounding curve.—Evidence in effect that plaintiff boarded an over crowded street car, stood on platform and held to the railing, at the window, that as he was paying his fare the car rounded a curve, gave a twist and then threw him off, and that the car was running about five miles per hour; is sufficient to sustain a finding that plaintiff, when thrown from a car as it was rounding a curve in the track, was not guilty of contributory negligence. Zimmer *v.* Fox River Valley, etc., R. Co. 95 N. W. 957, 118 Wis. 614.

91. Knocked from car by handlebar of passing car.—In an action against a street car company for injuries to plaintiff by being knocked off a street car by being struck by the handlebar on another car while he was riding on the steps, evidence not showing any particular defect or loose rail at the place at the time of accident, but showing the crooked condition of the track at other times when excavations were made to repair or relay the rails, where some of the passengers did not notice any swaying or rocking motion such as would be caused by a defect in the track, and others stated that there was none, but merely the jerk caused by plaintiff coming in contact with the other car; is sufficient to support a finding that there was no risk to plaintiff due to a defective rail, or the swaying of the car from such cause. Morgan *v.* Los Angeles Pac. Co., 13 Cal. App. 12, 108 Pac. 735.

92. Where, in an action for death of a street car passenger by being thrown from the front platform of the car by a sudden jolt thereof, there was no evidence describing the manner in which deceased was standing with reference to bracing himself, nor whether he had hold of any part of the car just prior to the accident, nor any facts from which the jury could have inferred that deceased was taking any precaution whatever to guard against losing his balance, plaintiff failed to establish that deceased was not guilty of contributory negligence. Depew *v.* New York City R. Co., 98 N. Y. S. 276, 112 App. Div. 260.

93. Knowledge of rule as to riding on front platform.—McDonough *v.* Boston, etc., R. Co., 191 Mass. 509, 78 N. E. 141.

sition which he chooses to take, and in any event a passenger riding on the running board assumes the risk of the ordinary perils incident to the position.[94] There are many instances where the passenger has been held guilty of contributory negligence; as where the passenger was struck by a trolley post,[95] where a number of other persons similarly situated were not injured,[96] where the passenger did not keep his body within the lines of the car,[97] and where he let go of the railing.[98] But the fact that a passenger was struck by a pillar in the street while he was on the running board[99] is insufficient to show freedom from contributory negligence under the New York doctrine.

§ 2892. Putting Head or Arms Out of Car.—A passenger who seated himself sideways on a seat running lengthwise with the car, facing toward the front, and rested his arm on the window sill, extending it over the sill and placing his fingers around its edge, and whose hand was caught by a car passing on an adjoining track, was not as a matter of law guilty of contributory negligence, though if he had been sitting with his back to the window, as the seat was designed, or if he had kept his hand and arm inside the window, the accident would not have happened.[1] Where the evidence showed that, at the time of an injury to the arm of a street-car passenger by another car passing on a switch, he was sitting beside an open window, reading, with his elbow resting on the sill, without reason to suppose that the cars would be run so close to each other, and the only circumstance showing want of car on his part was that his elbow might have extended not more than three inches beyond the sill, such evidence was sufficient to justify a finding that such passenger was using reasonable care at the time of the accident.[2]

Leaning Out of Open Car on Side Next to Poles.—In an action by a passenger on an open electric car to recover for injuries received by contact with a pole supporting the electric wires, evidence that the injured passenger arose from his seat, put his head and a portion of his body outside the car over the

94. Riding on running board of street car.—Bridges *v.* Jackson Elect. R., etc., Co., 86 Miss. 584, 38 So. 788.

95. Stricking trolley post.—In an action against a street railway for injuries to a passenger through being struck, while standing on the running board of defendant's car, by a trolley post, undisputed evidence that there was plenty of room inside, that plaintiff voluntarily took a position on the running board and remained there until the car was running rapidly and he endeavored to return to his seat by the running board instead of the aisle which would have been safe and convenient and that he knew the posts were there; is sufficient to show contributory negligence on plaintiff's part. Bridges *v.* Jackson Elect. R., etc., Co., 38 So. 788, 86 Miss. 584.

96. Number of others on board not injured.—Where one riding on a running step of a street car is knocked from the car by an electric light pole, and all the other persons on the step near the plaintiff had passed poles equally as near without injury, he must have been guilty of some negligence, by leaning back into the darkness, either to jump off or for some other cause, so as to bar recovery. Gilly *v.* New Orleans, etc., R. Co., 21 So. 850, 49 La. Ann. 588.

97. Failure to keep body within lines of car.—In an action against a street railroad company for injuries to a passenger who came in contact with a vehicle while he was standing on the running board of defendant's car, evidence showing that the injured passenger failed to keep a lookout in front and swing his body farther out from the stanchion than was compatible with safety instead of keeping his body within the lines of the car; is sufficient to support a finding that plaintiff was guilty of contributory negligence. Fraser *v.* California St. Cable R. Co., 81 Pac. 29, 146 Cal. 714.

98. Letting go hold on rails.—Evidence showing that the accident resulted from plaintiff's voluntary act in letting go his hold on the rails of the street car. Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46.

99. Evidence in an action for injury to a passenger on a street car, struck by a pillar in the street just after he had got on the car and while he was on the running board, held insufficient to show an absence of contributory negligence. Cusick *v.* Interurban St. R. Co., 86 N. Y. S. 758.

1. Putting head or arms out of car.—Pell *v.* Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542, affirming judgment in 142 Ill. App. 362.

2. Judgment, 65 N. Y. S. 989, 53 App. Div. 571, affirmed in Tucker *v.* Buffalo R. Co., 169 N. Y. 589, 62 N. E. 1101.

guard rail on the side next to the poles, to speak to an acquaintance, is conclusive on plaintiff's contributory negligence.[3]

Protection of Arm.—On a question whether plaintiff voluntarily put his arm out of the car window, or whether it was cast out by a lurch of the train, and came in contact with a bridge through which the car was passing, it appeared that the rail on plaintiff's side was one-half inch lower than the other, that neither the plaintiff nor the other passengers were moved from their seats by the lurch complained of, that plaintiff immediately after the injury said that he got his arm hurt by putting it out of the car window, and that the top of the car did not touch the bridge, as it must have done in case of a violent lurch, it was held, insufficient to show involuntary projection of plaintiff's arm from the window, and that the verdict in his favor must be set aside.[4]

Resting Arm on Window Sill of Street Car.—Evidence that a passenger on board a street car rests his arm on the sill of a window is not conclusive of the question of contributory negligence.[5] But in an action against a street railway company where plaintiff claimed that his arm was resting on a window sill, and through a collision with a passing wagon it was jarred outside of the car and there injured, evidence that the car lightly glazed the dashboard of the wagon and that there was only a slight scratch or mark on it and none on the car and that it was not disturbed in its position, is insufficient to show that plaintiff's arm was not outside the car when the collision occurred.[6]

§ 2893. Burning Out of Fuse.—Evidence in an action for death of a passenger on an electric car, occasioned by the burning out of the fuse in the fuse box situated above the floor, accompanied by a loud explosion and a flame streaming above the floor, whereupon the passenger jumped to the opposite side of the car to avoid the flame, and stepped or fell off, is sufficient to authorize a finding that death was not caused by contributory negligence of the passenger.[7]

§ 2894. Passenger Driving Stage Coach.—That a passenger was driving a stage coach while the driver, who was intoxicated, slept is not evidence of contributory negligence.[8]

§ 2895. Crossing in Front of Moving Train to Reboard Train on Side Track.—Evidence showing conclusively that a passenger, in attempting to reboard a train on a side track from which he had alighted for a purpose of his own, paused in front of a rapidly moving train on the main track, is sufficient to show contributory negligence.[9]

3. **Leaning out of open car on side next to poles.**—Wichita R., etc., Co. *v.* Cummings, 72 Kan. 694, 84 Pac. 121.

4. **Projection of arm.**—Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91.

5. **Resting arm on window still of street car.**—Lange *v.* Metropolitan St. R. Co. (Mo. App.), 132 S. W. 31.

6. Lange *v.* Metropolitan St. R. Co. (Mo. App.), 132 S. W. 31.

7. **Burning out of fuse.**—Lord *v.* Manchester St. Railway, 74 N. H. 295, 67 Atl. 639.

8. **Passenger driving stage coach.**—Plaintiff, a passenger on a stage coach, testified that, the driver falling asleep, plaintiff took the lines, and, on the driver's waking up, the latter took them, and shortly after the coach upset. The driver testified that he had no recollection of the coach upsetting, but, if it did, it was while plaintiff was driving, and that on waking up, plaintiff had told him they had upset. He further testified that he did not think it possible for the coach to upset without his knowing it, and he admitted he was driving at the place where plaintiff claimed the accident occurred. Held, that there was no evidence of contributory negligence of plaintiff. Schafer *v.* Gilmer, 13 Nev. 330.

9. **Crossing in front of moving train to reboard train on side track.**—A fast through train on defendant's road was side tracked at a small way station to allow another through train to pass. Some fifteen minutes later plaintiff's intestate left a car of the standing train in which he was a passenger, and crossed diagonally the main track upon which the other train was approaching, at a time and in such direction that he could see the incoming train. He hurriedly went to a

§§ 2896-2901. Leaving Conveyance—§ 2896. In General.—Inability of Passenger to Describe Actions.—That a passenger could not describe her action in leaving the car on which she was injured does not show that she did not exercise due care in so doing.[10]

§ 2897. Falling.—Falling in Attempt to Alight.—Where the evidence showed a rapidly moving car, and that plaintiff was seen pushing his way through the car and out on the platform, and the next instant was found lying on the street, an inference that he fell in attempting to alight is sustained.[11]

Falling in Vestibule of Car—Sand Plunger Projecting Too Far Above Floor.—In a street car passenger's action for injuries by falling by her dress catching on the sand plunger in the vestibule, projecting above the floor, evidence that the plunger projected farther above the floor than usual from which it could be inferred that the pin was bent or worn, is sufficient to sustain a finding that plaintiff was not guilty of contributory negligence.[12]

Steps of Car Slippery.—Where in an action against a street railway company for injuries sustained in alighting from a street car by reason of the slippery condition of the steps, occasionel by a storm of snow and sleet, plaintiff testified that she knew that she had to look out for herself, because it was slippery, and so held the handle of the car dasher; the jury was warranted in finding that she knew that the step was slippery and exercised due care in view of that knowledge.[13]

§ 2898. Alighting from Moving Train or Car.—Unless the train is moving very slowly, and the circumstances are especially favorable, alighting from it while it is in motion is prima facie negligence.[14] Thus in an action against a street car company for injuries, where defendant's evidence clearly shows that plaintiff received his injuries in attempting to alight from a moving car, and plaintiff's case rests on his unsupported testimony, partially contradicted by his own witnesses and by the circumstances of the case,[15] or by the testimony of apparently disinterested witnesses,[16] a verdict in his favor can not be sustained, especially where the plaintiff had made declarations to the effect that he jumped

pump some ten steps from where he crossed the main track, hurriedly procurred a drink, and ran back toward his car, attempted to pass in front of the rapidly moving train on the main track, and was struck by the engine and killed. Held, that deceased was guilty of such negligence as to preclude a recovery. Sattler *v.* Chicago, etc., R. Co., 71 Neb. 213, 98 N. W. 663.

10. Inability of passenger to describe actions.—Beattie *v.* Boston Elev. R. Co., 201 Mass. 3, 86 N. E. 920.

11. Falling in attempt to alight.—Lehner *v.* Pittsburg R. Co., 223 Pa. 208, 72 Atl. 525, 16 Am. & Eng. Ann. Cas. 83.

12. Falling in vestibule of car—Sand-plunger projecting too far above floor.—Martin *v.* Old Colony St. R. Co., 211 Mass. 535, 98 N. E. 579.

13. Steps of car slippery.—Foster *v.* Old Coloney St. R. Co., 182 Mass. 378, 65 N. E. 795.

14. Alighting from moving train or car.—Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

15. Hogan *v.* Metropolitan St. R. Co., 75 N. Y. S. 845, 71 App. Div. 614.

16. Where, in an action against a street railway company for personal injuries, plaintiff alone testifies that the car stopped on his signal on the north side of a crossing, and started as she was stepping off, but the driver, conductor, and two passengers testify that the car did not stop on that side of the crossing, but that plaintiff stepped off while the car was in motion, a verdict for plaintiff is not supported by the evidence. North Chicago St. R. Co. *v.* Lotz, 44 Ill. App. 78.

Judgment for plaintiff in an action for injury from the starting of a street car while she was alighting after it had been stopped on her signal will be reversed as against the weight of evidence, she having no witness, and four apparently disinterested witnesses, besides the conductor and motorman, testifying that, after plaintiff had asked the conductor to stop the car, she, disregarding his warning, alighted while it was in motion, and before it had stopped. Clancy *v.* Yonkers R. Co., 84 N. Y. S. 789, 88 App. Div. 612.

A judgment for plaintiff for injuries alleged to have been sustained by the starting of a street car while she was in the act of alighting after it had stopped on her signal will be reversed, because against

off the car while in motion as he had often done.[17] But where the evidence shows that the passenger leaped from the train or car under a sudden apprehension of danger[18] to avoid a wreck[19] or collision,[20] or while being forcibly ejected,[21] a finding that he was not guilty of contributory negligence is sustained. And in an action by a passenger against a railroad company for personal injuries, where the evidence was conflicting, both as to whether it was one of defendant's trainmen, or a fellow passenger, who advised plaintiff to step from the train as he did, whereby he was injured, and as to the speed at which the train was moving, the court did not err in refusing a new trial on the ground that the evidence "shows that plaintiff leaped out at right angles from the train, at night, when it was moving fast, at a place unknown to him."[22]

Knowledge and Consent of Trainmen.—Evidence showing that a passenger, who was injured by alighting from a moving train or car, did so at the direction or with the consent of the conductor or trainmen in charge of the train, is sufficient to sustain a finding of freedom from contributory negligence,[23] but not where plaintiff knew that he was not entitled to ride on the train and ar-

the weight of the evidence, where she had no witnesses, and two apparently disinterested witnesses, a lawyer and a policeman, testified that she alighted while the car was moving at about the regular rate of speed, and where she was otherwise contradicted. Maloney *v.* Metropolitan St. R. Co., 88 N. Y. S. 638, 95 App. Div. 393.

17. In an action against a street railroad company for injuries to a passenger, plaintiff, a seventeen year old boy, testified that the car came to a full stop at his request, and suddenly started while he was alighting. He was supported by only one witness, who gave a very confused and contradictory account of the accident. The driver and conductor of the car both testified that plaintiff left the car while in motion, without any request to stop it, and five disinterested eyewitnesses testified that the car did not stop or slacken speed until after the accident. Defendant further proved that plaintiff had made repeated declarations, shortly after the accident, that he had jumped off the car while in motion, as he had done many times before. Held, that a finding by the jury that plaintiff was injured by the sudden starting of the car while attempting to alight was against the weight of the evidence, and would be set aside. Bernstein *v.* Dry Dock, etc., R. Co., 72 Hun 46, 25 N. Y. S. 669, 55 N. Y. St. Rep. 341.

18. In an action by a passenger for personal injuries produced by her leaping from defendant's train under a sudden apprehension of danger, evidence held insufficient to support a verdict against the company. Gulf, etc., R. Co. *v.* Wallen, 65 Tex. 568.

19. Jumping from car to avoid wreck.—Evidence showing that the injuries complained of by a passenger were received in jumping from a car which had broken loose from the train and had started back down the grade, is sufficient that he was not guilty of contributory negligence. Prescott, etc., R. Co. *v.* Morris, 92 Ark. 365, 123 S. W. 392.

20. Jumping from car to avoid collision.—In an action for the death of a trolley car passenger jumping from a car onto a parallel track in front of an approaching car to avoid danger of a collision by a car running into the car on which he was riding, evidence that all who remained on the car were unhurt, that the car itself was not damaged beyond a bent fender, that it appeared that the approaching car would not stop before it reached the one with which it collided, and the situation was not accompanied by consternation on part of the passenger, is sufficient to show such negligence of defendant as to place decedent in a position of imminent peril so as to relieve him from the failure to exercise reasonable care. Adamson *v.* Norfolk, etc., Tract. Co., 69 S. E. 1055, 111 Va. 556.

21. Forcible ejection.—And in Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777, a person having a ticket for passage upon a railroad, boarded a freight train which did not carry passengers, believing the ticket good on that train. The conductor ordered him to get off the train while it was running at a speed which would endanger him in getting off, and refused to stop the train so that he might get off safely, and in violent and insulting language threatened to eject the person from the train by force if such order was not obeyed, and he had force at his command to execute the threat, and as a result, the person jumped from the train to avoid ejection by force. The court held, that he was to be treated as a passenger and not as a trespasser; and there was sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

22. Texas, etc., R. Co. *v.* Bagwell, 3 Tex. Civ. App. 256, 22 S. W. 829.

23. Herman *v.* Chicago, etc., R. Co., 79 Iowa 161, 44 N. W. 298.

ranged with the engineer to reduce speed so he could jump off at his destination.[24] And that the injured passenger was standing on the rear platform of the car, when the conductor took his ticket, and that afterwards some one told him that the train would not stop at his destination, but that he must jump when the train slowed up, which he did, both the conductor and brakeman testifying that they told plaintiff no such thing, and that the signal was given to stop the train, but plaintiff was found to have left the platform before the train was stopped, is not sufficient to show that it was with the knowledge or consent of either conductor or brakeman that plaintiff jumped from the moving train, and that he could not recover.[25]

Alighting from the Train after It Has Started.—Where the evidence shows that the injured passenger unnecessarily delayed to alight,[26] or where the physical facts as shown by the plaintiff's own testimony, are against his version of the accident and in addition to testimony of apparently disinterested witnesses that he did not attempt to leave the car until it had started and that he then voluntarily jumped off it, is sufficient to show contributory negligence as a matter of law.[27] Aliter, where the evidence shows that the time of stop was too brief to allow the injured passenger to alight.[28]

§ 2899. Injury Caused by Sudden Movement of Train or Car.—Where the testimony is conflicting as to whether the passenger's injuries were caused

24. In an action for injuries to a passenger alighting from a moving train, evidence showing that the plaintiff knew he was not entitled to ride on that train and had arranged with the engineer to reduce the speed so that he might jump off at his destination, is sufficient to show that plaintiff's injuries resulted from his own negligence, and that he was not entitled to recover. Glascock *v.* Cincinnati, etc., R. Co., 140 Ky. 720, 131 S. W. 779.

25. Herman *v.* Chicago, etc., R. Co., 79 Iowa 161, 44 N. W. 298.

26. Unnecessary delay of passenger to alight.—In an action for injuries to a passenger on alighting from a train, uncontroverted proof that plaintiff stopped at the door of the car on the steps before stepping off, long enough for a passenger to alight from the train and assist a lady and two small children on to the train and to take them and their bundles into the forward car, put down the bundles and start out before the train started, is sufficient to warrant a finding that he was guilty of contributory negligence. Barringer *v.* St. Louis, etc., R. Co., 85 S. W. 94, 87 S. W. 814, 73 Ark. 548.

27. Hannestad *v.* Chicago, etc., R. Co. (Iowa), 118 N. W. 38.

In an action for injuries to a street car passenger while attempting to alight, evidence conflicting as to whether the passenger when the car came to a full stop arose and was stepping on the running board in the act of stepping on to the side walk, when the car started with a sudden jerk and threw him, or whether the car was merely moving and coming to a stop when he got off, although the latter testimony was somewhat corroborated by the place where a key dropped by the injured passenger was found does not support a finding that the car slowed down and was coming to a stop when the passenger started to alight and was thrown from the car by a sudden jerk. Murray *v.* Rhode Island Co. (R. I.), 82 Atl. 1.

In an action against a railroad for injuries to a passenger claimed to have been caused by starting the train with a jerk after it had come to a stop near plaintiff's destination, irreconcilable testimony as to whether plaintiff was attempting to get off the train when it first stopped where uncontroverted proof as to where he was found unconscious and as to where the train stopped, conclusively negatives his testimony; is sufficient to show that in fact plaintiff attempted to dismount from the train after it started again, and was consequently guilty of contributory negligence. Newlin *v.* Iowa Cent. R. Co., 103 N. W. 999, 127 Iowa 654.

28. Stop too brief to allow passenger to alight.—In an action against a railroad for personal injuries the evidence showed that the time allowed at the station was too brief to permit plaintiff to alight before the train started. Plaintiff testified that when the train stopped he left the car as quickly as he could; that when he reached the platform he found the conductor on the steps, and asked him to let him pass; that the conductor stepped aside, and allowed him to get off; that the train did not stop as long as usual that morning, and that when he stepped off the train was moving slowly, and he thought he could do so safely. Held to justify a finding that plaintiff was not guilty of contributory negligence. Johnson *v.* Atlantic, etc., R. Co., 41 S. E. 794, 130 N. C. 488.

by a sudden movement of the train or car, the preponderance of evidence rule prevails. See instances in the footnotes.[29]

Passenger Acting on Invitation of Conductor or Trainmen.—In an action for injuries to a street car passenger while alighting, evidence that the conductor as he was about to step into the vestibule of the car barred his passage by putting his arm across the door and so holding it till the car came to a complete stop, whereupon he removed it and stepped back, is sufficient to justify a finding that such passenger was in the exercise of ordinary care, having been invited by the conductor to go out of the car.[30]

Opinion of Injured Person as to Length of Stop.—Where, in an action for injuries to a passenger while alighting from a train, alleged to have been caused by the sudden movement of the train, there was evidence that he hurried out as soon as the train had stopped, his statement that the train was still as long as three minutes before he got out of his seat, with a declaration that he "could not tell how long it had been still," is insufficient to charge him with contributory negligence, being mere opinion.[31]

Intending to Step on to Adjoining Track.—The statement of a street car passenger, who, because of the sudden starting of an open car while he was standing between two seats, in the act of alighting, was thrown forward toward the adjoining track, in which position he was struck by a car passing on the adjoining track, that when he lost his footing he was not looking for a car, on the adjoining track, but was looking where he meant to step, did not show that he meant to step onto the adjoining track without looking, and so did not show that he was guilty of contributory negligence.[32]

29. In an action for injuries to a passenger by being thrown from the train while attempting to alight, conflicting evidence as to whether train stopped, where none of the witnesses attempted to give the precise location of the stop, or the distance therefrom to the place where plaintiff fell, together with the testimony of the witnesses who saw the fall, that when first observed plaintiff was on the lower step clinging to the rail with one hand and had a little girl swinging from the other, and that plaintiff dropped the child and immediately fell; is sufficient to sustain a finding that decedent got on the steps while the train was stopped, and was attempting to alight when its sudden movement caused her to fall. St. Louis, etc., R. Co. *v.* Rush, 93 Ark. 631, 123 S. W. 804.

Evidence conflicting as to whether plaintiff, an old man, stepped off the car before it stopped, while going some four or five miles an hour, or whether the car came to a full stop and started off again as he put his foot on the step in the act of getting off, is sufficient to sustain a finding that a street car passenger, injured by the sudden starting of the car, did not attempt to step from the car until it came to a full stop. Buccola *v.* Shreveport Tract. Co., 61 So. 130, 132 La. 106.

Evidence in an action by a passenger for injuries sustained in attempting to alight from a train examined, and held to sustain a finding that the passenger received injuries to which no negligence on her part contributed. Pomroy *v.* Bangor, etc., R. Co., 67 Atl. 561, 102 Me. 497.

In an action against a street railroad company for the death of plaintiff's intestate, deceased's son, about twelve years old, testified. That, when the car on which deceased was a passenger came to the street, it stopped, and his "father went to alight, and as he was just about, just had one foot off when the car started, and it threw him, and he fell; and it stopped again, and I got off. I guess the car went not more than a couple of feet after it started. It was just a simple lurch of the car." That his father's right foot was lame, and he stepped off on the other foot. A physician testified that deceased, immediately after he was hurt, said to him that he was afraid the car would not stop, and he jumped off. The conductor testified that deceased started to get off the car before it came to a full stop, but "I think the car had stopped when I helped him off." Three other witnesses testified that deceased attempted to get off the car before it stopped. Another testified that deceased lost his balance and fell off, and that the car had not then stopped. Held, that a verdict for plaintiff would not be discharged. Williams *v.* Camden, etc., R. Co. (N. J.), 37 Atl. 1107.

30. Passenger acting on invitation of conductor or trainmen.—McDermott *v.* Boston Elev. R. Co., 208 Mass. 104, 94 N. E. 309.

31. Opinion of injured person as to length of step.—St. Louis, etc., R. Co. *v.* Byrne, 73 Ark. 377, 84 S. W. 469.

32. Intending to step on to adjoining track.—Scamell *v.* St. Louis Transit Co., 102 Mo. App. 198, 76 S. W. 660.

Hand Crushed in Door.—In an action for personal injuries by defendant's suddenly starting the train as a passenger was leaving, evidence that the porter picked up the passenger's valise, said "this is your station," that she got up and went to the door, that the train then began moving back, that she stopped, that the train then jerked, and the door came too on her hand crushing it, is sufficient to establish that the passenger was not negligent on her part.[33]

§ 2900. Alighting from Car between Stations.—The fact that a passenger was injured in alighting from a train or car at a place other than his station, while under a misapprehension that the car had reached his destination, does not of itself show contributory negligence;[34] but evidence that a train having passed beyond a station at which a passenger lived, to a switch, and backed into the station, and started again, he was found under the wheels, on the wrong side of the train, there being no evidence as to how he came there, that there was a heap of snow a foot or so from the track, and no evidence that he did not know which was the proper side to get off, is not sufficient to show freedom from contributory negligence and a verdict against the railroad is not justified.[35]

Following Direction or Invitation of Conductor.—In an action against a street railway company for injuries sustained by a passenger while alighting from a car on the company's private way, evidence that the conductor assisted plaintiff to alight at a place other than the station, and that the appearance of the place was deceptive, the height and slope of the enbankment being concealed by tall grass and weeds; does not show contributory negligence precluding a recovery.[36]

Implied Invitation to Alight.—On the issue whether a street car conductor invited a passenger to alight at a place where the car stopped on the company's private way, evidence that the car ran by the platform, that the conductor rang the bell to stop, that he was looking at the passengers as she attempted to alight and did not warn her not to do so, is sufficient to show that the conductor impliedly invited the passenger to alight.[37]

Passenger Carried Beyond Destination.—In an action for injury to a street car passenger, a plea that she assumed the risk by voluntarily and knowingly alighting between stations, appreciating the danger of doing so, was unsupported, where the evidence showed that the passenger, with the conductor's assistance, alighted from the car before she knew she was beyond her destination, or between that station and the next one.[38]

Directions as to Way to Return to Desired Street.—Evidence that a passenger on a street car at night informed the conductor that he desired to alight at a certain street, was carried by, and the conductor then refused to back the car or to permit the passenger to remain on the car until it returned to the desired street, but instructed him to walk to a certain light, which he pointed out, and then turn in a certain direction, stating that such course would take

33. Hand crushed in door.—Illinois Cent. R. Co. *v.* Taylor, 24 Ky. L. Rep. 1169, 70 S. W. 825.

34. Alighting between or at place other than station.—Plaintiff, riding on a street car, signaled the conductor to stop at the next stopping point. The motorman stopped the car, because he saw a fire engine approaching, and plaintiff, under the misapprehension that the car had reached her destination, stepped into the street, and was injured by a rapidly passing hose car. It was about eight o'clock in the evening, and plaintiff, who was familiar with the street, testified that she thought she took pains to find out whether anything was approaching, and that she was looking, and thought the way was clear. Held, that the evidence did not show her guilty of contributory negligence. Oddy *v.* West End St. R. Co., 59 N. E. 1026, 178 Mass. 341, 86 Am. St. Rep. 482.

35. Leary *v.* Fitchburg R. Co., 173 Mass. 373, 53 N. E. 817.

36. Following direction or invitation of conductor.—Topp *v.* United R., etc., Co., 99 Md. 630, 59 Atl. 52.

37. Implied invitation to alight.—Topp *v.* United R., etc., Co., 99 Md. 630, 59 Atl. 52.

38. Passenger carried beyond destination.—Melton *v.* Birmingham R., etc., Co., 153 Ala. 95, 45 So. 151, 16 L. R. A., N. S., 467.

the passenger to his destination, and the passenger, while following such directions, walked upon a trestle and fell through it, whereby he was injured, not having known, owing to the darkness, that he was on a trestle when he fell, is sufficient to sustain a finding that the passenger was not guilty of contributory negligence.[39]

§ **2901. Passenger Struck by Car on Parallel Track.**—Evidence showing that a passenger who alighted from an out bound street car passed around the rear of the car and attempted to cross the street, was injured by being struck by a car coming in the opposite direction, which he saw at a good distance away, as he went around the rear of the outbound car, from which he had alighted and that it had approached so rapidly that when he had passed over the few feet separating the two tracks and stepped on to inbound track, was then a little more than two car lengths away and that he then preceded diagonally across the track with his back partially turned toward the approaching car without looking again, is sufficient to show contributory negligence.[40]

§ 2902. Leaving Depot or Station.—A passenger, on leaving a depot, passed along the platform, which ran parallel with a side track, and in descending found his way obstructed by a pile of shells deposited by a railroad company, making it necessary for him to step aside upon the cross-ties of the side track, and in so doing he was struck by a passing train. Steam was escaping from an engine on the main track, so he could not hear the noise of the train which struck him. He was not warned by defendant's servants, nor did he know, or have any reason to know, that a train was due to arrive. Held not conclusive of contributory negligence.[41]

Leaving Ferry Boat by Vehicle Gangway.—Evidence that a passenger leaving a ferry boat was injured by falling over a chain in the vehicle gangway of the ferry, where the foot passenger gangway was unobstructed, is sufficient to show contributory negligence barring a recovery.[42]

§ 2903. Willfulness or Wantonness of Carrier's Servants.—Actual knowledge by a carrier's servants of the peril of a passenger, sufficient to render the carrier guilty of wanton negligence, so as to excuse contributory negligence, may be proved by circumstances from which such knowledge is a legitimate inference.[43]

Speed.—In an action for death of an infirm passenger by being thrown from his seat in defendant's street car as it was rounding a curve, evidence that the car was running at a velocity greater than its customary speed in order to make up time, is sufficient to justify a finding that defendant's servants operated the car in a reckless, willful, or wanton disregard of existing conditions, within Rev. Laws, c. 111, § 267, authorizing a recovery for the death of a passenger caused by gross negligence of the carrier's servants.[44]

§ 2904. Last Clear Chance.—In an action for causing death of one intending to take passage on a street car, evidence that such person signaled the car then about three hundred feet or more away, that there was an 18 foot roadway between the curb and the nearest rail, but which is wholly uninforming as to the position and movements of the deceased, beyond the fact that he gave the signal, is insufficient to show negligence of the motorman after he knew, or

39. **Same—Directions as to way to return to desired street.**—Kentucky, etc., R. Co. *v.* Buckler, 30 Ky. L. Rep. 1086, 100 S. W. 328, 8 L. R. A., N. S., 555.

40. **Passenger struck by car on parallel track.**—Cohen *v.* Boston Elev. R. Co., 202 Mass. 66, 88 N. E. 453.

41. **Leaving depot or station.**—Sanchez *v.* San Antonio, etc., R. Co., 3 Tex. Civ. App. 89, 22 S. W. 242.

42. **Leaving ferry boat by vehicle gangway.**—Grabler *v.* New York, etc., Ferry Co., 117 N. Y. S. 1018, 64 Misc. Rep. 58.

43. **Willfulness or wantonness on part of carrier's servants.**—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

44. **Speed.**—Spooner *v.* Old Colony St. R. Co., 190 Mass. 132, 76 N. E. 660.

ought, in the exercise of reasonable care, to have known, of the danger of plaintiff's intestate.[45]

§§ 2905-2921. Questions for Jury—§ 2905. In General.—In an action against a carrier for negligent injury to a passenger, the question whether or not the passenger was guilty of contributory negligence barring his recovery is a question of fact for the jury under appropriate instructions, where the circumstances raise a question upon the subject.[46] In other words whether a passenger was in the exercise of due and ordinary care for his own safety at the time of his injury is a question for the jury to determine from the evidence; and the court should not rule, as a matter of law, that the plaintiff has been guilty thereof, unless the facts on which such a ruling must rest are undisputed.[47] The court, however, must first determine whether or not the facts in evidence are sufficient to make an issue. There must, in all cases, be special circumstances surrounding and characterizing the act claimed to constitute contributory negligence. If these fairly admit of question as to whether or not the act was negligent, a case is made for the jury, but if they leave no doubt and suggest no question of the kind, there is nothing for the jury to determine.[48] Thus, the court need not direct the jury to find for the carrier in an action to recover damages for the injuries sustained by a passenger, where there is evidence on behalf of the plaintiff of a substantial character, bearing upon the

45. Last clear chance.—Kruck *v.* Connecticut Co., 84 Conn. 401, 80 Atl. 162.

46. Questions for jury.—*Alabama.*—Birmingham R., etc., Co. *v.* Lide (Ala.), 58 So. 990; Louisville, etc., R. Co. *v.* Dilburn (Ala.), 59 So. 438.

District of Columbia.—Harmon *v.* Washington, etc., R. Co., 7 Mackey (18 D. C.) 255.

Georgia.—Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902.

Illinois.—Peterson *v.* Elgin, etc., Co., 142 Ill. App. 34.

Indiana.—Hall *v.* Terre Haute Elect. Co., 38 Ind. App. 43, 76 N. E. 334.

Iowa.—Burger *v.* Omaha, etc., St. R. Co., 139 Iowa 645, 117 N. W. 35; Dorn *v.* Chicago, etc., R. Co., 154 Iowa 140, 134 N. W. 855; Cubbage *v.* Estate (Iowa), 134 N. W. 1074.

Kentucky.—Louisville, etc., R. Co. *v.* Moore, 150 Ky. 692, 150 S. W. 849; Louisville, etc., R. Co. *v.* Grimes, 150 Ky. 219, 150 S. W. 346.

Whether plaintiff exercised proper care for his own safety, or brought about the injury by his own inattention, is, under the evidence, a question for the jury. Illinois Cent. R. Co. *v.* Proctor, 89 S. W. 714, 122 Ky. 92, 28 Ky. L. Rep. 598.

Maryland.—Strauss *v.* United R., etc., Co., 101 Md. 497, 61 Atl. 137.

Massachusetts.—Hamilton *v.* Boston Elev. R. Co., 213 Mass. 420, 100 N. E. 604.

Minnesota.—Hoblit *v.* Minneapolis St. R. Co., 111 Minn. 77, 126 N. W. 407; Mathews *v.* Great Northern R. Co., 119 Minn. 49, 137 N. W. 175.

Missouri.—Haderlein *v.* St. Louis R. Co., 3 Mo. App. 601, memorandum.

Montana.—Knuckey *v.* Butte Elect.. R. Co., 45 Mont. 106, 122 Pac. 280.

Nebraska.—Chicago, etc., R. Co. *v.* Winfrey, 67 Neb. 13, 93 N. W. 526.

North Carolina.—Miller *v.* Atlanta, etc., R. Co., 143 N. C. 115, 55 S. E. 439.

Ohio.—Holmes *v.* Ashtabula Rapid Transit Co., 10 O. C. D. 638; Cincinnati St. R. Co. *v.* Snell, 54 O. St. 197, 43 N. E. 207, 32 L. R. A. 276; Hollingsworth *v.* Cincinnati St. R. Co., 21 O. C. C. 536, 12 O. C. D. 100.

Texas.—Galveston, etc., R. Co. *v.* Le Gierse, 51 Tex. 189; Galveston, etc., R. Co. *v.* Smith, 59 Tex. 406; Missouri, etc., R. Co. *v.* Rodgers, 89 Tex. 675, 36 S. W. 243, reversing 35 S. W. 412; Gulf, etc., R. Co. *v.* Bell, 93 Tex. 632, 57 S. W. 939; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291; St. Louis, etc., R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315; Dallas Rapid Transit Co. *v.* Payne, 98 Tex. 211, 82 S. W. 649.

Where, in an action for injuries to a passenger, the latter's contributory negligence was raised by both pleadings and evidence, it was not error for the court to submit such issue to the jury. Yecker *v.* San Antonio Tract. Co., 76 S. W. 780, 33 Tex. Civ. App. 239.

West Virginia.—Normile *v.* Wheeling Tract. Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.

Injury caused by jerking of the train.—St. Louis, etc., R. Co. *v.* Holmes, 96 Ark. 339, 131 S. W. 692.

Cattle shipper injured while attending cattle.—Leslie *v.* Atchison, etc., R. Co., 82 Kan. 152, 107 Pac. 765, 27 L. R. A., N. S., 646.

47. Harmon *v.* Washington, etc., R. Co., 7 Mackey (18 D. C.) 255.

48. Gulf, etc., R. Co. *v.* Bell, 93 Tex. 632, 57 S. W. 939.

general issue as to the carrier's negligence.[49] This is the rule as to passengers on trains, whether on regular passenger trains, freight trains,[50] cattle trains,[51] or mixed trains; and as to passengers on street cars,[52] in elevators,[53] and on ferry boats.[54]

Evidence Conflicting.—Where, in an action for injuries, the evidence was conflicting, and there was evidence justifying a finding that the plaintiff was not guilty of contributory negligence, or, if he was, that such negligence was not the proximate cause of his injury, the court was not required to direct an affirmative response to the issue as to contributory negligence on a given state of facts, if found by the jury, though there was evidence of such facts.[55]

Directing Verdict Generally.—It affirmatively appearing from the evidence that the defendant carrier was not guilty of any negligence, and that the injury of the passenger was attributable to his failure to observe ordinary care for his own safety, a verdict for the defendant is demanded.[56]

Contributory Negligence Established by Plaintiff's Evidence.—In an action for negligence, the trial court may direct judgment by way of nonsuit when the evidence introduced by plaintiff so conclusively establishes contributory negligence as that the court would grant a new trial in case of a verdict in his favor on like evidence.[57]

Where Conduct of Passenger Negligence Per Se.—The court may find as a matter of law that certain conduct of a passenger constituted contributory negligence per se when it is such an act that all men must conclude that it was the proximate cause of the injury.[58]

49. Judgment, City, etc., R. Co. *v.* Svedborg, 20 App. D. C. 543, affirmed in 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

50. Passenger on freight train.—Newman *v.* Chicago, etc., R. Co., 154 Iowa 72, 134 N. W. 585.

51. Caretaker of live stock riding on cattle train.—St. Louis, etc., R. Co. *v.* Loyd, 105 Ark. 340, 150 S. W. 864.

52. Street cars.—City, etc., R. Co. *v.* Svedborg, 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

In an action against a street car company for injuries resulting from a defect in the car, it is proper to refuse to instruct that plaintiff's knowledge of the defect, or his haste in getting off the car, would constitute contributory negligence, since negligence is a question of fact. North Chicago St. R. Co. *v.* Eldridge, 151 Ill. 542, 38 N. E. 246.

Injury by a shock received from the controller box on a car.—South Covington, etc., R. Co. *v.* Smith, 27 Ky. L. Rep. 811, 86 S. W. 970.

53. Elevators.—Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251.

54. Injury to passenger on ferry boat.—Whether plaintiff, a passenger on a ferry boat, was guilty of contributory negligence when injured by collision with a wagon which ran back on the inclined drop, was a question for the jury. Townsend *v.* Boston, 187 Mass. 283, 72 N. E. 991.

55. Evidence conflicting.—Graves *v.* Norfolk, etc., R. Co., 135 N. C. 3, 48 S. E. 502; Cleveland *v.* New Jersey Steamboat Co., 53 Hun 638, 7 N. Y. S. 28, 25 N. Y. St. Rep. 666, 2 Silvernail 93; Norfolk, etc., Terminal Co. *v.* Rotolo, 191 Fed. 4, 112 C. C. A. 583.

56. Directing verdict generally.—Marshall *v.* Southwestern R. Co., 103 Ga. 585, 30 S. E. 431.

The plaintiff in an action to recover for personal injuries alleged to have been sustained by the negligent backing of a freight train against a passenger coach, having testified at the trial that he could easily have avoided being injured and having failed to explain in his testimony why he omitted to do so, and his declaration alleging that he was injured after he discovered that the danger was imminent, a new trial should have been awarded on the general grounds of the motion, though it was not positive error to deny the motion for a nonsuit. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Negligence is a question of fact for the jury, where the facts are such that fair minded men may differ in opinion on them. But, if contributive negligence is clearly established, as where, in an action in behalf of a person injured by being thrown off a moving train, it appears that he got on the train at an improper place, and without leave or payment of fare, the court should dismiss the complaint. Buckley *v.* New York, etc., R. Co., 43 N. Y. Super. Ct. 187.

57. Contributory negligence established by plaintiff's evidence.—McQuilken *v.* Central Pac. R. Co., 50 Cal. 7.

58. Where conduct of passenger's negligence per se.—Cincinnati, etc., St. R. Co. *v.* Lohe, 27 O. C. C. 138.

Issue of Contributory Negligence Not Raised.—Where a passenger pleaded and showed that, as she was in the act of alighting from the street car, which had stopped to let her off, it suddenly started, throwing her to the street, and the company pleaded and showed that the passenger did not fall until she had safely reached the street and was clear of the car, the issue of contributory negligence was not raised, and the court properly authorized a verdict for the passenger if her evidence was found true, and properly directed a finding for the company if its evidence was found true.[59]

Instructions in Effect a Demurrer to Evidence.—In a passenger's action for injuries, an instruction which recited all the substantial facts and charged that plaintiff would be guilty of contributory negligence under the facts stated, being in effect a demurrer to the evidence, is properly refused, where the question of contributory negligence was for the jury.[60]

Whether Plaintiff Established Freedom from Contributory Negligence.—In an action against a carrier for injuries received by a passenger on its train, where the jury might have inferred from defendant's evidence, though of a negative character, that no accident had occurred to plaintiff in the manner stated by his witness, either through any negligence of defendant, or without contributory negligence on plaintiff's part, it was error to take from the jury the question whether plaintiff had established his freedom from contributory negligence.[61]

Where Doctrine of Comparative Negligence Prevails.—Where the doctrine of comparative negligence prevails it is proper to submit to the jury the question whether the act of the injured passenger was negligence, and if so to compare it with the acts of the carrier's servants who helped to produce the injury making allowance in the verdict for so much of the passenger's negligence as helped bring about his injury.[62]

§ 2906. Care Required of or in Respect to Children and Others under Disability.—Intoxicated Passengers.—The fact that a passenger was in any degree intoxicated at the time of his injury is not of itself contributory negligence, but the question whether or not his intoxication contributed to his injury is one of fact for the injury.[63] And also the question whether a person

59. **Issue of contributory negligence not raised.**—South Covington, etc., R. Co. *v.* Hossfeld, 145 Ky. 22, 139 S. W. 1095.

60. **Instructions in effect a demurrer to evidence.**—Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961.

61. **Whether plaintiff established freedom from contributory negligence.**—Wimpleberg *v.* Yonkers R. Co., 81 N. Y. S. 963, 83 App. Div. 19; Kleffmann *v.* Dry Dock, etc., R. Co., 93 N. Y. S. 741, 104 App. Div. 416, 16 N. Y. Ann. Cas. 334; Brettner *v.* Westchester Elect. R. Co., 98 N. Y. S. 857, 49 Misc. Rep. 508; Berry *v.* Utica, etc., St. R. Co., 78 N. Y. S. 542, 76 App. Div. 490.

62. **Where doctrine of comparative negligence prevails.**—Gen. St. Fla. 1906, § 3149, forbids recovery of damages from a railroad company where the injury is caused by plaintiff's negligence, but provides that, if the complainant and the agents of the company are both at fault, the former may recover, but the damages are diminished or increased by the jury in proportion to the amount of default attributable to him. Held, that such section established a rule of comparative negligence, and hence, in an action under the Florida statute for death of a passenger, it was proper not to direct a verdict for defendant because plaintiff's intestate was riding on the platform of a moving car when he was killed, but that it was proper to submit to the jury whether his act was negligence, and, if so, to compare it with the acts of defendant's servants who helped to produce the injury, making allowance in the verdict for so much of intestate's negligence as may have helped to bring about his death. Louisville, etc., R. Co. *v.* Massie (Ky.), 128 S. W. 330.

63. **Intoxicated passengers.**—Evidence, if any, tending to show that deceased was somewhat intoxicated at the time of the accident, made it a question for the jury as to what extent, if at all, that may have contributed to the accident. Blair *v.* Lewiston, etc., St. Railway, 85 Atl. 792, 110 Me. 235.

In an action against a railroad company for the death of a drunken passenger, who, it was alleged, was placed in charge of defendant's conductor, and was by him negligently permitted to go onto the platform, and fall from the train, evidence held to justify a submission to the

who was injured while a passenger on a train was in any degree intoxicated at the time of the accident for which he sued is a question for the jury.[64] Hence an instruction that a passenger injured while alighting could not recover if he was intoxicated was properly refused, as making any degree of intoxication contributory negligence as a matter of law.[65]

Blind Passenger.—In an action for injuries to a blind passenger, whether the passenger was negligent is a question for the jury.[66]

Crippled or Maimed Passenger.—Whether it was contributory negligence for a man with only one arm to attempt to board a moving train without assistance is a question for the jury.[67]

Infants of Tender Years.—Whether a child of tender years has sufficient discretion to exercise due and ordinary care for his own safety while a passenger[68] and whether he was in fact negligent thereby contributing to his injury[69] are questions for the jury, where the evidence is conflicting or the circumstances raise a doubt as to the question. A number of instances are set forth in the footnotes.

jury of the issue of the contributory negligence of deceased. Price *v.* St. Louis, etc., R. Co., 88 S. W. 575, 75 Ark. 479, 112 Am. St. Rep. 79.

64. Newman *v.* Chicago, etc., R. Co., 154 Iowa 72, 134 N. W. 585.

65. Hughes *v.* Chicago, etc., R. Co., 150 Iowa 232, 129 N. W. 956.

A refusal to direct a verdict for defendant is justified in an action for injuries to an intoxicated passenger, caused by his falling or being thrown from the platform of a train while in motion. Fox *v.* Michigan Cent. R. Co., 101 N. W. 624, 138 Mich. 433, 68 L. R. A. 336.

66. Blind passenger.—Denver, etc., R. Co. *v.* Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A., N. S., 761.

67. Crippled or maimed passenger.—Talbert *v.* Charleston, etc., R. Co., 72 S. C. 137, 51 S. E. 564.

68. Riding on platform.—In an action for injuries to a boy ten years of age, allowed to ride on the front platform of defendant's street car, whether plaintiff was of such immature years and so wanting in intelligence that he could not appreciate the danger of riding on the front platform was for the jury. Denison, etc., R. Co. *v.* Carter (Tex. Civ. App.), 79 S. W. 320, judgment reversed in 82 S. W. 782, 98 Tex. 196, 107 Am. St. Rep. 626.

Alighting from car.—Whether a child nine years old has sufficient discretion to alight from a car without special attention from the conductor is a question of fact. Ridenhour *v.* Kansas, etc., R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

69. Standing on running board.—Whether a fifteen year old boy exercised ordinary care in boarding a street car, and standing on the running board while a car was approaching from the opposite direction, is for the jury. Schneider *v.* North Chicago St. R. Co., 80 Ill. App. 306.

Riding on steps of street car.—Whether it was contributory negligence for a boy thirteen years of age to sit on the platform of an electric car, resting his feet on the lower step, was a question for the jury. Seller *v.* Market St. R. Co., 72 Pac. 1006, 139 Cal. 268.

Touching catch of car window.—Where, in an action for injuries to a child occasioned by the falling of a car window, she admitted that she touched the catch of the window, it was a question for the jury whether she caused the window to fall, and whether she was, in touching the catch, guilty of contributory negligence. Cleveland, etc., R. Co. *v.* Scott, 111 Ill. App. 234.

Following adult passenger to platform.—Contributory negligence is a question for the jury where a boy ten and a half years old remained in his seat until the train entered the station at the terminus, when he arose, and followed adult passengers to the platform of the car, and was thrown from the platform through the negligent stoppage of the train. Schreiner *v.* New York, etc., R. Co., 42 N. Y. S. 163, 12 App. Div. 551.

Car not stopping long enough for boy to alight.—The questions of negligence and contributory negligence are for the jury; there being evidence that a boy on a street car intended and attempted to get off at a certain street crossing, but was prevented from doing so by the car not stopping long enough, and the evidence being conflicting as to whether he was jolted from the car, or fell off or jumped off; he having in some way got off and under the car between that and the next street. Moran *v.* Versailles Tract. Co., 41 Atl. 652, 188 Pa. 557.

Alighting from moving train at order of conductor.—Whether a boy riding on a freight car, in charge of mules and other freight, was guilty of contributory negligence in alighting from the train while in motion in obedience to an order of the conductor, held, under the evidence, a question for the jury. Fore *v.* Alabama, etc., R. Co., 39 So. 493, 87 Miss. 211, suggestion of error overruled in 39 So. 690.

Care Required of Sick or Ill Passengers.—Where in an action against a carrier by a person who was ill at the time he became a passenger, for negligence, whereby his illness was aggravated, it appeared that he omitted to procure the aid of a physicain until he reached home and had taken physical exercise while waiting for the train, but it did not appear that he understood the nature of his physicial condition or that it required immediate medical attention, and it also appeared that he believed the exercise taken by him was conducive to his improvement, the question of contributory negligence was for the jury.[70]

§ 2907. Awaiting and Seeking Transportation.—Use of Station and Furnishings.—In an action for injuries sustained by falling through a defective seat in a depot,[71] by sitting with his feet outside the door of a small building at which passengers waited for cars,[72] by using the usual passage way from the ticket office to the baggage room,[73] by attempting to open a defective door in the baggage room into which he had gone at the invitation of the baggage master,[74] by stumbling over obstructions in passageway to ticket office,[75] the question whether or not plaintiff was negligent is for the jury.

Use of Platform and Approaches.—The question as to whether or not the failure of a passenger attempting to board the carrier's train, to observe care in looking out for his own safety, while going along the platform to the train, constituted negligence, is for the determination of the jury.[76] Thus, in an action for injuries sustained by plaintiffs by using an approach to a platform

70. **Care required of sick or ill passengers.**—A passenger who had suffered an attack of paralysis took defendant's train and was carried by his station, and was obliged to spend some time at another place, and by the time he reached home he had become permanently paralyzed. In an action against the carrier for negligence, whereby his illness was aggravated so that it resulted in the permanent paralysis, it appeared that he had failed to consult any physician until he reached home, and had taken considerable physical exercise while waiting for the train that took him home, but it did not appear that he knew the truth as to his condition or that he required medical advice. Held, that the question of contributory negligence was for the jury. Nelson *v.* Chicago, etc., R. Co., 109 N. W. 933, 130 Wis. 214.

71. **Falling through seat.**—St. Louis, etc., R. Co. *v.* Grimsley, 90 Ark. 64, 117 S. W. 1064.

72. **Sitting with feet outside door of station.**—Defendant street railway maintained a small building for the storing of materials, and also permitted passengers to remain there while waiting for cars. Plaintiff, a passenger, was directed to leave a car in which he was riding, and wait at this building for another car. He sat on the floor of the building with his feet outside, and several cars passed him safely on a track some few feet away from where he sat. A defective car was run on the track, left the rails and crashed into the building, and injured plaintiff. Held, that plaintiff was not guilty of contributory negligence as a matter of law. East St. Louis, etc., R. Co. *v.* Zink, 82 N. E. 283, 229 Ill. 180.

73. **Passage from ticket office to baggage room.**—A passenger may assume that the usual passage leading from the ticket office to the baggage room is safe for use, so that whether she was guilty of contributory negligence merely because there was another way which might have been used without injury, when the dangers of the usual passageway were not perceivable or avoidable in the exercise of ordinary care, is for the jury. Judgment, 42 Atl. 486, 62 N. J. L. 7, affirmed in Exton *v.* Central R. Co., 46 Atl. 1099, 63 N. J. L. 356, 56 L. R. A. 508.

74. **Opening door in baggage room.**—Where the owner of baggage entered a baggage room at a railway station at the invitation of the baggage master, to point out the baggage wanted, and was injured by the falling of a defective door which she attempted to open, the question of her contributory negligence is for the jury, there being evidence, which is contradicted, that she was told not to open the door. Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

75. **Passageway to ticket office.**—Whether a person who, while going through a narrow passage to the ticket office of a railroad company, at the same time looking in her purse for the money, was injured by stumbling over an obstruction, was negligent, is a question for the jury. Lycett *v.* Manhattan R. Co., 42 N. Y. S. 431, 12 App. Div. 326.

76. **Use of platform and approaches.**—Savannah, etc., R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677.

which had been in use for many years and often used by him,[77] by standing on the edge of a station platform with his back to an approaching train,[78] falling in an attempt to sit down on the platform, at a station where there was no building,[79] by falling over a semaphore brace as he stepped back to make room on the platform for another passenger,[80] by a collision with a baggage truck on the platform,[81] by crossing a station platform on which there was snow and ice,[82] by standing on a narrow platform between a parallel track and the one on which the train was coming in,[83] by attempting to pass over a sliding platform into the car,[84] by standing on a cross walk between the tracks of a street railway preparatory to taking a car,[85] the question whether or not plaintiff was negligent is for the jury.

Use of Unlighted Platform in Search of Water Closet.—Where plaintiff

77. Use of approach to platform.—The approach to a platform having been used for years by many persons, and often by plaintiff, it was not negligence, as a matter of law, for plaintiff to use it again. Union Pac. R. Co. *v.* Evans, 71 N. W. 1062, 52 Neb. 50.

78. Standing with back to train.—Where a passenger, while standing on the edge of a station platform awaiting a train, was struck by the engine bumper, which projected slightly over such platform, the fact that at the time of the accident he had his back to the train did not make him guilty of contributory negligence as a matter of law. Campbell *v.* Yazoo, etc., R. Co., 48 So. 618, 95 Miss. 309, 21 Am. & Eng. Ann. Cas. 1179.

79. Falling in attempt to sit down on platform.—In an action by a woman against a railroad company for personal injuries, it appeared that at a junction of two railroads defendant had a platform, but no buildings, at which passenger trains stopped; that plaintiff, her sister, and the latter's small children went to the platform on a dark night, where her sister intended to take defendant's train; that her sister sat on the edge of the platform, holding one of the children; that the other asked plaintiff to hold her; that plaintiff thought she could step off the platform and sit down on the side of it; that she attempted to step down about three feet from her sister; that the distance to the ground was about four feet, and she fell; and that where they went on the platform it was nearly on a level with the ground. Held, that whether plaintiff was guilty of contributory negligence was a question for the jury. Missouri, etc., R. Co. *v.* Turley, 37 S. W. 52, 1 Ind. T. 275.

80. Falling over semaphore.—A person who was lawfully upon a depot platform, and who stepped back to make room for another, was not necessarily guilty of negligence in not observing the presence of a semaphore brace over which he fell. Vance *v.* Great Northern R. Co., 118 N. W. 674, 106 Minn. 172.

81. Collision with baggage truck.—A railroad passenger awaiting a train who was injured by a baggage truck on the platform by choosing the least safe way of escaping injury, is not negligent as a matter of law but the question of contributory negligence is for the jury. Kansas. etc., R. Co. *v.* Watson, 102 Ark. 499, 144 S. W. 922.

82. Crossing platform covered with snow and ice.—Whether a passenger was negligent in going to a train over a sloping part of a station platform, on which there was ice and snow, instead of down the steps, is for the jury. Rathgebe *v.* Pennsylvania R. Co., 36 Atl. 160, 179 Pa. 31.

83. Standing on platform between parallel tracks.—Where plaintiff left a waiting room at a station with other passengers on hearing the train whistle, and passed over one track and onto a narrow platform between such track and the one on which the train was coming, and while standing there was struck by a freight train, which, with the engine reversed and showing no light, ran down on the first track, and the space between the two trains standing side by side was only twenty-five inches, the court could not say as a matter of law that plaintiff was guilty of contributory negligence. Harper *v.* Pittsburg, etc., R. Co., 68 Atl. 831, 219 Pa. 368.

84. Passing over sliding platform into car.—Plummer *v.* Boston Elev. R. Co., 198 Mass. 499, 84 N. E. 849.

85. Standing on cross walk between track and street.—Evidence showed that plaintiff was standing on a cross walk between the tracks of a street railway, preparatory to taking a south bound car, when he was struck by a north bound car, which was in full view of him while approaching. The drivers were instructed to slow up or stop when approaching a car near or on a cross walk receiving passengers; but the driver of the north bound car approached the place where plaintiff was standing, without checking his speed. Plaintiff, being about to take the south bound car, was facing in that direction, and did not notice the approach of the other car. Held sufficient to authorize the submission of the case to the jury. Order Boetgen *v.* New York, etc., R. Co., 50 N. Y. S. 331, reversed in 55 N. Y. S. 847, 36 App. Div. 460.

on going to defendant's station to take a train at night found the same unlighted, and while seeking a secluded spot to answer an urgent call of nature fell from an unlighted and ungarded platform, and was injured, he was not negligent as a matter of law, but the question of contributory negligence is for the jury,[86] especially in view of a statute requiring platforms and approaches to water closets to be well lighted when required for the convenience of passengers.[87]

Crossing or Being on or Along Track.—A passenger before crossing a track at a railroad station while taking a train is not required, as a matter of law, to look and listen for approaching trains, but is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury.[88] Hence, it has been held, in an action for an injury to a passenger caused by his crossing[89] or walking on or along an intervening or parallel track[90] to a train or

86. Use of unlighted platform in search of water closet.—Drummy *v.* Minneapolis, etc., R. Co., 153 Iowa 479, 133 N. W. 655.

87. While plaintiff was waiting for a train in a station on defendant's railroad in the evening, she had occasion to visit the water closet, which was 150 feet from the station and reached over a platform extending along the track and beyond the building. Having been shown the way by another passenger, plaintiff was passing along such platform, when she fell off and was injured. Held, that evidence that the night was very dark, and that the platform was inadequately lighted, if at all, was sufficient to require submission to the jury of the question of plaintiff's contributory negligence, especially in view of a state regulation requiring such places to be well lighted, where required for the convenience of passengers. O'Field *v.* St. Louis, etc., R. Co., 189 Fed. 721, 111 C. C. A. 259.

88. Crossing or being on or along track.—Judgment 151 Fed. 908, affirmed in Chicago, etc., R. Co. *v.* Stepp, 164 Fed. 785, 89 C. C. A. 431.

It is not negligence per se for a passenger to fail to stop, look, and listen while crossing a track in a depot to take passage on a train scheduled to stop there at the very time he crosses. Illinois Cent. R. Co. *v.* Daniels, 50 So. 721, 96 Miss. 314, 27 L. R. A., N. S., 128.

89. Crossing track to board train.—St. Louis, etc., R. Co. *v.* Hutchinson, 101 Ark. 424, 142 S. W. 527.

90. Crossing intervening track.—In an action for the death of a passenger, who was struck by a train while attempting to cross an intervening track upon the planked way provided for the use of passengers, to reach his train from the station, whether he was guilty of contributory negligence held for the jury. Keifner *v.* Pittsburg, etc., R. Co., 72 Atl. 253, 223 Pa. 50.

Where the position of the station and the tracks is such that intending passengers must cross intervening tracks to reach their train, and the train is approaching so slowly as to indicate that it is about to stop, and the passengers then step on intervening tracks without apprehending danger, it is a question for the jury whether they have exercised proper care, when the train is not designed to stop. Redhing *v.* Central R. Co., 54 Atl. 431, 68 N. J. L. 641.

Where a passenger was injured while crossing a railroad track for the purpose of taking a train, which was at some distance from where he entered the depot grounds, and at the time of his injury he was walking on the track, though there was a space between two of the tracks on which he might have walked, the question of contributory negligence was for the jury. Chicago, etc., R. Co. *v.* Lagerkrans, 91 N. W. 358, 95 N. W. 2, 65 Neb. 566.

At a railroad station, the direct and usual course for passengers to reach, from the station house, trains going northward, was by crossing a platform eight feet wide, and then one of the tracks. Upon the arrival at the station of a train going northward, between quarter and half past five o'clock on a dusky afternoon about the middle of November, a passenger on his way to it from the station house walked diagonally across the platform some thirty feet to the outer edge of the platform, looking meanwhile up and down the track to ascertain if a train or car was approaching upon it, and then stepped upon the track without so looking at the moment, and was instantly struck and injured by a hand car which was passing southward over the track at a speed of more than ten miles per hour. His view northward along the track, as he walked across the platform, extended only to a point from forty to forty-five feet north of the place where he stepped from the platform. There were no lights on the hand car, nor any at the station except from the train which he was endeavoring to reach, and from two lanterns on a post at the point which bounded his northward view; and no signal of warning was given to him except simultaneously with the collision. Held, that the question whether he used due care was for the jury, in an action by him against the railroad cor-

street car,[91] by a train's backing against him as he ran up the track to catch a train,[92] by crossing the main track to a train on a side track,[93] by stepping in

poration to recover for his injuries as caused by their negligence. Chaffee *v.* Boston, etc., R. Corp., 104 Mass. 108.

Plaintiff's intestate entered the waiting room at a station on defendant's railroad, having the return part of a round trip ticket, and, after inquiring the time of his train, sat down and waited for it. There were two tracks in front of the station building and his train passed on the farther one. A street crossed the tracks at the end of the station, paved with concrete, and from it and on the same level a paved platform extended on the outer side of each track; there being no division between the pavement of the street and the platforms. A picket fence also extended from the street between the tracks past the station, which prevented crossing except on the street. An automatic bell was rung by every train from the time it approached until it left the station. The train of plaintiff's intestate stopped with the rear car on the street crossing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. Held, that the question of contributory negligence was for the jury. Atlantic City R. Co. *v.* Clegg, 183 Fed. 216, 105 C. C. A. 478.

Through freight shedule at same time as passenger train.—A carrier so arranged its schedule that a through freight running at the rate of twenty-five to forty-five miles an hour reached the depot the very instant a passenger train was scheduled to arrive there. A passenger, desiring to board the passenger train, on hearing the whistle, ran toward the depot without stopping, looking, or listening before stepping on the track on which the freight ran, and the freight struck him. Persons who saw his danger undertook to warn him, but he did not understand. Held, that the question of his contributory negligence was for the jury. Illinois Cent. R. Co. *v.* Daniels, 96 Miss. 314, 50 So. 721, 27 L. R. A., N. S., 128.

Crossing track to platform at request of agent.—In an action for the death of a passenger by being struck by a train while he was attempting to cross the tracks to another platform to take the train, after the agent had notified him of the train's approach and requested him to cross over to the platform, whether decedent was himself negligent held for the jury. Judgment 105 N. W. 526, reversed on rehearing. Dieckmann *v.* Chicago, etc., R. Co., 121 N. W. 676, 145 Iowa 250, 31 L. R. A., N. S., 338.

Passenger struck by locomotive of train he intended to take.—Where a passenger at a station in crossing an intervening track to take his train is struck by the locomotive of the train which he intends to take, the question of his contributory negligence is for the jury. Struble *v.* Pennsylvania Co., 75 Atl. 17, 226 Pa. 118.

Caretaker of stock.—In an action for injuries to a passenger accompanying live stock in shipment in crossing the track between the caboose and the platform, who was struck by a switch engine, it was error to withdraw from the jury the question whether under the circumstances his failure to look constituted contributory negligence. Coon *v.* Atchison, etc., R. Co., 108 Pac. 85, 82 Kan. 311, 27 L. R. A., N. S., 1013.

91. Street car.—One desiring to board a car crossed one track, and was injured by a car coming from the opposite direction. He had seen both cars as they approached, but the one that injured him was coming at a more rapid rate than he thought. No bell was rung and no other warning given. Held, that the question of contributory negligence was for the jury. Fonda *v.* St. Paul City R. Co., 74 N. W. 166, 71 Minn. 438, 70 Am. St. Rep. 341.

Whether a passenger struck by a car while crossing a track, after having given a signal for the car to stop by operating a device maintained between that track and a parallel track, was guilty of contributory negligence, held for the jury. Karr *v.* Milwaukee Light, etc., Co., 113 N. W. 62, 132 Wis. 662, 13 L. R. A., N. S., 283.

Crossing track at place car usually stopped.—Plaintiff attempted to cross a street to board a south bound street car at a place where cars usually stopped. When he reached the north bound track, and the car was within 150 feet, he waved his hand to the motorman, who shut off the power and checked the speed. Believing that the car would be stopped as usual, and after again looking, plaintiff walked quickly onto the south bound track, and when about halfway over, observing that the car was coming very rapidly, he increased his speed, but could not clear the track, and was struck. Held, that he was not negligent as matter of law. Hunt *v.* Old Colony St. R. Co., 91 N. E. 883, 206 Mass. 11.

92. Running up track struck by backing train.—A passenger, struck and killed by a train backing against him at night as he was running up the track to catch the train, which he supposed had already passed the station, held not negligent as a matter of law. Evans *v.* Southern Pac. Co., 202 Fed. 160, 120 C. C. A. 448.

93. Crossing main track to train on siding.—Two trains passed daily at a station, where the one first arriving passed to a side track, to reach which from the depot

front of the train coming in on a track which it had seldom if ever used before,[94] or by having gone on the other side of the track and recrossing after hearing the signal of the approach of a train,[95] that the question, whether or not he was guilty of contributory negligence, is for the jury.

Being in Yards.—In an action for injury to a passenger while awaiting or seeking transportation caused by changing his position while waiting for a stock train to be made up in the yards,[96] or by his having fallen into a drain box while crossing defendant's yards for the purpose of changing cars,[97] the question of contributory negligence is for the jury.

Going to Car Stopped at Usual Place.—In an action by a passenger for an injury caused by walking in the dark to a train[98] or street car[99] which has stopped at a place beyond the usual stopping point, the question of contributory negligence is, under all the circumstances of the case, for the jury.

Passenger Injured by Crowd.—Where plaintiff who was injured as she was about to board a street car had reason to expect that the car would stop with a trailer or a portion thereof opposite the point where she took her position and from which she was pushed under the car and injured by the crowd behind her, she was not negligent as a matter of law in taking such position, but the question of negligence on her part must be determined by the jury.[1]

Failure of Passenger to Protect Himself against Cold and Exposure.—In an action against a railroad company for injuries from taking cold, the

it was necessary for passengers to cross the main track, on which the second train was due five minutes later. On the conductor of the first train calling "all aboard," plaintiff, without looking, started to cross the main track to such train, but was struck by the second train, which had signaled its approach, but which he could not see, on account of the crowd, until he reached the track. Held, that plaintiff's failure to look and listen was not negligence per se, but the question was properly submitted to the jury. Gulf, etc., R. Co. *v.* Morgan, 64 S. W. 688, 26 Tex. Civ. App. 378.

94. Train on track seldom used by it.—Deceased had frequently crossed a track to take a train at an early hour on a second track. One cold morning, when it was not yet light, he hurried from the station after the gates were opened, and was struck by the train coming on the first track. There was a headlight on the engine and a bell was rung. He did not look before attempting to cross. A passenger behind him barely escaped, and others were stopped by the interposition of the train. The gateman announced the coming of the train, but did not announce that it was on the first track. A switchman testified that the train had not come in on the first track before the accident for thirteen years, but a passenger thought it had done so once or twice about two months prior thereto. Held a question for the jury whether deceased was guilty of contributory negligence. Beecher *v.* Long Island R. Co., 55 N. Y. S. 23, 35 App. Div. 292, order affirmed in 55 N. E. 899, 161 N. Y. 222.

95. Recrossing track.—Whether it is gross negligence for one waiting at a station to go on the other side of the track, and recross after hearing the first signal of the approach of a train, is a question for the jury. Drawdy *v.* Atlantic, etc., R. Co., 55 S. E. 444, 75 S. C. 308.

96. A stock shipper accompanying his stock, in order to catch his train when it was made up at a junction, was compelled to wait in a switch yard containing many tracks. The night was dark and wet. The engineer making up his train pulled by, then stopped and turned back, striking the shipper, who had meanwhile shifted his position. No signal of warning was given, and, if there was a headlight, none of those in that vicinity noticed it. Held, that the question of contributory negligence was for the jury. Omaha, etc., R. Co. *v.* Crow, 74 N. W. 1066, 54 Neb. 747, 69 Am. St. Rep. 741.

97. Philadelphia, etc., R. Co. *v.* McGugan, 102 Md. 270, 62 Atl. 752.

98. Going to car stopped at unusual place.—Where plaintiff, on a very dark night, while walking rapidly with a conductor who was carrying a lantern and showing him to a train which he desired to board, and which had stopped some distance from the station, fell into a gully, which he claimed he did not see, and of the existence of which he was not aware, the question of whether he saw or should have seen the gully was for the jury. San Antonio, etc., R. Co. *v.* Turney, 78 S. W. 256, 33 Tex. Civ. App. 626.

99. Whether an intending passenger was negligent in attempting to reach a street car which passed by a usual stopping place, compelling plaintiff to walk some thirty feet on a dark night, was a question for the jury. Vasele *v.* Grant St. Elect. R. Co., 48 Pac. 249, 16 Wash. 602.

1. Passenger injured by crowd.—Cousi-

questions whether the passenger should have anticipated that he would be made sick by remaining in the cold room, and whether by reasonable effort he could have found accommodations elsewhere, and whether he should have imposed on the railroad company the burden of providing accommodation for the length of time he did, are for the jury.[2] And it is a question for the jury whether five hours before the departure of a train is an unreasonable time for one intending to become a passenger to remain in a railroad waiting room, which a railroad company voluntarily keeps open for the time such person is there.[3]

Failure to Consider Possibility of Collision.—The failure of a person intending to become, or who has been accepted as, a street railway passenger, to consider whether or not the car may come into contact with a passing train, affords no conclusive presumption of his carelessness, but the question of negligence is for the jury.[4]

§ 2908. Entering Conveyance in General.—Whether a passenger, injured while attempting to board a train[5] or street car,[6] was negligent, or failed to exercise due and ordinary care for his own safety, is, ordinarily, a question for the jury. Thus, where plaintiff alone testified in his own behalf as to the circumstances of the accident in which he received injuries in boarding defendant's car, and his statements were contradicted by defendant's witnesses, the case should be submitted to the jury.[7]

Necessity for Special Invitation.—It is not negligence as matter of law for one to board a street car without special invitation to do so, but the question of contributory negligence is for the jury.[8]

Instances Generally.—In an action for injuries to a passenger boarding a train or car, caused by the jostling of a crowd where she had been in similar crowds theretofore and seen the same struggling,[9] by standing on a pile of dirt in the street,[10] by the attempt of an enfeebled person, encumbered with heavy

neau *v.* Muskegon Tract., etc., Co., 152 Mich. 48, 115 N. W. 987.

2. Failure of passenger to protect himself against cold and exposure.—Brackett *v.* Southern Railway, 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1170.

Waiting room washed out while passenger there.—Evidence, in an action against a carrier by a passenger who caught cold, the waiting room for white people at a station where she was waiting for a train to connect with that from which she had alighted being washed out while she was there, held sufficient to warrant submission of the issue of contributory negligence and wantonness. Neal *v.* Southern Railway, 75 S. E. 405, 92 S. C. 197.

Flag station.—What ordinary diligence would require of a passenger at a flag station, where train failed to stop on signal, who had to protect himself from resulting injury through cold and exposure, is a question for the jury. Central, etc., R. Co. *v.* White, 135 Ga. 524, 69 S. E. 818.

3. Brackett *v.* Southern Railway, 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1170.

4. Failure to consider possibility of collision.—Lockwood *v.* Boston Elev. R. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A., N. S., 488.

5. Entering conveyance in general.—Benjamin *v.* Metropolitan St. R. Co., 84 N. Y. S. 458.

Struck by engine.—Whether a passenger struck by a part of the engine while attempting to board the train was negligent is a question for the jury. Williford *v.* Southern Railway, 85 S. C. 301, 67 S. E. 302.

6. Street car.—In an action against a street railway company for injuries to a boarding passenger, the question of contributory negligence is for the jury. Haas *v.* Wichita R., etc., Co., 132 Pac. 195, 89 Kan. 613, 48 L. R. A., N. S., 974.

7. Sweeny *v.* Union R. Co., 62 N. Y. S. 1034, 31 Misc. Rep. 797. Judgment reversed in 64 N. Y. S. 453, 31 Misc. Rep. 472.

8. Necessity for special invitation.—Baskett *v.* Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138.

9. Injury by jostling crowd.—Whether a passenger, injured while attempting to board a car at a station by reason of the jostling of a crowd, was guilty of contributory negligence or assumed the risk, in view of the fact that she had been in similar crowds before and had seen the same struggling and the same failure on the part of the carrier to control the crowd, was for the jury. Kuhlen *v.* Boston, etc., R. Co., 79 N. E. 815, 193 Mass. 341, 7 L. R. A., N. S., 729.

10. Standing on pile of dirt in street.—Thorne *v.* Philadelphia Rapid Transit Co., 237 Pa. 20, 85 Atl. 25.

grips,[11] to board a train or by placing his hand on the door instead of hand rail next to it,[12] the question whether or not he was guilty of contributory negligence is a question for the jury. So, also, where the injury to a pregnant woman might have been caused by her lifting a child onto the platform of the car.[13]

Whether Passenger Acted with Reasonable Promptness.—In an action against a railway company for injuries to a passenger, the question whether plaintiff acted with reasonable promptness in boarding the train is for the jury.[14]

Premature Starting of Train.—Where evidence is conflicting as to whether plaintiff was guilty of contributory negligence in boarding a train, in which act he was injured by the sudden starting of the train while he was on the car steps, it should not be directed for defendant, though the evidence preponderates in favor of the idea of contributory negligence,[15] but the question should be submitted to the jury.

Premature Starting of Street Car.—The question of plaintiff's contributory negligence, when injured by alleged negligent starting of a street car, which he was attempting to board, while he was on the step, was one for the jury,[16] for the risk of a premature start while boarding a car is never assumed.[17] And whether a passenger, thrown from his footing in attempting to board a street railway car by the negligent starting thereof, was guilty of contributory negligence in not releasing his hold on the rail and in running alongside and attempting to regain his position and board the car, is for the jury, and especially where the starting off of the car was slow.[18]

Car Starting after Stopping Reasonable Time.—Where a car was stopped in response to signals, the fact that the car stopped long enough so that the passenger had ample opportunity to board it, and that after the car had stopped a reasonable time he attempted to board it, without paying any attention to the signals to start the car, did not, as a matter of law, make him negligent, nor require him to anticipate that the car would start while he was about to board it; but the question of his negligence was for the jury.[19]

Boarding Train or Car from Wrong Side.—In an action against a carrier

11. Attempt by enfeebled person to board train.—Negligence as a matter of law, barring recovery for injuries to a passenger by the movement of a train while he was ascending the steps of a car, was not shown by the fact that he had just recovered from an illness, and was weak and enfeebled, and attempted to board the train with two heavy grips. Galveston, etc., R. Co. *v.* Fink, 44 Tex. Civ. App. 544, 99 S. W. 204.

12. Placing hand on door instead of hand rail.—Where a passenger was injured while boarding a street car by placing his hand on the door, which had not been fully opened, he was not guilty of negligence, as a matter of law, in placing his hand on the door, instead of on the handle or rail next to it; he having testified that he believed the door was open and received no warning from the conductor to the contrary. Carter *v.* Boston, etc., R. Co., 91 N. E. 142, 205 Mass. 21.

13. In a street car passenger's action for injuries by a violent jerk in starting, testimony of a physician that plaintiff's act, lifting her child onto the car, might have caused her miscarriage, held to carry to the jury the question of contributory negligence. Atwood *v.* Washington Water Power Co., 128 Pac. 1065, 71 Wash. 518.

14. Whether passenger acted with reasonable promptness.—St. Louis, etc., R. Co. *v.* Hartung, 95 Ark. 220, 128 S. W. 1025.

15. Premature starting of train.—Kulman *v.* Erie R. Co., 65 N. J. L. 241, 47 Atl. 497.

16. Premature starting of street car.—Rea *v.* Media, etc., R. Co., 221 Pa. 129, 70 Atl. 554.

17. Whether plaintiff assumed the risk of a sudden jerk while standing on the step of a street car held for the jury, in view of the evidence tending to show that she did not intend to remain on the step, and that the car started prematurely, for the risk of a premature start while boarding a car is never assumed. Rand *v.* Boston Elev. R. Co., 84 N. E. 841, 198 Mass. 569.

18. Burger *v.* Omaha, etc., St. R. Co., 139 Iowa 645, 117 N. W. 35.

19. Car starting after stopping reasonable time.—Ryan *v.* Pittsfield, etc., R. Co., 203 Mass. 283, 89 N. E. 527.

for injuries caused to a passenger while attempting to board a train [20] or street car [21] from the wrong side, the question whether or not the injured person was guilty of contributory negligence is for the jury.

Boarding Street Car Not in Proper Place at Platform.—In an action for injuries received by plaintiff in attempting to board a street car, which was not put in its proper place beside the platform, but was stopped with only eight inches of the car step adjacent to the straight part of the platform, the remaining two feet or more of the platform curving sharply away, whether the plaintiff used due care is a question for the jury.[22]

Attempting to Board Crowded Car.—Where a passenger attempted to take passage on a crowded car, which had stopped at a place where cars usually received passengers, but, owing to the crowd, did not secure a firm footing before the car was started with such force as to throw him to the ground, the carrier's servants not having warned him not to take passage; the question of contributory negligence is for the jury.[23]

Elevators.—In an action for injuries to a passenger by falling into an elevator shaft,[24] by having his foot caught between the elevator and the side of the well,[25] by slipping into elevator without notice that its floor was below the

20. Boarding train from wrong side.—In an action against a railroad for injuries caused to a passenger while attempting to board a train from the wrong side, plaintiff's testimony that he at first stood on the platform, but the crowd was so great that it crowded him forward across the first track, at which time some one came along and parted the crowd to make room for the train, and he was shoved over to the outside, makes the question of his contributory negligence one for the jury. Begley *v.* Pennsylvania R. Co., 50 Atl. 1009, 201 Pa. 84.

21. Boarding car from wrong side.—Plaintiff could not be held guilty of contributory negligence as matter of law, on evidence that she, a woman on crutches, with intention of taking passage on defendant's street car, got on the step leading to the rear vestibule from the left hand side, in ignorance of defendant's rule by which the door at that side was kept locked, and entrance could be had only by the door at the right hand side, and there stood with both hands on the grab iron, holding her crutches, and rapping on the door, and asking for admission, and that the conductor shook his head, and at the same time gave the starting signal, resulting in her being thrown off. Yancy *v.* Boston Elev. R. Co., 91 N. E. 202, 205 Mass. 162, 26 L. R. A., N. S., 1217.

22. Boarding street car not in proper place at platform.—Brisbin *v.* Boston Elev. R. Co., 207 Mass. 553, 93 N. E. 572.

23. Attempting to board crowded car.—Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935.

24. Falling into elevator shaft.—In an action for injuries to a customer in a store by falling into an elevator shaft through an open door leading to the elevator, whether plaintiff was guilty of contributory negligence was a question for the jury. Phillips Co. *v.* Pruitt, 82 S. W. 628, 26 Ky. L. Rep. 831.

Thus, whether a customer in a store, who was directed by the proprietor to take the elevator, and, in response to such direction, walked rapidly in a dim light to the open door of the elevator shaft, and, without stopping to see that the elevator was not in place, stepped into the shaft, and fell, was guilty of contributory negligence, was a question for the jury; and it was immaterial that he might have ascended to the floor which he wished to reach by a stairway. Morgan *v.* Saks, 38 So. 848, 143 Ala. 139.

Where defendant led the way to an elevator in his store, raised the gate, and called "Elevator," and plaintiff, believing this an invitation to enter the elevator, stepped forward and fell into the shaft, the fact that it was light enough for him to see that the elevator was not in the shaft, had he looked, did not preclude recovery, but it was for the jury to decide that under the circumstances plaintiff was not bound to exercise so high a degree of care. Burgess *v.* Stowe, 96 N. W. 29, 134 Mich. 204

It was proper to refuse an instruction that if defendant, on raising the elevator gate, called "Elevator!" in a loud tone, with intention of warning others above who might be using the elevator, such act was not negligence; but it was for the jury to find whether an ordinarily prudent man would not have apprehended that such action might be construed by plaintiff as an invitation to step forward to enter the elevator. Burgess *v.* Stowe, 96 N. W. 29, 134 Mich. 204.

25. Foot caught between elevator and sidee of wall.—In an action by a woman to recover for an injury received by having her foot caught between an elevator and the side of the wall in defendant's

floor of the building,[26] by attempting to enter an elevator, the floor of which was seven inches above that of the building, there being a considerable open space between the floor of the car and the threshold of the door;[27] or by the falling of the elevator,[28] the question whether or not the injured passenger was guilty of contributory negligence is for the jury.

§ 2909. Boarding Moving Conveyance.—Trains Generally.—The act of a passenger in boarding a moving train ordinarily presents a question of fact as to contributory negligence, to be determined by the jury under the facts of each case, and is not necessarily negligence per se,[29] unless it is moving so fast as to make the danger of boarding or alighting obvious to a person of ordinary prudence.[30] But where plaintiff's evidence shows conclusively that he was negligent in attempting to board a moving train it requires a nonsuit.[31]

Where the train does not stop a sufficient length of time to permit passengers to go aboard, is moving slowly by the station platform, and the passenger making the attempt is physically active, his freedom of action unimpeded, and there are reasons justifying his attempt to take the particular train, the question is one of fact.[32]

Failure to Board Train Till after it Started.—Where, in an action for injuries to a passenger attempting to board a train, the passenger relied on the negligence of the carrier in starting the train too soon after the conductor called "All aboard," and on the act of a porter in hindering his efforts to board, and on the failure of the conductor to stop the train after the danger to the passenger was or should have been apparent, the conduct of the passenger in not taking the train until it had started was, as a matter of law, the proximate

building while she was waiting for or stepping into the elevator, the question of contributory negligence is ordinarily for the jury. Oregon Co. *v.* Roe, 100 C. C. A. 269, 176 Fed. 715.

26. Failure to notice that floor below that of building.—Whether party stepping into elevator without noticing that its floor was several inches below the floor of the buildings was guilty of contributory negligence a question for the jury. Perrault *v.* Emporium, etc., Store Co., 128 Pac. 1049, 71 Wash 523.

27. Open space between threshold of door and floor of car.—Where there is evidence that the plaintiff had given a signal for the elevator to come to the floor where he was waiting, and that the defendant, operating the elevator himself, opened the door, and asked him to step in, which he there upon attempted to do, and that the floor of the car was then six or seven inches above the floor on which the plaintiff stood, and was only two inches thick; and that the car was of such dimensions that when its floor was at the same level with the floor of the hall, there was a considerable open space between the threshold of the door giving access to the elevator and the floor of the car; the question of the care of negligence of plaintiff was a question for the jury. Sullivan *v.* Marin, 175 Mass. 422, 56 N. E. 600.

28. Falling of elevator.—The question whether a person who has received an injury from falling in an elevator in a store was careless in omitting to observe, before stepping upon the platform from a room in which the machinery for running the elevator was, whether the engine was in operation so that the elevator could not fall, is a proper one to be submitted to the determination of the jury. Stewart *v.* Harvard College (Mass.), 12 Allen 58.

29. Trains generally.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Rush, 86 Ark. 325, 111 S. W. 263.

Illinois.—Chicago, etc., R. Co. *v.* Flaharty, 96 Ill. App. 563.

Minnesota.—Hull *v.* Minneapolis, etc., R. Co., 116 Minn. 349, 133 N. W. 852.

The question whether a passenger is chargeable with contributory negligence in attempting to board a train while it is in motion may or may not be one of fact for the jury, depending upon the facts and circumstances of the particular case. Hull *v.* Minneapolis, etc., R. Co., 116 Minn. 349, 133 N. W. 852.

Texas.—Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497.

30. Holden *v.* Great Northern R. Co., 103 Minn. 98, 114 N. W. 365; Cooper *v.* Atlantic, etc., R. Co., 78 S. C. 562, 59 S. E. 704; Gyles *v.* Southern Railway, 79 S. C. 176, 60 S. E. 433.

31. Meeks *v.* Atlantic, etc., R. Co., 122 Ga. 266, 50 S. E. 99.

32. Hull *v.* Minneapolis, etc., R. Co., 116 Minn. 349, 133 N. W. 852.

cause of the injury.[33]

Passenger Having Alighted at Intermediate Station. —Whether a passenger, who gets off his train at an intermediate station, and undertakes, under the direction of the conductor, to board it again while moving, is guilty of contributory negligence, is a question for the jury, considering the speed of the train, the direction he receives from the conductor, and the other circumstances.[34] The fact that the train he undertakes to board is a freight train does not change the rule, though it is a circumstance to be considered.[35]

Street Cars Generally.—Whether it is negligence for a person to attempt to get on a street car in motion depends on the circumstances of the case, and is a question of fact for the determination of the jury,[36] unless the speed is so

33. Failure to board train till after it started.—Roberts *v.* Atlantic, etc., R. Co., 155 N. C. 79, 70 S. E. 1080.

Defendant, a railway company, had tickets for an excursion, but none were on sale at the town in which decedent lived. Decedent, wishing to go, arranged to have tickets from the next station brought by the baggage master on the excursion train. As soon as the train arrived he took the tickets, signed the tickets as required by the company, and attempted to board the train, which was already moving slowly, and was hurled against a baggage truck, and thrown under the cars and killed. His wife, niece, and granddaughter had been helped on board by a friend, and had no time to get their seats before the train started. Held, that the question of decedent's contributory negligence should have been submitted to the jury, and a peremptory instruction for defendant was erroneous. Wooten *v.* Mobile, etc., R. Co., 29 So. 61, 79 Miss. 26.

34. Passengers having alighted at intermediate station.—Illinois Cent. R. Co. *v.* Glover, 24 Ky. L. Rep. 1447, 71 S. W. 630.

35. Illinois Cent. R. Co. *v.* Glover, 24 Ky. L. Rep. 1447, 71 S. W. 630.

36. Street cars generally.—*Alabama.*—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 79, 45 So. 292.

Georgia.—Rome R., etc., Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468.

Illinois.—South Chicago City R. Co. *v.* Dufresne, 102 Ill. App. 493, judgment affirmed in 65 N. E. 1075, 200 Ill. 456; Chicago Union Tract. Co. *v.* Olsen, 71 N. E. 985, 211 Ill. 255, affirming 113 Ill. App. 303; Donnelly *v.* Chicago City R. Co., 235 Ill. 35, 85 N. E. 233, affirming judgment 136 Ill. App. 204.

Iowa.—Blades *v.* Des Moines City R. Co. (Iowa), 113 N. W. 922.

Kentucky.—Lexington R. Co. *v.* Herring, 29 Ky. L. Rep. 794, 96 S. W. 558, rehearing denied in 30 Ky. L. Rep. 269, 97 S. W. 1127.

Massachusetts.—Hamilton *v.* Boston Elev. R. Co., 213 Mass. 420, 100 N. E. 604.

Plaintiff's testimony tended to show that, when he saw defendant's car coming, he, with another boy, left the sidewalk and stood by the side of the track; that the car stopped less than two car lengths from the place of the accident, and started with a tow horse attached; that the grade was rising; that the horses started on a walk, and, at the time the plaintiff attempted to get upon the platform, were just beginning to trot, or going at a slow trot; that, when the car approached the plaintiff, he signaled the driver to stop; that the driver saw him and turned to speak to the tow boy, who was on the front platform on the opposite side of the car from the plaintiff; that as the plaintiff was getting upon the front platform, with one foot upon the step and holding to the railing with both hands, the driver and the tow boy started up the horses, giving the car a jerk by which the plaintiff's foot was thrown off the step, and, after being dragged a few feet, he fell, receiving the injuries complained of. There was no rule or notice prohibiting the getting on the front platform of the car when in motion. Held, that the question whether the plaintiff was in the exercise of due care was for the jury. McDonough *v.* Metropolitan R. Co., 137 Mass. 210.

Missouri.—Where the evidence was that a street car stopped for plaintiff to get on, that he hesitated, and that he did not attempt to get on until the car started, and there is no evidence as to the speed of the car at the time, the question of plaintiff's negligence is for the jury. Posch *v.* Southern Elect. R. Co., 76 Mo. App. 601.

Nebraska.—Nocita *v.* Omaha, etc., St. R. Co., 89 Neb. 209, 131 N. W. 214.

New York.—Clinton *v.* Brooklyn Heights R. Co., 86 N. Y. S. 932, 91 App. Div. 374.

Premature starting of car.—Shanahan *v.* St. Louis Trans. Co., 109 Mo. App. 228, 83 S. W. 783.

Failure to board car till after it starts. —Where a person first attempts to get upon a street car after it has started, the question whether he was negligent is for the jury, in an action for injuries caused by being thrown from the car. Gordon *v.* West End St. R. Co., 175 Mass. 181, 55 N. E. 990.

great[37] or he is so infirm or encumbered as to make it manifest negligence.[38] Hence, a charge declaring that, as a matter of law, it is not negligence for a passenger to attempt to board a street car in slow motion, is improper.[39] This rule applies to both electric and horse cars.[40]

Elevators.—The question whether a passenger attempting to get on an elevator when it is moving, but before it is in such rapid motion as to make the attempt to enter it gross negligence, is guilty of negligence, is a question for the jury.[41]

§ 2910. Conduct While in Transit in General.—In General.—A passenger traveling on a railway passenger train,[42] mixed train,[43] cattle train,[44] or in a street car,[45] is not bound as is a person approaching a dangerous crossing to keep all of his senses alert, and be constantly on the lookout for danger. He has, while exercising ordinary care and prudence on his part, a right to presume that the company in whose cars he is traveling will discharge its duty towards him as its passenger and exercise that high degree of care for his protection which the law requires of it. Where, in the course of such travel, he is injured, the question of negligence is primarily one for the jury under proper instructions from the court defining the degree of care required of each party.

37. Speed of car.—O'Mara *v.* St. Louis Trans. Co., 102 Mo. App. 202, 76 S. W. 680.

An attempt to board a car moving not more than from one to three miles an hour was not negligence per se, but presented a mixed question of law and fact, to be submitted to the jury under proper instructions. Hansberger *v.* Sedalia Elect. R., etc., Co., 82 Mo. App. 566.

Speed not checked to take on passenger.—Whether plaintiff was guilty of contributory negligence in attempting to board an electric street car while it was moving rapidly, or when he ought to have known that its speed had been checked not to take on passengers, but to get past a broken circuit at a crossing, and that it was likely to recover speed immediately, so as to preclude his recovery for injuries received at the time, was a question for the jury. Leu *v.* St. Louis Trans. Co., 85 S. W. 137, 110 Mo. App. 458.

Sudden increase of speed.—Whether a person attempting to board a street car moving at a slow rate of speed is guilty of contributory negligence, precluding a recovery for injuries occasioned by the sudden increase of speed, is for the jury. Leu *v.* St. Louis Trans. Co., 106 Mo. App. 329, 80 S. W. 273.

38. Infirm person or one encumbered with baggage.—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557; O'Mara *v.* St. Louis Trans. Co., 102 Mo. App. 202, 76 S. W. 680.

If a street car was just starting and barely moving, the attempt of a woman incumbered with bundles to board it would not constitute negligence as matter of law. Payne *v.* Springfield St. R. Co., 89 N. E. 536, 203 Mass. 425.

Though an attempt by a man of sixty-two years, weighing 200 pounds, to board a street car going six miles an hour may be negligent and the jury would be justified in so finding, where it was not conclusively shown that the car was going six miles an hour, and where the conductor was appraised of the person's intention to board the car in motion and of the danger, and rang the bell twice, the question of contributory negligence was for the jury. Orth *v.* Saginaw Valley Tract. Co., 162 Mich. 353, 127 N. W. 330.

39. Birmingham R., etc., Co. *v.* Brannon, 132 Ala. 431, 31 So. 523.

40. Central Pass. R. Co. *v.* Rose, 14 Ky. L. Rep. 204.

Cable car.—North Chicago St. R. Co. *v.* Kaspers, 85 Ill. App. 316, judgment affirmed in 186 Ill. 246, 57 N. E. 849.

41. Elevators.—Blackwell *v.* O'Gorman, 22 R. I. 638, 49 Atl. 28.

42. Cumberland Valley R. Co. *v.* Maugans, 61 Md. 53, 48 Am. Rep. 88; Baltimore Consol. R. Co. *v.* Rofcowitz, 89 Md. 338, 43 Atl. 762.

43. Mixed trains.—In an action by a passenger on a mixed train to recover for personal injuries, the question of plaintiff's contributory negligence is one for the jury. Symonds *v.* Minneapolis, etc., R. Co., 92 N. W. 409, 87 Minn. 408.

44. Stock passenger injured in burning cattle.—Hess *v.* Baltimore, etc., R. Co., 28 Pa. Super. Ct. 220.

45. Street car.—Jones *v.* United R., etc., Co., 99 Md. 64, 57 Atl. 620.

Where, in an action for injuries to the plaintiff while a passenger in an open street car, a witness testified that the wagon carrying the slab which struck plaintiff scraped the side of the car, making a noise that could be heard by any one in the car, before the accident, but the plaintiff testified that he did not hear it, it was a question for the jury whether he was guilty of contributory negligence. Jones *v.* United R., etc., Co., 57 Atl. 620, 99 Md. 64.

It is only where the facts are undisputed, or where but one reasonable inference can be drawn from them, that it is proper to take the case from the jury.[46]

Allowing Ladies to Occupy Safest and Most Desirable Seats.—A passenger in a railway train does not owe a duty to the company to push and crowd his way in order to get an advantage over other passengers in securing a place within the cars, and it does not follow as a matter of law that he will be guilty of negligence in not so doing, and as a matter of law it is not negligence to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance.[47]

Riding in Baggage Car.—Whether or not an injured passenger was rightfully in the baggage compartment of the train[48] or whether he was guilty of contributory negligence in being there is a question for the jury.[49] Thus where passengers were without objection generally permitted to use as a smoking room the baggage compartment of a combination coach, consisting of one compartment supplied with seats for passengers and another compartment used for baggage, the permission amounted to an implied invitation to so use it, and a passenger so using it was not as a matter of law guilty of contributory negligence.[50]

Riding in Cupola of Caboose.—Whether it was contributory negligence for a passenger on a freight train to ride in the cupola of the caboose is a question for the jury to determine from all the circumstances.[51]

Riding on Logging Truck.—One riding with the implied consent of a logging company on its logging train, consisting of an engine and a logging truck, is not guilty of contributory negligence per se in riding on the truck, so as to prevent recovery for his injury from collision of that and another train.[52]

Riding on Top of Tie Train.—In an action by a wife for the death of her husband who was killed on defendant's tie train, on which he was making trips

46. Jones *v.* United R., etc., Co., 99 Md. 64, 57 Atl. 620; B. & O. R. Co. *v.* Dougherty, 36 Md. 366; Cumberland Valley R. Co. *v.* Maugans, 61 Md. 53, 48 Am. Rep. 88; Cooke *v.* Baltimore Tract. Co., 80 Md. 551, 31 Atl. 327; Consolidated R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762.

47. Allowing ladies to occupy safest and most desirable seats.—Peterson *v.* Elgin, etc., Co., 142 Ill. App. 34, judgment affirmed in 87 N. E. 345.

48. Riding in baggage car.—Davis *v.* Iowa Cent. R. Co., 147 Iowa 594, 124 N. W. 753.

A passenger, desiring to go but a short distance on the train, and fearing that he could not see the conductor in time to make known his wishes, by reason of the rush of passengers, left his seat while the train was standing at a station, and went into the baggage compartment, and, while talking there to the conductor in regard to his journey, was injured. There was a notice over the door of the baggage compartment of "No admittance," but the passenger did not see it. The door was standing open. Held, that whether the passenger was rightfully in the baggage compartment was a question for the jury. Gardner *v.* Waycross, etc., R. Co., 25 S. E. 334, 97 Ga. 482, 54 Am. St. Rep. 435.

49. Under Oklahoma Statutes.—Wilson's Rev. & Ann. St. 1903, § 657, makes it the duty of a carrier to use the utmost care and diligence for the safe carriage of its passengers; §§ 658-660, 712-714, require a carrier to furnish safe vehicles and sufficient accommodations, and empower it to make rules for the conduct of its business; § 1050 provides that in case a passenger shall be injured while on the platform of a car while in motion, or in any baggage car in violation of the rules of the corporation, then the carrier shall not be liable, provided it furnished room inside its cars sufficient for the accommodation of its passengers; and § 1051 provides that, when fare is taken by a carrier on any mixed train, the same care must be taken as of passengers on passage cars. Held, that under the statutes it was not negligence per se for a passenger on a mixed railroad train to occupy a seat in a baggage car. Lane *v.* Choctaw, etc., R. Co. (Okla.), 91 Pac. 883.

50. Davis *v.* Iowa Cent. R. Co., 147 Iowa 594, 124 N. W. 753.

51. Riding in cupola of caboose.—St. Louis, etc., R. Co. *v.* Morgan, 44 Tex. Civ. App. 155, 98 S. W. 408.

52. Riding on logging truck.—Harvey *v.* Deep River Logging Co., 49 Ore. 583, 90 Pac. 501, 12 L. R. A., N. S., 131.

to inspect ties, it is a question for the jury whether he was guilty of negligence in riding on the top of the train with the foreman in charge.[53]

Whether Rule against Carrying Passengers on Freight Trains Abrogated.—Repeated violations of a rule of a railroad company forbidding the carrying of passengers on freight trains, and failure to publish and practically enforce same, are mere facts to be considered by the jury in determining whether a reasonably prudent person would have concluded that the rule had fallen into disuse. Hence it was error for the court to charge that any particular state of facts would authorize persons to believe that same had been abrogated, or had been permitted to fall into disuse, but the issue should have been left to the jury.[54]

Standing or Walking in Train.—Where a passenger is injured while out of his seat in a car and standing [55] or walking in the aisle,[56] and the question

53. Riding on top of the train.—St. Louis, etc., R. Co. *v.* Kitchen, 98 Ark. 507, 136 S. W. 970, 50 L. R. A., N. S., 828.

54. Whether rule against carrying passengers on freight trains abrogated.—San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

55. Leaving seat to speak to conductor—Cars being drilled.—A passenger left his seat while the train was standing at a station, in order to speak with the conductor on business, and, while standing talking, was thrown down, as the result of another car bumping into that in which he stood. The conductor had been drilling cars, and the passenger, before leaving his seat, looked out and saw that no drilling was then being done. The concussion of the car was unusually severe, throwing down the conductor as well as the passenger. Held, that whether plaintiff could have avoided the injury by the exercise of ordinary diligence was a question for the jury. Gardner *v.* Waycross, etc., R. Co., 25 S. E. 334, 97 Ga. 482, 54 Am. St. Rep. 435.

Leaving seat to get drink—Cars being shifted.—A passenger on a mixed train who leaves his seat in the coach to get a drink while the coach is standing and cars are being shifted is not negligent as matter of law. Suttle *v.* Southern R. Co., 64 S. E. 778, 150 N. C. 668.

Collision.—Where a passenger train, by negligence of the railroad's servants, ran against a freight car which was driven on the main track by a storm, and injured plaintiff, who was a passenger on the train and was standing in the aisle of the car at the time of the collision, the court is not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. Gulf, etc., R. Co. *v.* Bell, 93 Tex. 632, 57 S. W. 939.

Where a passenger was injured by the backing of a freight train against the passenger car while he was standing in such car and knew that the train was approaching, after instructing the jury that he was bound to use ordinary diligence to avoid injury, it is not error to refer to the jury whether or not under the circumstances, he should have left the car or should have taken the seat nearest to where he stood when he discovered the danger. This being a matter for the opinion of the jury in the light of the evidence it could be referred to them under the phraseology "if you think," etc. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Standing in aisle while engine being coupled.—Whether, under the circumstances, it was negligence contributing to his injury for a passenger to stand in the aisle of a car, while the engine was being backed down to the train, held a question for the jury. Lane *v.* Spokane Falls, etc., R. Co., 57 Pac. 367, 21 Wash. 119, 46 L. R. A. 153, 75 Am. St. Rep. 821.

Standing in caboose.—Whether a passenger on a freight train, injured by a car striking the caboose while uncoupled from the train, was guilty of contributory negligence because he was standing up in the caboose at the time of the accident, notwithstanding a notice posed therein warning passengers of the danger of standing up, held for the jury. St. Louis, etc., R. Co. *v.* Gilbreath, 87 Ark. 572, 113 S. W. 200.

While a caboose, with several cars attached, was standing on a track, plaintiff, a passenger thereon, went to the front platform, and saw the engine and other cars moving about, but saw nothing to indicate when they would back down to make coupling. He returned inside, and stood in the aisle, and while so standing the train backed down, and he was injured. There was evidence that his stoppage in the aisle was merely momentary. Held, that the question of plaintiff's negligence should have been submitted to the jury. Harden *v.* Chicago, etc., R. Co., 78 N. W. 424, 102 Wis. 213.

56. Walking in aisle.—In an action against a railroad company for injuries to a passenger resulting from being thrown to the floor by a violent jolt in switching, evidence considered, and held to require submission to the jury of the

whether it was negligence for him to be standing is, under the circumstances, one about which reasonable men might fairly differ in opinion, it should be submitted to the jury. This is the rule whether the injured passenger is traveling on a passenger, freight,[57] or mixed train,[58] or standing in the aisle of a crowded street car.[59]

Protruding Body, Head or Arm Out of Window.—Where the body,[60] head, or arms of a passenger is protruding from a car and he is injured thereby,[61] and the evidence is conflicting as to how he became exposed,[62] or where reasonable men might fairly differ in opinion as to whether he was guilty of contributory negligence,[63] it is a question for the jury whether he was guilty

issue as to whether plaintiff was guilty of contributory negligence in standing or walking in the aisle of the car. Yazoo, etc., R. Co. *v.* Humphrey, 36 So. 154, 83 Miss. 721.

57. Freight train.—Where plaintiff, a passenger on a freight train, had occasion to stand for a moment in the coach as the train was slowly pulling out of the station for a proper purpose, and was thrown to the floor and injured by a severe jar of the train, whether he was guilty of such contributory negligence as precluded a recovery was for the jury. Pasley *v.* St. Louis, etc., R. Co., 83 Ark. 22, 102 S. W. 387.

Whether it is an act amounting to contributory negligence for a passenger, traveling in the caboose of a freight train in motion, to stand up and lean forward to spit in a stove in the car, should be left to the jury. St. Louis, etc., R. Co. *v.* Burrows, 61 Pac. 439, 62 Kan. 89.

58. Mixed trains.—A passenger is not guilty of contributory negligence per se in standing in a mixed train. St. Louis, etc., R. Co. *v.* Hartung, 93 Ark. 220, 128 S. W. 1025.

The mere fact that a woman passenger who had boarded the passenger coach of a mixed train at the station platform went to the front end of the coach to get a drink of water while the coach was standing and while switching was being done by the engine for the purpose of making up the train did not make her guilty of contributory negligence as a matter of law. St. Louis, etc., R. Co. *v.* Billingsley, 96 S. W. 357, 79 Ark. 335.

59. Standing in aisle of crowded street car.—In an action for injuries to a passenger while standing in the aisle of a crowded street car, evidence held to require submission to the jury of the issue of plaintiff's contributory negligence in failing to have hold of a strap at the time he was injured. Butler *v.* New York City R. Co., 96 N. Y. S. 254, 109 App. Div. 658.

60. Protruding body, head, or arm out of window.—A passenger was fatally injured by striking against an open gate on a stock chute near a railroad track while leaning out of a car window. Held, that it was for the jury to determine whether he was negligent in thus exposing himself. Gulf, etc., R. Co. *v.* Phillips, 74 S. W. 793, 32 Tex. Civ. App. 238.

61. Inexperienced passenger.—Whether a female passenger, who was an inexperienced traveler, was guilty of contributory negligence in placing her arm on the sill of an open window of the car after the window had twice fallen in her presence, and had been raised by other passengers for her accommodation, was a question for the jury. Cincinnati, etc., R. Co. *v.* Lorton, 110 S. W. 857, 33 Ky. L. Rep. 689.

62. In an action by an adult for injuries sustained while his elbow was protruding from the window of a railway carriage in which he was a passenger, where the evidence is conflicting as to how plaintiff's arm came to be exposed, the question of negligence is for the jury. Pittsburg, etc., R. Co. *v.* Andrews, 39 Md. 329, 17 Am. Rep. 568.

63. Where the arm of a passenger was projecting from a car window, and was injured by a bale of cotton from an adjacent platform falling on it, it is a question to be determined from the evidence whether or not such passenger was negligent, barring recovery. Kird *v.* New Orleans, etc., R. Co., 29 So. 729, 105 La. 226.

Where the arm of a passenger was projecting from the sill of the car window, and was struck by the open side door of a freight car left on the switch connecting with the main track so near that the open door extended from the switch to the main track, it is a question for the jury whether the passenger was guilty of contributory negligence. Clerc *v.* Morgan's, etc., R. Co., 31 So. 886, 107 La. 370, 90 Am. St. Rep. 319.

Plaintiff's arm, resting on the window sill, was injured by a falling stone as the car was passing through a cut. It appeared that the rocks had at different times fallen or rolled down and bounded from the rock cut onto the tracks below, a watchman being frequently kept there, though none was there at the time of the accident. A wire screen running on the outside of the car across the window, the bottom of which was about four inches from the window sill, was uninjured, and defendant's evidence showed no injury to the car, though plaintiff testified that after the accident he examined the window sill and found a piece of the window knocked out of it. Held that, it not appearing just how

of negligence barring a recovery. Where the evidence conclusively shows that the injury resulted from the plaintiff's carelessly allowing his arm to protrude from the window, it is error to refuse a peremptory instruction for the defendant.[64]

Street Car Passenger.—It is not negligence as a matter of law for a passenger on a street car to protrude a portion of his body out of the car in which he is being carried, but such question is one of fact to be determined by the jury under proper instructions from the court, the test being whether or not an ordinarily prudent person would do the same act under the same or like circumstances.[65]

Going on to Platform of Moving Train.—Whether an injured passenger

far plaintiff's arm extended beyond the screen, it could not be said as a matter of law, even if some part of the arm was beyond the surface of the screen, that plaintiff was guilty of contributory negligence and the question was for the jury. Goller *v.* Fonda, etc., R. Co., 96 N. Y. S. 483, 110 App. Div. 620.

64. In an action by a passenger against a railroad company for injuries to his arm in passing a cattle chute, plaintiff testified that his arm was lying in the car window, and that he did not think it projected, because he had several times after the accident placed it in a similar position, which experiments convinced him that it was inside the car. Two witnesses testified that plaintiff was asleep, and that his arm projected from the car window. There were no indentations on the side of the car showing contact with the chute in passing. Held, that it was error to refuse a peremptory instruction for the defendant. Chicago, etc., R. Co. *v.* Hoover, 64 S. W. 579, 3 Ind. T. 693.

65. Street car passenger.—Gage *v.* St. Louis Trans. Co., 211 Mo. 139, 109 S. W. 13.

Where a street car passenger is injured by reason of the protrusion of his arm out of the side of the car, the question of whether he was guilty of contributory negligence is not one of law for the court, but of fact for the jury. Georgetown, etc., R. Co. *v.* Smith, 25 App. D. C. 259, 5 L. R. A., N. S., 274.

It is a question of fact whether a person riding in a street car who places his arm upon the window sill, even if it extends slightly outside, does so in a manner hazardous under the circumstances, or whether he exercises reasonable care for his own safety. Pell *v.* Joliet, etc., R. Co., 142 Ill. App. 362, judgment affirmed in 238 Ill. 510, 87 N. E. 542.

The seats on defendant street railway company's car extended transversely, leaving no passageway down the middle, the passengers entering the space between the seats directly from the footboard on the outside of the car. The sides of the car were not inclosed, except by upright posts erected at the ends of the seats. On the outside of these posts were attached perpendicular handholds for the convenience of passengers in getting on or off. While moving, a rail or guard was let down on the left side of the car, about three feet above the floor, and with the upright posts constituted the only barrier on that side. The space between two cars standing at rest on the tracks was about eleven inches, but the tracks were uneven, the rails being depressed at the joints, thus permitting the cars when in motion to rock and sway, thereby reducing the space between them. Plaintiff's intestate, a passenger, gave the end seat, which he occupied, to a lady, the car being crowded, and stood with his back against the guard rail and post, and on throwing back his head in laughter, so that it extended a few inches beyond the post, was struck by the post or handrail of a car moving rapidly in the opposite direction, and fatally injured. Held, that the question of decedent's contributory negligence was for the jury. La Barge *v.* Union Elect. Co., 116 N. W. 816, 138 Iowa 691, 19 L. R. A., N. S., 213.

Struck by beam near track.—In an action by a street car passenger for injuries from being struck by a beam near a track, evidence showing that he was riding with his arm protruding through a window is sufficient to take the case to the jury as to contributory negligence. Such an act of the passenger would not be negligence per se, preventing a recovery. Gardner *v.* Metropolitan St. R. Co., 223 Mo. 339, 122 S. W. 1068, 18 Am. & Eng. Ann. Cas. 1166.

Exposing elbow.—Where plaintiff, a passenger on a street car, sustained a fractured elbow by its being struck by a passing car on an opposite track, plaintiff was not guilty of contributory negligence, as a matter of law, in exposing his elbow to a slight degree from the window of the car on which he was riding, or in resting the same on the window sill within the car. Smith *v.* St. Louis Trans. Co., 97 S. W. 218, 120 Mo. App. 328.

Nauseated passenger.—A passenger in a street car, who became nauseated and put his head out of an open window, was not guilty of contributory negligence as a matter of law. Lacey *v.* Minneapolis St. R. Co. (Minn.), 136 N. W. 878.

who went on to the platform of a moving train was guilty of contributory negligence is a question for the jury.[66]

Going on Platform While Train Stopped.—Whether a passenger on a railroad is negligent in attempting to go upon the platform of the car while the train is standing at a regular station is for the jury.[67] A passenger on a railroad train has a right to go on the platform of a car after the train has stopped at a regular station, and within the time allowed for the stopping of said train, providing he does not intefere with the management of the train and with persons alighting therefrom or getting thereon, and it is not negligence per se so to do.[68]

Passing from One Car to Another.—It is not negligence as a matter of law for a passenger, in the absence of any rule of the carrier prohibiting it, to pass from one car to another while the train is in motion.[69] But where the conduct of a passenger passing from one car to another is such that reasonable men might fairly differ in opinion on the question of contributory negligence, it should be left to the jury. Where the injured passenger relinquishes his hold on the door handle and was thrown from the platform, where he stepped onto the upper step of the platform,[70] where he walked through an outside vestibule,

66. Going on to platform of moving train.—Whether a passenger on a railroad train in leaving his seat and going to the door or on the coach platform while the train is in motion is guilty of such negligence as will defeat a recovery for an injury resulting from the negligence of the company in operating its train is a question for the jury; and, in determining the same, the jury may take into consideration the age and physical condition of the passenger, the speed of the train, the reason of the passenger for leaving his seat, and all other attendant facts and circumstances. Central, etc., R. Co. *v.* Forehand, 58 S. E. 44, 128 Ga. 547.

Where whistle for station sounded.—Where a train, after sounding the usual whistle for a passenger station, passed the station at a speed of thirty miles an hour, the question whether the passenger was guilty of contributory negligence in going on the platform as the train passed the station was for the jury. Louisville, etc., R. Co. *v.* Head, 59 S. W. 23, 22 Ky. L. Rep. 863.

Passenger thrown through vestibule door.—In an action by a passenger against a railroad company for injuries from being thrown through an open vestibule by a sudden jerking of the car, where it did not appear the plaintiff knew that the vestibule doors were open, held, that the question of plaintiff's contributory negligence in going upon the platform was for the jury. Kearney *v.* Oregon R., etc., Co., 59 Ore. 12, 112 Pac. 1083, 115 Pac. 593.

67. Going on platform while train stopped.—McCurrie *v.* Southern Pac. Co., 122 Cal. 558, 55 Pac. 324.

In an action for injury to a passenger caused by a jerking of a caboose as she was re-entering it, whether she was guilty of contributory negligence on leaving her seat and going out on the back platform in the circumstances is under the evidence, for the jury. St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 101, 112 S. W. 212.

68. Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

A passenger can not be held guilty of contributory negligence as a matter of law in quitting his seat in a passenger coach while the train is stopping at a regular station waiting for the arrival of another train and going on the platform of the coach. Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

69. Releasing hold on door handle.—Intestate boarded defendant's train at a small station, where there was neither station agent nor baggageman. He went into the baggage car with a hamper, according to custom, and, after receiving a check, stepped on the platform, while the train was in motion, to go to the smoking or passenger car, when a gust of wind raised his hat, and, as he relinquished his hold on the door handle of the car, he was thrown from the platform and killed. Held, that intestate was not guilty of contributory negligence as matter of law. Boston, etc., R. Co. *v.* Stockwell, 146 Fed. 505, 77 C. C. A. 19.

Passing from one car to another.—St. Louis, etc., R. Co. *v.* Pollock, 93 Ark. 240, 123 S. W. 790.

70. Stepping on to step of platform.—The question whether a passenger, who had just boarded a smoking car and was passing through that car to the next coach in the rear, where he intended to ride, was guilty of contributory negligence, where he grasped the railings on the steps of the platform and stepped down on the upper step for the purpose of spitting, was a question for the jury, and not for the court. St. Louis, etc., R. Co. *v.* Leftwich, 117 Fed. 127, 54 C. C. A. 1.

thinking he was returning to a sleeping coach,[71] and where he was hurt by the swinging of a car door by a jerk of the train,[72] the question of contributory negligence is for the jury.

Crossing from One Car Platform to Another.—The act of crossing from one car platform to another on a moving train is not per se negligence, and a passenger, undertaking to go from one car to another while the train is in motion, assumes only the risk incident to such undertaking; and where he is thrown from the platform by a sudden jerk, the question of the negligence of the defendant in causing the injury and plaintiff's contributory negligence are for the jury.[73]

Walking on Running Board to Seat.—Whether a street car passenger, injured by being thrown from a car as he was walking along the running board to a seat while the car was in motion, was guilty of contributory negligence, is a question for the jury.[74]

Passing from One Seat to Another Over the Running Board.—It is not negligence per se on the part of a street railway passenger not to anticipate that a pole may be permitted to stand so near the track that he can not, in an erect position and careful manner, pass from one seat in the car to another over the running board without danger of injury from collision with such pole.[75]

Falling Over Valise in Aisle.—Where a passenger fell over a valise or suit case placed by another passenger in the aisle of a poorly-lighted car, the question of contributory negligence is for the jury.[76]

Injury by Articles Falling from Parcel Rack.—In an action against a carrier for an injury to a passenger caused by the fall of a suit case or other article belonging to another passenger from the parcel rack, the question whether the passenger was guilty of contributory negligence in not observing such article or in sitting under it without objection, is for the jury.[77]

Remaining on Train Not Provided with Accommodations and Protection.—In an action for injuries to a passenger resulting from the failure

71. **Walking through outside vestibule.**—A passenger riding in the rear coach of a vestibuled train left the coach at night to go to the forward end of the train, and, to facilitate his return, left open the door of the sleeping coach in which he was riding. The night was dark, the vestibule was not lighted, and the train was running rapidly. On his return, in passing through the vestibule which led into the coach in which he was riding, he supposed a dim, reflected light from the windows of the sleeper was a light shining through the door of the coach which he had left open, and proceeding, in the exercise of due care, to enter, as he supposed, the doorway of the coach, walked through an outside vestibule door, which had been left open, fell from the train, and was seriously injured. Held, that the question of contributory negligence is one for the jury. Bronson *v.* Oakes, 76 Fed. 734, 22 C. C. A. 520.

72. **Swinging of car door.**—In an action by a passenger, who, when the train blew for his station, started for another coach to get a bundle, and was hurt by the swinging of a car door by a jerk of the train, whether he was guilty of contributory negligence in undertaking to go into the other coach while the train was in motion was a question for the jury. Branan *v.* Southern R. Co., 68 S. E. 793, 135 Ga. 24.

73. **Crossing from one car platform to another.**—Auld *v.* Southern R. Co., 136 Ga. 266, 71 S. E. 426, 37 L. R. A., N. S., 518.

74. **Walking on running board to seat.**—Holliday *v.* Boston Elev. R. Co., 214 Mass. 424, 101 N. E. 1073.

75. **Passing from one seat to another over the running board.**—Cameron *v.* Lewiston, etc., St. Railway, 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497.

76. **Falling over valise in aisle.**—Beiser *v.* Cincinnati, etc., R. Co., 152 Ky. 522, 153 S. W. 742; Burns *v.* Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

77. **Injury by articles falling from parcel rack.**—A passenger wearing a heavy crepe veil boarded defendant's train, and was taken to a seat by the brakeman, and her ticket taken by the conductor. After three or four stops, the passenger was injured by the fall of a suit case belonging to another passenger from the parcel rack above her, which she had not previously seen. Held, that whether she was negligent in not observing the suit case or in sitting under it without objection was for the jury. Adams *v.* Louisville, etc., R. Co., 121 S. W. 419, 134 Ky. 620, 21 Am. & Eng. Ann. Cas. 321.

to provide him proper accommodation and protection, evidence that after protesting to the conductor he and the other passenger remained on the train, but which does not disclose that he would not have encountered other difficulties by doing so, is insufficient to show, as a matter of law, that plaintiff was negligent,[78] and where he became aware of the cold and crowded condition of the train or car in time to have abandoned it, whether he was guilty of contributory negligence for failing to do so,[79] or to procure wraps,[80] or to call the attention of the carrier's employees to its condition,[81] is a question for the jury.

Husband's Permitting Wife to Carry Child on Crowded Train.—In an action by the husband for personal injuries to the wife, sustained as a passenger, arising from the crowded condition of the train, compelling her to stand, while she carried a child, the negligence of the husband, who was also a passenger, in permitting her to carry the child, is a question for the jury.[82]

Collisions—Sitting in Street Car with Back to Approaching Train.—In an action for injuries received by a street-car passenger in a collision with a railroad train at a crossing, where the evidence showed that he was sitting in the street car with his back to the approaching train, and was not aware of its presence until the collision, a refusal to submit the issue of contributory negligence is proper.[83]

Reading on Car about to Cross Railroad Track.—A passenger is not guilty of contributory negligence as a matter of law who sits in a car reading while the same is about to cross railroad tracks, if there is nothing to warn him of danger.[84]

Failure to Leave Car Stalled at Crossing.—In an action for injuries to a street car passenger in a collision between a railroad engine and a street car which had become stalled on a crossing, whether plaintiff was negligent in not immediately leaving the car was for the jury.[85]

Leaving Train En Route.—The question whether a passenger was negligent in leaving a train en route, whereby he was injured, is a question for the jury.[86]

78. **Remaining on train not provided with accommodations and protection.**—McCollum *v.* Southern Pac. Co., 31 Utah 494, 88 Pac. 663; Fitzgerald *v.* Southern Pac. Co., 31 Utah 510, 88 Pac. 669.

79. Where a railway passenger who is injured as a result of the cold and crowded condition of a train became aware of its condition before it left the station, and could have abandoned it, his contributory negligence for failing to there abandon the train is a question for the jury. Texas, etc., R. Co. *v.* Rea, 65 S. W. 1115, 27 Tex. Civ. App. 549.

80. In an action against a railroad company for injuries to plaintiff from failure to heat the car, it is a question for the jury whether plaintiff was chargeable with contributory negligence because he did not leave the car at some station, made no effort to procure additional wraps from his trunk in the baggage car, took off his overcoat at one time to give his wife the benefit of its warmth, and wore inadequate clothing to meet the demands of the climate and season. Taylor *v.* Wabash R. Co. (Mo.), 38 S. W. 304, 42 L. R. A. 110.

81. **Failure to call employees attention to cold condition of car.**—In an action against a railroad company for injuries resulting from a cold contracted by plaintiff while traveling, the failure of plaintiff, who was inexperienced in traveling, to call the attention of the company's employees to the cold condition of the car, before taken sick, would not preclude recovery, but its effect as bearing upon the question of contributory negligence should be left to the jury, to be determined from all the circumstances in the case. Hastings *v.* Northern Pac. R. Co., 53 Fed. 224.

82. **Husband's permitting wife to carry child on crowded train.**—Texas, etc., R. Co. *v.* Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115.

83. **Collisions—Sitting in street car with back to approaching train.**—Gulf, etc., R. Co. *v.* Pendery, 87 Tex. 553, 29 S. W. 1038, 47 Am. St. Rep. 125.

84. **Reading on car about to cross railroad track.**—Chicago, etc., R. Co. *v.* Smith, 124 Ill. App. 627; Chicago City R. Co. *v.* Smith, 124 Ill. App. 627, judgment affirmed in 226 Ill. 178, 80 N. E. 716.

85. **Failure to leave car stalled at crossing.**—Barnes *v.* Danville St. R., etc., Co., 235 Ill. 566, 85 N. E. 921.

86. **Leaving train en route.**—The question whether a passenger was negligent in leaving a train standing at what ap-

Leaving Train to Care for Stock.—Where plaintiff, a passenger, on a freight train, whose duty it was, as defendant knew, to look after a car of live stock, started out of the caboose, when the train stopped at a station, to inspect the stock, and, having his hand on the doorknob, had his thumb mashed by the shutting of the door, caused by a sudden jerk of the train, it was a question for the jury whether the jerk was an extraordinary one, and therefore one the risk of which plaintiff had not assumed, and whether plaintiff was in the exercise of due care.[87]

Changing Cars.—Whether a person, who had left a street car in the night to pass on foot an obstruction in the route and take a car on the other side, was exercising due care when he fell, is, under the facts, a question for the jury.[88]

Failure to Inform Trainmen of Desire to Alight at Flag Station.—In an action against a carrier for carrying plaintiff beyond a flag station, her destination, whether plaintiff was negligent in not informing the conductor or flagman that she wished to get off there was for the jury.[89]

Effort of Passenger Carried beyond Destination to Return.—Where a railroad company has wrongfully carried passenger's beyond their destination it ought to foresee that they would do that which is prudent for them to do under the circumstances and to contemplate any exposure to which they would be subjected in a natural and prudent effort to return. It is the right of persons wrongfully carried past their destination to go back, and the question is, whether or not, in choosing the means of transportation and in their other conduct they act as persons of ordinary prudence; and this is a question for the jury.[90]

In an action against a railroad for rape committed on a passenger, it was proper to refuse to submit the question of contributory negligence.[91]

§ 2911. Riding on Platform.—Platform of Railway Train Generally.—The question whether the act of a passenger in using the platform of a moving

peared to be a regular station, to get a drink, not being able to find water on the train, whereby he was injured by a passing train, is for the jury. Wandell *v.* Corbin (N. Y.), 38 Hun 391.

Alighting to ascertain whether train right one.—A passenger is not guilty of contributory negligence as a matter of law in alighting to ascertain whether the train he is on is the right one, no one apparently being in charge who could give the information, so as to bar recovery for injuries sustained through the carrier's failure properly to light the station grounds, where there was no one in charge of her car. Texas, etc., R. Co. *v.* Stewart, 33 S. Ct. 548, 228 U. S. 357, affirming judgment, Texas, etc., R. Co. *v.* Mayer, 183 Fed. 575, 105 C. C. A. 646.

87. Leaving train to care for stock.—Illinois Cent. R. Co. *v.* Crady, 24 Ky. L. Rep. 643, 69 S. W. 706.

88. Changing cars.—Powers *v.* Old Colony St. R. Co., 201 Mass. 66, 87 N. E. 192.

In an action for injuries to a street car passenger by falling into a pit in a car barn after being directed to change cars, where the evidence sustained a finding that plaintiff took the natural and ordinary way in going to the other car, and there was some evidence that the ground around the pit was not well lighted, preventing him from seeing it, the question of plaintiff's due care was for the jury, though defendant's evidence that the pit was lighted was strong. Gurley *v.* Springfield St. R. Co., 92 N. E. 714, 206 Mass. 534.

89. Failure to inform trainmen of desire to alight at flag station.—Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

90. Effort of passenger carried beyond destination to return.—St. Louis, etc., R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315.

A night passenger on a railroad train, after being carried by the flag station for which his ticket called, requested the conductor to back the train up to the station, which was refused. He then got off the train, and started to walk back to the station, along the track, that being the only practicable way, as there was water on each side of the railroad, and fell through a trestle, and was injured. The evidence as to whether the night was dark or not was contradictory, and the character of the trestle, nor whether the passenger was familiar with the surroundings, was not shown. Held, that whether his injury was due to his contributory negligence or recklessness was a question of fact for the jury. Yazoo, etc., R. Co. *v.* Aden, 27 So. 385, 77 Miss. 382.

91. Garvik *v.* Burlington, etc., R. Co., 131 Iowa 415, 108 N. W. 327, 117 Am. St. Rep. 432.

train as a place of carriage is negligence on his part, is one for jury determination,[92] and is not determinable by the court as a matter of law, when circumstances reasonably excusing the passenger for riding there are not admittedly shown, unless the train is moving at a rapid rate of speed, or the condition of the passenger is such as to make his presence on the platform dangerous while the train is moving at any rate of speed.[93] Hence, ordinarily, whether it is negligence for a passenger to ride on the platform of a car when the train is traveling at a high rate of speed is a question of fact to be determined from a consideration of all the facts and circumstances in evidence.[94] This is the rule where the passenger was injured by being thrown from the platform[95] by a lurch of the train,[96] as the train rounded a curve[97] by having the car door shut on his hand,[98] and where it is a question whether he could have heard an announcement that a stop the train was making was not a station that had been called.[99]

Platform of Street Car Generally.—It is not negligence as a matter of law for one to board and ride on the platform of a street car and the question of contributory negligence is for the jury,[1] although there is room inside,[2] cer-

92. Platform of railway train generally.—*United States.*—Texas, etc., R. Co. *v.* Lacey, 185 Fed. 225, 107 C. C. A. 331.

Missouri.—Choate *v.* Missouri Pac. R. Co., 67 Mo. App. 105.

Texas.—St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

West Virginia.—Norvell *v.* Kanawha, etc., R. Co., 67 W. Va. 467, 68 S. E. 288.

Under California Civil Code.—Under Civ. Code Cal., § 483, which requires carriers to furnish on the inside of passenger cars sufficient room for passengers, and § 484 which declares that in case any passenger is injured on or from the platform of a car, in violation of printed and posted rules, the carrier shall not be responsible unless it has failed to comply with § 483, as construed by the supreme court of California, a passenger who voluntarily goes on the platform of a car while the train is in motion, in violation of rules properly posted, etc., as required, is not necessarily negligent, as a matter of law, precluding a recovery for injuries. Thomas *v.* San Pedro, etc., R. Co., 170 Fed. 129, 95 C. C. A. 371.

Under Civ. Code, §§ 483, 484, requiring railroads to furnish sufficient accommodations within its cars for all passengers, and relieving railroads from liability for injuries to passengers while riding on the platforms of the cars in violation of posted rules, where a passenger seeks to protect himself against an anticipated injury, or there is an invitation by the railroad requiring him to go on the platform while the train is in motion, the question whether it is necessary for him to go on the platform, or there is such invitation from the railroad as to amount to a waiver of a violation of its rules, is for the jury. Pruitt *v.* San Pedro, etc., R. Co., 118 Pac. 223, 161 Cal. 29, 36 L. R. A., N. S., 331.

93. Augusta, etc., R Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005.

94. Chicago, etc., R. Co. *v.* Newell, 113 Ill. App. 263.

95. Thrown from platform.—Brice *v.* Southern Railway, 85 S. C. 216, 67 S. E. 243, 27 L. R. A., N. S., 768.

96. Lurch of train.—Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565; Chicago, etc., R. Co. *v.* Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561.

97. Plaintiff being thrown from the front platform of a car while it was passing a curve, and injured, the question of his contributory negligence was for the jury. Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

98. Car door shut on hand of passenger.—In an action against a carrier to recover for injuries to plaintiff's hand by having the car door shut on it by the conductor, it is a question for the jury whether plaintiff, in placing his hand on the door jamb, was guilty of contributory negligence. Louisville, etc., R. Co. *v.* Mulder, 149 Ala. 676, 42 So. 742.

99. Ability to hear announcement in car.—Where the conductor or other trainman failed to announce that the stop the train was then making was not at a station which had been called, whether a passenger riding on the platform had placed himself in such a position that he could not have heard the announcement that the stop was not at the station if it had been given sufficiently loud to be heard by those inside the car held for the jury. Wagner *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 171.

1. Platform of street car generally.—Chicago Consol. Tract. Co. *v.* Schritter, 124 Ill. App. 578, judgment affirmed in 222 Ill. 364, 78 N. E. 820; Blair *v.* Lewiston, etc., St. Railway, 110 Me. 235, 85 Atl. 792; Baskett *v.* Metropolitan St. R. Co., 123 Mo. App. 725, 101 S. W. 138.

Whether a policeman riding on the front platform of an electric car and injured when it left the track was guilty of contributory negligence held for the jury. Goehring *v.* Beaver Valley Tract. Co., 72 Atl. 259, 222 Pa. 600.

2. Room inside car.—A passenger, standing on the platform of a street car,

tainly in the absence of any rule forbidding it, and where the injured passenger and others have been accustomed to do so.[3] Thus, where the injury to the passenger was caused by his falling or being thrown from the platform of a street car,[4] where it was a custom of the company to permit smoking on the front platform,[5] the question whether the injured passenger was guilty of contributory negligence is for the jury.

Overcrowded Car.—Where a passenger on boarding a train[6] or a street

though there is room inside of the car, is not guilty of negligence as a matter of law; but the question of his negligence is for the jury. Wellmeyer *v.* St. Louis Trans. Co., 95 S. W. 925, 198 Mo. 527.

Standing room.—The question whether it was negligence to stand on the platform, if there was standing room on the inside of a car, is for the jury. Graham *v.* McNeill, 55 Pac. 631, 20 Wash. 466, 43 L. R. A. 300, 72 Am. St. Rep. 121.

3. Absence of rule against riding on platform.—Whether a passenger who, in the absence of any rule forbidding it, rides on the front platform of an electric car, as he and others have been accustomed, and whose fare is there taken, is guilty of negligence which will preclude a recovery for injuries received in a collision with another car, is for the jury. Bailey *v.* Tacoma Tract. Co., 47 Pac. 241, 16 Wash. 48.

4. Germantown Passenger R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796; Alton R., etc., Co. *v.* Webb, 219 Ill. 563, 76 N. E. 687, affirming judgment in 119 Ill. App. 75.

Where the evidence is conflicting as to whether a passenger while riding on the platform of a street railway car was using due care when thrown from the car and injured, the question is one for the jury. Capital Tract. Co. *v.* Brown, 29 App. D. C. 473, 12 L. R. A., N. S., 831.

Lurching of car.—Where a passenger standing on the platform of a cable car, with his back to the car and his hands in his pocket, on a cold night, was thrown therefrom by a lurch of the car as it rounds a curve, and injured whether the passenger's negligence contributed to the injury is for the jury. Adams *v.* Washington, etc., R. Co., 9 App. D. C. 26.

Car ascending incline.—Whether a street railway passenger, who left his seat and went out onto the front platform while the car was ascending an incline and at a curve to reach the level of elevated trains, that he might catch a train if there should be one ready to go, and who knew that it was usual for the motorman to shut off the power and for a car to slow down at the curve, and for the power to be put on afterwards and the speed increased, was guilty of contributory negligence, barring a recovery for injuries sustained in being thrown from the platform, held for the jury. Cutts *v.* Boston Elev. R. Co., 89 N. E. 21, 202 Mass. 450.

5. Smoking on platform permitted.—A passenger on a horse car was injured while riding on the front platform, and smoking. The track was slippery from snow, but not sufficiently so as to cause unusual movements of the car. It was a custom of the company to permit smoking on the front platform. Held, that whether he was negligent in being on the platform was for the jury. Bradley *v.* Second Ave. R. Co., 54 N. Y. S. 256, 34 App. Div. 284.

6. Overcrowded car.—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778; Previsich *v.* Butte Elect. R. Co., 47 Mont. 170, 131 Pac. 25; Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442.

Instances.—Where a passenger was injured by being thrown from the platform of a railroad train as it rounded a curve, in an action for the injuries, it appearing that neither seats nor standing room in the cars could be conveniently obtained, it was a question for the jury whether plaintiff was guilty of contributory negligence. Chicago, etc., R. Co. *v.* Newell, 72 N. E. 416, 212 Ill. 332, dismissed in 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

Unreasonable crowding necessary to enter car.—If a car be so crowded that a reasonably prudent man would conclude that he could not get inside without unreasonable pushing, the question as to whether or not he is guilty of contributory negligence in riding on the platform is for the jury. Rolette *v.* Great Northern R. Co., 97 N. W. 431, 91 Minn. 16.

Ticket good only for certain train.—Riding on a platform of an overcrowded railroad car is not negligence per se, and where the passenger's ticket was good only for a certain train, and the evidence was conflicting as to whether the railroad company provided sufficient train sections and sufficient carriages for the accommodation of the crowd, the question of contributory negligence in riding on the platform was properly submitted to the jury. Pennsylvania Co. *v.* Paul, 126 Fed. 157, 62 C. C. A. 135.

Colored passenger crowded onto platform by white passengers.—Where plaintiff, a negro, boarded an excursion train, and there was evidence that the seats and room in the coach for negroes were occupied by whites, so that plaintiff was crowded onto the platform, and the con-

car [7] finds the cars crowded, whether he is guilty of contributory negligence in standing on the platform is ordinarily a question for the jury; for a passenger required to ride on the platform because of the crowded condition of the car, can not be said as a matter of law not to have assumed any increased risks.[8]

Disobeying Notice Forbidding Standing on Platform.—A passenger who was injured while standing on the platform of a railway car is not, as a matter of law, guilty of contributory negligence in disobeying a notice forbidding passengers to stand on the platform,[9] where the train was not in motion and he was in the act of entering the car after being stopped on the platform by the conductor,[10] or where defendant's employees allowed passengers to ride without objection, and habitually crowded so many persons on the car that some of them were obliged to ride on the front platform. And the question whether plaintiff had waived the enforcement of the rule was properly submitted to the jury.[11]

Duty to Hold to Hand Rail.—Whether a passenger riding upon a platform, or standing there awaiting an opportunity to alight, while the car is moving, should, in the exercise of ordinary care for his own safety, take hold of the hand rail, is one for the jury.[12] And a charge that a passenger, riding on the platform of an electric car without supporting herself with either hand, is guilty of contributory negligence, is properly refused.[13]

Passenger Encumbered with Packages.—It is not contributory negligence as a matter of law for a passenger compelled to stand in a street car to have a package in each hand but the question must be determined by the jury.[14]

Attempt to Avoid Imminent Peril.—Where a passenger goes upon the platform of a car on which he was riding, under the belief that he had been placed in imminent peril by the manner in which the train was operated, and in attempting to avoid the danger, whether he exercised ordinary and reasonable care under the circumstances as they reasonably appeared to him at the time, is a question for the jury, although in acting upon the spur of the moment he did not do what was best, and would not have been injured if he had done nothing but remain quiet.[15] Thus, where a passenger riding on the front platform

ductor refused a transfer to a train following, though he had authority to make such transfer, it was not error to refuse an instruction stating that plaintiff was not guilty of contributory negligence in standing on the platform, as the question of negligence was for the jury. Williams *v.* International, etc., R. Co., 67 S. W. 1085, 28 Tex. Civ. App. 503.

7. Street car.—Zimmer *v.* Fox River Valley, etc., R. Co., 118 Wis. 614, 95 N. W. 957.

Whether one who enters a crowded street car and rides on a crowded platform from which he is pushed off is negligent is for the jury. Lobner *v.* Metropolitan St. R. Co., 79 Kan. 811, 101 Pac. 463, 21 L. R. A., N. S., 972.

Whether it is negligence for a passenger on a street car to ride on the platform of the car in a case where other passengers are on the platform and people are holding onto the straps inside and the seats are filled is a question for the jury. Chicago City R. Co. *v.* McCaughna, 74 N. E. 819, 216 Ill. 202, affirming judgment 117 Ill. App. 538.

In an action for personal injuries to a party, caused by his falling from the platform of a crowded street car, where it was clear from the evidence that he was guilty of contributory negligence, the court should determine the matter as a question of law; but, where the measure of the injured party's duty was only the exercise of ordinary and reasonable care, the question of his contributory negligence was for the jury. Germantown Passenger R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796.

8. Zimmer *v.* Fox River Valley, etc., R. Co., 118 Wis. 614, 95 N. W. 957.

9. Disobeying notice forbidding standing on platforms.—St. Louis, etc., R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

10. Louisville, etc., R. Co. *v.* Mulder, 149 Ala. 676, 42 So. 742.

11. Sweetland *v.* Lynn, etc., R. Co., 59 N. E. 443, 177 Mass. 574, 51 L. R. A. 783.

12. Duty to hold to hand rail.—Judgment 43 Atl. 1060, 63 N. J. L. 407, affirmed in Scott *v.* Bergen County Tract. Co., 48 Atl. 1118, 64 N. J. L. 362.

13. Birmingham R., etc., Co. *v.* Girod, 164 Ala. 10, 51 So. 242.

14. Passenger encumbered with packages.—Ruch *v.* Aurora, etc., R. Co., 150 Ill. App. 329, petition stricken out for certiorari in 90 N. E. 924.

15. Prescott, etc., R. Co. *v.* Smith, 70 Ark. 179, 67 S. W. 865.

of a street car became frightened and jumped from the car;[16] where the injured passenger was apprehensive that the train might be derailed, and the caboose crushed by heavy cars behind, and feared that if he remained in the caboose and an accident happened, he would be unable to escape in time to avoid injury;[17] and where a freight train on which the injured passenger was riding broke in two, whereupon he went upon the platform, after which a collision occurred by reason of the negligence of the operatives,[18] it is a question for the jury to determine whether or not he was guilty of contributory negligence.

Going on Platform While Train Stopped.—See ante, "Riding on Platform," § 2911.

§ 2912. Riding on Steps, Footboard or Projection from Vestibule.—Standing on the steps of a railway car when the train is in motion, although prima facie evidence of negligence, is not negligence, under all circumstances, per se and as a matter of law. Nevertheless, riding on the lower step of the platform of an ordinary railway train going at a high rate of speed would doubtless be regarded as gross negligence in a passenger, unless some good reason appears for so doing other than voluntary choice. But whether it is negligence or not is a conclusion of fact from the circumstances, and its determination should be left to the jury.[19]

Street Car Generally.—Whether a street railway passenger was guilty of contributory negligence in riding on the running board[20] or upon the step of the platform of an electric street car,[21] when injured, is a question of fact for

16. **Jumping from car.**—In an action against a street railroad for injuries to a passenger who was riding on the front platform, and, becoming frightened, jumped from the car, it was proper to submit to the jury the question of the passenger's contributory negligence in taking a position on the front platform. Moore *v.* Northern Texas Tract. Co., 41 Tex. Civ. App. 583, 95 S. W. 652.

17. **Going onto platform of caboose behind which heavy cars being pushed.**—In an action for the death of a passenger, caused by the caboose leaving the tract, it appeared that he rode on the platform of the caboose in front of several cars of freight and lumber pushed backward by the engine in the rear, and the evidence tended to show that he did not ride there as a matter of choice, but because he thought that it was dangerous to remain in the caboose because of the manner of operating the train. Held, that the question of the passenger's contributory negligence was for the jury. Prescott, etc., R. Co. *v.* Smith, 67 S. W. 865, 70 Ark. 179.

18. **Train broken in two.**—Where a freight train on which plaintiff was riding as a passenger broke in two, and owing to the negligence of the operatives of the train a collision resulted, in which plaintiff was injured, it was not error to submit to the jury the question whether plaintiff was guilty of contributory negligence in leaving the caboose and going on the platform after he had knowledge that the train had broken in two. Ft. Worth, etc., R. Co. *v.* Rogers, 60 S. W. 61, 24 Tex. Civ. App. 382.

19. **Riding on steps, footboard or projection from vestibule.**—Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406.

Passenger struck by car on parallel track.—A passenger on a railroad train operated for the accommodation of workmen, with a speed of seven miles per hour, while facing the platform on the lowest step of a car, with his hands on the railing and body projecting outside the line of the coach, while the platform was crowded with other passengers, was struck by another car, which the railroad company had negligently left near the track, and was injured. Held, a question for the jury whether he was guilty of contributory negligence. Judgment 76 Ill. App. 613, affirmed in Lake Shore, etc., R. Co. *v.* Kelsey, 54 N. E. 608, 180 Ill. 530.

20. **Street car generally.**—Olund *v.* Worcester, etc., R. Co., 206 Mass. 544, 92 N. E. 720; Betz *v.* Rhode Island Co. (R. I.), 70 Atl. 1058.

Under conflicting evidence in a street car passenger's action for injuries, it was a question for the jury whether he fell or jumped off a car, and whether, in the exercise of ordinary care, he must have known that, in taking a position on the footboard of the car, he was exposing himself to danger arising from the proximity of telegraph poles. Previsich *v.* Butte Elect. R. Co., 131 Pac. 25, 47 Mont. 170.

21. **Steps of platform.**—It is not negligence per se for a passenger to ride upon the step of the platform of an electric street railway car. Trussell *v.*

the jury. Whether or not it is negligence for a person to ride on the running board of a street car, facing the inside and holding to the railing,[22] to stand on the running board of an open car with his back to the front of the car,[23] to take a position on the running board of an open car when he could have ridden in the front vestibule,[24] to attempt to take a seat by way of the inner footboard next to a parallel track,[25] or to fail to look for trolley poles while riding or walking on the running board of a moving car,[26] is a question for the jury. And where the injury to a passenger riding on the steps or running board of a street car was caused by his coming in contact with iron posts of a bridge over which the car was passing when he might have taken a position in the front vestibule,[27] by being struck by a trolley pole,[28] crushed between two cars,[29] and by being struck by another car on a parallel track while he was on the running board looking for a seat,[30] whether he was guilty of contributory negligence is for the jury.

Morris County Tract. Co., 77 Atl. 535, 79 N. J. L. 533, 30 L. R. A., N. S., 351.

Remaining on running board after he could have taken a seat.—Ward *v.* International R. Co., 99 N. E. 262, 206 N. Y. 83, Ann. Cas. 1914A, 1170, reversing judgment 125 N. Y. S. 1149, 140 App. Div. 938.

22. Purington-Kimball Brick Co. *v.* Eckman, 102 Ill. App. 183.

23. Standing with back to front of car.—Where a passenger, while standing on the running board of an open car with his back to the front of the car, was struck by a pole erected by the company, the question of his contributory negligence was for the jury. Mason *v.* Boston, etc., St. R. Co., 76 N. E. 717, 190 Mass. 255.

24. Room on front vestibule.—Union Tract. Co. *v.* Sullivan, 38 Ind. App. 513, 76 N. E. 116.

25. Going to seat over inside footboard.—In an action against a street railroad for injuries to a passenger while attempting to take a seat in a car by way of the inner footboard, next to a car line on which cars ran in the opposite direction, one of which struck plaintiff causing his injuries, the evidence examined, and held to present a question for the jury whether plaintiff was guilty of contributory negligence. Allen *v.* St. Louis Trans. Co., 81 S. W. 1142, 183 Mo. 411.

26. Failure to look for trolley poles.—Indianapolis Tract., etc., Co. *v.* Richey (Ind. App.), 80 N. E. 170.

In an action by a passenger to recover for injuries sustained by contact with a trolley pole while walking on the running board of a moving car, evidence examined, and held to show that the question of obvious risk was for the jury. Wheeler *v.* South Orange, etc., Tract. Co., 58 Atl. 927, 70 N. J. L. 725.

27. Being struck by post of bridge.—In an action against a street railway for injuries to a passenger riding on the running board of an open car, caused by his coming in contact with iron posts of a bridge over which the car passed, whether plaintiff was guilty of contributory negligence, in that he might have taken a position in the front vestibule of the car where he would not have been injured, and in that he had ridden over the bridge before and had a general knowledge of its construction, held, under the evidence, a queston for the jury. Union Tract. Co. *v.* Sullivan, 76 N. E. 116, 38 Ind. App. 513.

28. Being struck by trolley pole.—In an action for injuries caused by plaintiff's decedent being struck by a trolley pole while on the running board of a street car, it was error to instruct that reasonable care on the part of decedent did not include his failure to look for trolley poles on the side of the car next the running board, since the question of reasonable care under the circumstances was one for the jury. Indianapolis Tract., etc., Co. *v.* Richey (Ind. App.), 80 N. E. 170.

In an action against a street railroad for injuries to a passenger, owing to his being struck by a trolley pole while standing on the running board of the car, held, under the evidence, that the questions of contributory negligence and assumed risk were for the jury. Pomeroy *v.* Boston, etc., R. Co., 79 N. E. 764, 193 Mass. 507.

29. Crushed between cars.—Peterson *v.* Elgin, etc., Tract. Co., 238 Ill. 403, 87 N. E. 345, affirming judgment 142 Ill. App. 34.

30. Being struck by car on parallel track.—Where one, intending to become a passenger, stepped on the running board of an open car of an electric street railroad, going north, and while on the running board, while the car was rounding a curve, was struck by a passing car on the other track, going south, which by reason of the curve projected too close to the north going car, the questions as to the negligence of the street-car company and the contributory negligence of plaintiff are for the jury. Hollingsworth *v.* Cincinnati St. R. Co., 21 O. C. C. 536, 12 O. C. D. 100.

Crowded Street Car.—Where a street car on which plaintiff was riding at the time of his injury was so crowded that plaintiff could not secure a safer place than the step,[31] platform,[32] running board,[33] or a projection outside of the vestibule,[34] on which to ride, whether plaintiff was guilty of contributory negligence in riding on the step, etc., is a question for the jury, certainly where he rode on the steps of platform or running board of a crowded street car with the assent of the conductor.[35]

§ 2913. Leaving Conveyance in General.—Ordinarily, whether a passenger, was guilty of contributory negligence in alighting from a train,[36] or

31. **Crowded street car.**—Chicago Consol. Tract. Co. *v.* Schritter, 222 Ill. 364, 78 N. E. 820; Schaefer *v.* Union R. Co., 51 N. Y. S. 431, 29 App. Div. 261.

Thrown from car by sudden jerk.—Where a passenger leaves a crowded car, and seats himself on the platform steps, from which he is thrown by a sudden jerk of the car, and injured, whether he was negligent is for the jury. Holloway *v.* Pasadena, etc., R. Co., 62 Pac. 478, 130 Cal. 177.

Being pushed off steps by other passenger, car turning curve.—W. hailed a crowded street car, and the driver stopped. Being unable to get on the rear platform by reason of the crowd, he went to the front platform, which was also crowded, but he succeeded in standing on the step, on which there were already two persons, by holding on to the hand rails at the side. In turning a curve, several passengers, pushed against W., breaking his hold, when he fell under the wheel and was killed. In suit by his widow against the company for damages, held, that the question whether deceased was guilty of contributory negligence was properly submitted to the jury. Germantown Passenger R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796.

32. **Lower step of platform.**—It is a question for the jury whether a passenger riding on the lower step of the platform of a crowded street car and thrown therefrom by the negligent operation of the car is guilty of such contributory negligence as will defeat recovery. Coffey *v.* Omaha, etc., St. R. Co., 79 Neb. 286, 112 N. W. 589.

33. **Running board.**—Where plaintiff, on boarding a street car, found that it was so crowded that passengers were standing on the platform and running board, he was not negligent as a matter of law in himself taking a position on the running board. Egan *v.* Old Colony St. R. Co., 195 Mass. 159, 80 N. E. 696; Kramer *v.* Brooklyn Heights R. Co., 190 N. Y. 310, 83 N. E. 35, reversing 100 N. Y. S. 276, 114 App. Div. 804.

In an action against a street railway company to recover for the death of a passenger killed while riding on the running board of a summer car, the court could not say as a matter of law that plaintiff's intestate was guilty of contributory negligence, though there was evidence that at the time of the collision he was standing on the track by the side of the car. Abel *v.* Northampton Tract. Co., 61 Atl. 915, 212 Pa. 329.

Being struck by passing car.—Where plaintiff boarded an open, crowded electric car stopping for passengers, and was injured, while standing on the running board, facing the inside of the car, looking for a seat, as the car was passing a van, he was not guilty of contributory negligence as a matter of law, since whether, when the car passed the van, reasonable care required that plaintiff should observe the side of the street, rather than to see if there was a vacant place within the car, was a question for the jury. Henderson *v.* Nassau Elect. R. Co., 61 N. Y. S. 690, 46 App. Div. 280.

34. **Riding on projection outside of vestibule.**—Where a passenger on a street car, which was so crowded that he could not enter the car proper, stood on a projection outside of the vestibule, and was injured owing to a car in the rear of that on which he was being carried riding up onto the rear of such car owing to the breaking of a defective coupling, the question whether plaintiff was guilty of contributory negligence which proximately contributed to his injury was one for the jury. Birmingham R., etc., Co. *v.* Bynum, 36 So. 736, 139 Ala. 389.

35. Germantown Passenger R. Co. *v.* Walling, 97 Pa. 55, 39 Am. Rep. 796.

Where a person riding on the running board of a street car was recognized as a passenger by collection of his fare, he was not, because of his position, as a matter of law negligent, if subsequently injured through the carrier's carelessness. Eldredge *v.* Boston Elev. R. Co., 89 N. E. 1041, 203 Mass. 582.

36. **Leaving conveyance in general.**—*California.*—Maxwell *v.* Fresno City R. Co. (Cal. App.), 89 Pac. 367.

Kentucky.—Louisville, etc., R. Co. *v.* Mount, 31 Ky. L. Rep. 210, 101 S. W. 1182.

South Carolina.—Singletary *v.* Seaboard,

street car,[37] is a question for the jury. Thus, for instance, where the injury was caused by reason of unnecessary haste in alighting;[38] by the passenger's placing his hand on the door jamb of the car,[39] by falling while alighting,[40] by slipping on the platform of the car,[41] as a result of failing to hold on to the hand railing of the car,[42] by attempting to alight before the train reached the station platform,[43] by alighting from the car in which he had ridden instead of passing through another to reach the station platform,[44] by alighting facing the rear of the car,[45] by alighting on the side of the car opposite the platform,[46]

etc., Railway, 88 S. C. 565, 71 S. E. 57.

Texas.—Selman *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 101 S. W. 1030.

Washington.—Breeden *v.* Seattle, etc., R. Co., 60 Wash. 522, 111 Pac. 771.

Wisconsin.—Whether a passenger is chargeable with contributive negligence in the manner of alighting from a railroad car is purely a question for the jury, under the circumstances of the particular case. Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

37. Street car.—Camden, etc., R. Co. *v.* Rice, 69 C. C. A. 656, 137 Fed. 326.

Whether a passenger is guilty of contributory negligence in the manner in which he alights from the car at the point of destination is ordinarily for the jury under proper instructions. Indiana Union Tract. Co. *v.* Keiter, 92 N. E. 982, 175 Ind. 268.

38. Unnecessary haste in alighting.—Whether or not an injury to a passenger was attributable solely to his unnecessary haste in alighting from defendant's train was a question for the jury. Tucker *v.* Central, etc., R. Co., 50 S. E. 128, 122 Ga. 387.

A passenger on an elevated railroad, who moves rapidly to alight from car and is injured by running into the gate thereof without observing it or the brakeman closing it, is not, as a matter of law, guilty of contributory negligence, precluding a recovery. McGarry *v.* Boston Elev. R. Co., 195 Mass. 538, 81 N. E. 194.

39. Placing hand on door jamb.—Plaintiff, a passenger, waited sufficient time before starting to leave the car after the train had stopped and the car door had been opened by the brakeman, and had been caught so as to hold it open by a device provided for that purpose; plaintiff having heard it catch when it was opened. In leaving the car, plaintiff rested her hand upon the door jamb, when the door came shut without an apparent cause, injuring her hand. Held, that the question of plaintiff's due care in placing her hand on the door jamb, whereby it was caught by the closing door, was for the jury. Silva *v.* Boston, etc., Railroad, 90 N. E. 547, 204 Mass. 63.

40. Passenger falling while alighting.—Mobile, etc., R. Co. *v.* Walsh, 146 Ala. 299, 40 So. 559.

41. Slipping on platform.—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

42. Failure to hold to railing.—That a passenger, injured by falling on the icy steps of a car from which he was alighting in the night, was carrying a grip in each hand, belonging to ladies in his charge, instead of holding to the railing with one hand, can not be said to constitute contributory negligence as matter of law. Thompson *v.* Chicago, etc., R. Co., 189 Fed. 723, 111 C. C. A. 261.

43. Alighting before train reached station platform.—A passenger, unused to travel, who, on a trainman throwing open the car door, calling the station, and saying, "All change!" and the train stopping, and other passengers moving, went to the door, with a valise in her hand, and started to get off the train, having hold of the rail with her hand, and who, when on the second step, was thrown by the train starting with a sudden jerk, can not be held guilty of contributory negligence as matter of law, though she did not notice whether the station platform had been reached. Wolford *v.* New York Cent., etc., R. Co., 102 N. Y. S. 1008, 118 App. Div. 553.

44. Alighting from car in which passenger had ridden.—A lady passenger wishing to alight need not pass through the smoker, though the station platform can not otherwise be reached; and her negligence in alighting from the car in which she has ridden is for the jury. Cartwright *v.* Chicago, etc., R. Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274.

45. Alighting facing rear of car.—A passenger, alighting from a car which had stopped, is not negligent as a matter of law because she attempts to alight with her back in the direction in which the car was going; she having the right to assume that the car would remain stationary until she had alighted. Birmingham R., etc., Co. *v.* Handy (Ala.), 39 So. 917.

Whether a person stepping off facing the rear of a street car, which had stopped to let her alight and started again before she had taken the last step, thereby negligently contributed to the injury suffered, is a question for the jury. Morrison *v.* Charlotte Elect. R., etc., Co., 31 S. E. 720, 123 N. C. 414.

46. Alighting on opposite side from platform.—In an action against a railroad for injuries in alighting from a train, it is error to grant a nonsuit, though plaintiff attempted to alight on

where the evidence is conflicting as to whether he knew there was no platform on the side on which he alighted,[47] by alighting from the side of the car onto a track on which cars were operated in the opposite direction,[48] by being struck by the hub of a passing wagon while in the act of alighting,[49] by jumping down on the filling between the blocks where the carrier furnishes no other place for alighting,[50] by alighting on a baggage truck which plaintiff supposed to be the platform of the station,[51] by stepping onto a defective footstool,[52] or by slipping on snow or ice on the station platform,[53] the question of contributory negligence has been held to be for the jury. So also the question whether or not the injured passenger jumped from the car after it started[54] is for the jury under the evidence.

Safety of Place to Alight and Manner of Egress.—Whether or not the

the side opposite the platform, in accordance with established custom permitted by the railroad officers. Roberts *v.* Pennsylvania R. Co., 86 Atl. 284, 238 Pa. 404.

Where a passenger, who knows where the platform is, alights on the opposite side for his own convenience, it is for the jury whether, under all the attending circumstances, it is negligence in the particular case. Owen *v.* Washington, etc., R. Co., 69 Pac. 757, 29 Wash. 207.

47. Knowledge of location of platform.—In an action against a railroad company for injuries received by stepping off at a station in the nighttime on the side of a track at which there was no platform, and falling a distance of several feet, it appeared that the rear platform of the car on which plaintiff was had gates on both sides, and when the car reached his station he hurriedly left the car by the north side of the rear platform, as he observed passengers do at the last station. There was no light and no one on the platform to indicate on which side to get off, and no barrier to obstruct his passage at the north side. As to whether he knew there was no platform on the north side of the track the evidence was conflicting. Held, that the question whether plaintiff was negligent was for the jury. Kentucky, etc., Bridge Co. *v.* McKinney, 9 Ind. App. 213, 36 N. E. 448.

48. Whether a passenger on a street car was negligent in attempting to alight from the side of the car onto a track on which cars were operated in the opposite direction held for the jury. Elliott *v.* Seattle, etc., R. Co., 122 Pac. 614, 68 Wash. 129, 39 L. R. A., N. S., 608.

49. Being struck by passing wagon.—Where a passenger on an open railway car, riding backward, and about to alight, stepped down on the running footboard with one foot while reaching back into the car for a bundle, and was struck and injured by the hub of a wagon which the car was then passing, said hub projecting over the footboard, and the evidence was conflicting as to the speed of the car and whether a warning was given to the passengers, the question of contributory negligence was for the jury. Bleier *v.* Bushwick R. Co., 9 N. Y. St. Rep. 706.

50. Jumping down on filling between tracks.—The question of contributory negligence is for the jury, where the carrier furnishes no place for alighting at a station, except on the filling between the tracks, which is at about the same height as the top of the ties, and the passenger jumps down when it is dusk, and alights with one foot in a hole. Truesdell *v.* Erie R. Co., 104 N. Y. S. 243, 119 App. Div. 371.

51. Alighting on baggage truck.—Plaintiff, in attempting to alight, stepped on a baggage truck, fell, and was injured. There was evidence that plaintiff had never alighted at that part of the station before; that the car was full of passengers, that she was near the middle of the car, and all the passengers were going one way; that those before her got out on the truck, which she supposed to be the platform of the station, and that she followed them. Held, that the question whether plaintiff exercised due care was for the jury. Bethmann *v.* Old Colony R. Co., 155 Mass. 352, 29 N. E. 587.

52. Stepping onto defective footstool.—In an action against a railroad company for personal injuries received in stepping from a passenger coach onto a defective footstool, the question whether plaintiff was negligent in stepping on the stool as he did, and whether it was the proximate cause of the injury, was for the jury. Atlanta, etc., Railway *v.* Wheeler, 154 Ala. 530, 46 So. 262.

53. Slipping on ice on platform.—The question whether a passenger who, in alighting from the car, slipped on the ice on the platform, was in due care, was for the jury. Gilman *v.* Boston, etc., Railroad, 47 N. E. 193, 168 Mass. 454.

54. Jumping from car after it started.—The fact that a passenger fell, seventy-five feet from the stopping place of the car, does not conclusively show that he jumped from the car, but there being evidence that he had hold of the rail with one hand, and stood with one foot on the lower step, in the act of alighting, and held on for a while after the car had started after having stopped at the usual place, the question was for the jury. Lucas *v.* Marquette, etc., R. Co., 98 N. W. 980, 136 Mich. 142.

injured passenger was guilty of contributory negligence in failing to avoid the consequences of the negligence of the railway company in not providing a safe and suitable place to alight,[55] in accepting the invitation of the conductor of an interurban car to alight at an unsafe place at a highway crossing,[56] in tripping on the rails of the main track as he was leaving a train which had not stopped at the regular platform,[57] and in falling or slipping into an excavation in the street where the street car stopped,[58] or a hole on or near the approaches to the station near where he alighted,[59] are questions for the jury. And whether there was a reasonable safe and accessible place of exit from the terminal grounds which the passenger was negligent in not taking[60] is a question for the jury under all the circumstances where the evidence is disputed.

Premature Movement or Lurching of Train or Car.—In an action by

55. Failure of carrier to provide safe place to alight.—Whether by the use of ordinary care a pregnant woman could avoid the consequences of the negligence of a railway company, in not providing a safe and suitable place to alight from the cars, the conductor having designated the place as suitable and assisted her to alight, is a question for the jury. Georgia R., etc., Co. *v.* Usry, 82 Ga. 54, 8 S. E. 186, 14 Am. St. Rep. 140.

56. Accepting invitation of conductor.—A passenger on an interurban car, which stops for him to alight at a highway crossing, may assume that the car has been stopped in a portion of the highway where he is invited to alight, unless warned of danger, and is not conclusively negligent in accepting the invitation to alight at a place which is in fact unsafe, but the question of his negligence is for the jury. McGovern *v.* Interurban R. Co., 111 N. W. 412, 136 Iowa 13, 13 L. R. A., N. S., 476.

57. Tripping on rails of main track.—In an action against a carrier for injuries to a passenger, alleged to have resulted from tripping on the rails of defendant's main track as plaintiff was leaving the train, which had not stopped at the regular platform, evidence examined, and whether plaintiff was guilty of contributory negligence held a question for the jury. Hancock *v.* New York, etc., R. Co., 91 N. Y. S. 601, 100 App. Div. 161, affirmed in 76 N. E. 1096, 184 N. Y. 540.

58. Excavation in street.—Murray *v.* Seattle Elect. Co., 50 Wash. 444, 97 Pac. 458.

Whether a street car passenger, injured while alighting from a car to board another to complete her journey, because of excavations in the street, was guilty of contributory negligence held, under the evidence, for the jury. Louisville, etc., Tract. Co. *v.* Walker, 177 Ind. 38, 97 N. E. 151.

Plaintiff, a passenger on defendant street railway company's car, alighted in the evening from the car, and was injured by falling into an excavation made by defendant preparatory to paving the street. Plaintiff was ignorant of the situation. Held, that whether the night was dark, and the obstructions and a single red light placed by defendant in the vicinity were calculated to warn a prudent person of the situation, and whether plaintiff exercised proper care, were questions for the jury. Spangler *v.* Saginaw Valley Tract. Co., 116 N. W. 373, 152 Mich. 405.

59. Falling into holes.—In a passenger's action for injuries sustained by falling into a hole on alighting from the front end of a coach, whether plaintiff was guilty of contributory negligence in getting off at that place held for the jury. Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961.

An approach which was for many years generally used by passengers in going to and from defendant's depot ran along the right of way between a spur track and an unprotected hole eighteen-feet wide and twelve to twenty-feet deep on the property of another, the hole being about twenty-five feet from the station and twenve feet from the edge of the track. A passenger got off a train in the nighttime at the station and started along the approach to the street with which it connected, and, in stepping to one side to permit a person with a lantern to pass, fell into the hole and was injured. Held, that whether he was guilty of contributory negligence was a jury question. St. Louis, etc., R. Co. *v.* Caldwell, 93 Ark. 286, 124 S. W. 1034.

60. Safe place of exit.—In an action by a passenger for injuries from a defective stile leading from the railroad company's terminal grounds, evidence that there was an opening in the barb wire fence inclosing the grounds, some forty rods away, but not at a place which afforded a reasonable means of egress, and another opening four or five hundred feet away, which was not in sight, renders the question whether there was another reasonably safe and accessible place of exit, which the passenger was negligent in not taking, one for the jury. Cotant *v.* Boone Suburban R. Co., 99 N. W. 115, 125 Iowa 46, 69 L. R. A. 982.

a passenger for injuries received by being thrown from the steps of a train,[61] or street car,[62] by a sudden movement or lurching of the train or car while attempting to alight, the question of contributory negligence is for the jury. And charges assuming that as a matter of law it is negligence to attempt to alight from a moving car are properly refused.[63] It has been so held where the injured passenger was drunk,[64] encumbered with baggage or bundles,[65] or old or infirm,[66] and where the evidence is conflicting[67] as to the alleged movement of the train or car,[68] although it appeared that the injured passenger was

61. Premature movement or lurching of train or car.—Hill *v.* St. Louis, etc., R. Co., 85 Ark. 529, 109 S. W. 523; Olson *v.* Chicago, etc., R. Co., 94 Minn. 241, 102 N. W. 449.

62. Meade *v.* Boston Elev. R. Co., 185 Mass. 327, 70 N. E. 197.

63. Hence where the complaint, in an action for injuries to a passenger alighting from a car, predicated a recovery on a jerk, resulting in the throwing of plaintiff to the ground, charges pretermitting consideration of this issue, and assuming that as matter of law it is negligence to attempt to alight from a moving car, were properly refused. Birmingham R., etc., Co. *v.* Harden, 156 Ala. 244, 47 So. 327.

64. Drunk passenger.—Where, in an anction for injuries to a passenger alleged to have been occasioned by a sudden lurch of the train as he alighted, the only evidence of contributory negligence is that plaintiff was drunk, any error in leaving to the jury to determine what was contributory negligence was against the plaintiff. Louisville, etc., R. Co. *v.* Deason, 96 S. W. 1115, 29 Ky. L. Rep. 1259.

65. Passenger encumbered with baggage or bundles.—Whether a woman passenger, fifty-two years of age, with a jug of molasses in her left hand and a satchel suspended from her right arm, was in the exercise of due care when she fell or was thrown from a train, which had stopped at a station, and was started again while she was on the steps of the car, holding on to the outer iron rail with her right hand in the act of alighting, is a question of fact for the jury. Clement *v.* Boston, etc., Railroad, 184 Mass. 312, 68 N. E. 1126.

66. Infirm passenger.—In an action for injury to a passenger caused by the train moving while he was alighting, evidence that he was sixty-nine years of age, and gradually let himself from the steps at night, held insufficient to show contributory negligence as a matter of law. Kearney *v.* Seaboard, etc., R. Co., 74 S. E. 593, 158 N. C. 521.

67. Evidence conflicting.—Where, in on action for injuries to a passenger while attempting to alight from a train at a station, the evidence showed that the train had moved only a few feet, and was going very slowly when the accident occurred, and the evidence was conflicting as to whether the passenger stepped or jumped from the car, or was thrown therefrom by a sudden jerk of the train while she was on the steps of the car, the question of contributory negligence was for the jury. Chicago, etc., R. Co. *v.* Lampman, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788

Where the petition alleged that plaintiff was riding in defendant's street car, that the car came to a standstill at a crossing, that as she was alighting the car was negligently and violently started forward, with such force as to throw her off the car and down upon the pavement, proof that the car was not brought to a standstill, but was still moving slowly at the time of the accident, does not necessarily defeat the right of recovery, but the question of contributory negligence is for the jury. Altwein *v.* Metropolitan St. R. Co., 120 Pac. 550, 86 Kan. 220.

In an action against a street car company for personal injuries, plaintiff testified that, after the car had come to a full stop, she started to leave the car, and, just as her foot touched the ground, the car suddenly started, throwing her to the ground with a jerk. Defendant's witnesses testified that plaintiff got off the car while it was slowing up, and before it had stopped. Held, that the court erred in directing a verdict for defendant, for the jury might have found from the evidence that plaintiff was thrown to the ground by a sudden start of the car, though they also found that plaintiff undertook to alight before the car had fully stopped. Hill *v.* West End St. R. Co., 158 Mass. 458, 33 N. E. 582.

68. Evidence conflicting as to alleged movement of car.—In an action for personal injuries caused by a defendant's negligence, it appeared that plaintiff was a passenger on defendant's train; that at the station where plaintiff wished to leave the train, while in the act of alighting, she was thrown from the steps of the car platform by a sudden backward movement of the train. Witnesses for plaintiff testified that she was not on the platform when the car stopped, and did not leave her seat till afterwards, and that it was from a half minute to a minute after the train stopped before it started back. The engineer testified that when the train stopped he immediately reversed the engine, and moved the train back. Held, that the question of contributory

unnecessarily upon the platform and attempted to alight therefrom,[69] where plaintiff was standing holding to the knob of the door of the car preparatory to alighting[70] and where the injured passenger had not noticed whether the station platform had been reached or not.[71] In a street car passenger's action for personal injuries from the sudden starting of the car while she was attempting to alight, whether plaintiff was guilty of contributory negligence, in that she should have known the car was about to start, was held a jury question.[72]

Failure to Wait for Assistance.—Whether or not a passenger waited a reasonable time for the promised assistance of the trainmen before attempting, unaided, to alight from a train, is for the jury, where the facts are disputed.[73] And where a passenger who was unable because of physical disability to leave the car safely, secured the promise of the conductor to assist her, and on arriving at her station after dark, walked to the car platform and waited some time for assistance, but it was not given her, and a child who was with her attempted to get assistance, but failed, the question whether plaintiff was negligent in attempting to alight unassisted was for the jury.[74]

Elevators.—Whether a passenger is guilty of contributory negligence in the manner in which he leaves an elevator is ordinarily a question for the jury.[75]

negligence was for the jury. Morgan *v.* Southern Pac. Co., 95 Cal. 501, 30 Pac. 601.

The question of contributory negligence is for the jury, where there is evidence that when plaintiff, a passenger on a street car, attempted to alight, it was not in motion and no signal had been given to start, that she looked at the starter all the time while she was getting out, that he could not have seen her if he had looked, that he gave the signal before she had alighted, and that the car was started when she had got as far as the running board, throwing her down. Meade *v.* Boston Elev. R. Co., 70 N. E. 197, 185 Mass. 327.

69. Although it appeared that deceased was unnecessarily upon the front platform of the car, and attempted to alight therefrom, held, that the case should go to the jury, the evidence being conflicting as to whether the car had been stopped at the request of deceased, and started again negligently while he was in the act of alighting. Lax *v.* Forty Second St., etc., R. Co., 46 N. Y. Super. Ct. 448.

70. Passenger holding door knob.—In an action for personal injuries to plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train, while moving on after it had stopped near plaintiff's destination, and while she was standing, preparatory to alighting, holding to the knob of the door of the car, held, that plaintiff's contributory negligence was a question for the jury. St. Louis, etc., R. Co. *v.* Brabbzson, 87 Ark. 109, 112 S. W. 222.

71. Failure to notice whether station platform reached.—A passenger, unused to travel, who, on a trainman throwing open the car door, calling the station, and saying, "All change!" and the train stopping, and other passengers moving, went to the door, with a valise in her hand, and started to get off the train, having hold of the rail with her hand, and who, when on the second step, was thrown by the train starting with a sudden jerk, can not be held guilty of contributory negligence as matter of law, though she did not notice whether the station platform had been reached. Judgment, 102 N. Y. S. 1008, 118 App. Div. 553, affirmed in Wolford *v.* New York Cent., etc., R. Co., 85 N. E. 1118, 191 N. Y. 554.

72. Vine *v.* Berkshire St. R. Co., 212 Mass. 580, 99 N. E. 473.

73. Failure to wait for assistance.—St. Louis, etc., R. Co. *v.* Baker, 67 Ark. 531, 55 S. W. 941.

A lady passenger was promised the assistance of the trainmen in alighting from the cars, and was told by a porter to keep her seat until he came to help her off. On arriving at the station she started out with the other passengers, and passed forward with valise in hand until she reached the bottom step, and, being unassisted, in attempting to alight she fell and was injured. Held, that whether she was negligent was for the jury. St. Louis, etc., R. Co. *v.* Baker, 55 S. W. 941, 67 Ark. 531.

74. Mercer *v.* Cincinnati Northern R. Co., 115 N. W. 733, 151 Mich. 566.

75. Leaving elevator.—Plaintiff entered defendant's elevator on the eighth floor, desiring to go to the ground floor, and knowing it to be the custom, when a passenger wished to get off at an intermediate floor, to notify the conductor. On reaching the second floor, the elevator stopped, and plaintiff, under the impression that it was the ground floor, started to leave without speaking to the conductor, who started the elevator before closing the door, and plaintiff was

§ 2914. Preparing to Leave Conveyance before It Stops.—It is not per se negligence for a passenger on a train[76] or street car[77] to make preparations to alight from the car before it comes to a standstill, but the question of contributory negligence is for the jury. The general rule is that it is not negligence per se for a passenger to leave his seat in the car as it approaches the end of his journey[78] and stand in the aisle,[79] or walk to the door of the car;[80] or to cross the upper deck of a double-decker street car,[81] after the conductor or trainman has called the name of the station,[82] or the passenger has given the

injured. Held, that such evidence tended to show that plaintiff was in the exercise of due care, and it was not error to refuse the peremptory instruction on that ground. Judgment, 98 Ill. App. 189, affirmed in Chicago Exch. Bldg. Co. *v.* Nelson, 64 N. E. 369, 197 Ill. 334.

In an action against the owner of a building for negligently causing the death of plaintiff's intestate, who was killed by the starting upward of a passenger elevator as he was attempting to leave it, evidence considered, and held to justify submission to the jury of the issue of intestate's contributory negligence. Judgment, 110 Ill. App. 504, affirmed in Masonic Fraternity Temple Ass'n *v.* Collins, 71 N. E. 396, 210 Ill. 482.

Plaintiff entered an elevator in an office building, and requested the conductor to let him off at the office of a tenant. All the passengers had left, except plaintiff, when the ninth floor was reached. On the elevator reaching the ninth floor, it was stopped, and the door opened, and plaintiff, concluding that the elevator had stopped for him to alight, started to do so, when, as he was stepping from the elevator, the conductor started the elevator, and before it could be stopped plaintiff was crushed against the overhead framework. Held, that whether plaintiff was guilty of contributory negligence in attempting to leave the car without first in words acquainting the conductor with his purpose, or whether he had a right to assume that the car would not be started until the door was closed, was for the jury. Roulo *v.* Minot, 93 N. W. 870, 132 Mich. 317.

76. Preparing to leave conveyance before it stops.—Railroad Co. *v.* Pollard (U. S.), 22 Wall. 341, 22 L. Ed. 877.

77. Street car.—Sandlin *v.* Lexington R. Co., 33 Ky. L. Rep. 518, 110 S. W. 374.

78. Newton *v.* Central Vermont R. Co., 30 N. Y. S. 488, 80 Hun 491, 62 N. Y. St. Rep. 387.

79. Standing in aisle.—Whether a passenger is wanting in reasonable care in leaving his seat and standing in the aisle on approach to the end of his journey is a question for the jury, if, while so standing, he is injured by some jerk or bump of the train not incident to its proper management. Illinois Cent. R. Co. *v.* Jolly, 78 S. W. 476, 117 Ky. 632, 25 Ky. L. Rep. 1735.

Whether a passenger in a rail car, standing up in it when getting near the station house, at the close of the journey, but before an actual stoppage of the car, is guilty of negligence, is a question for the jury. New Jersey R., etc., Co. *v.* Pollard (U. S.), 22 Wall. 341, 22 L. Ed. 877.

On the announcement of a station to which a passenger was going, he left his seat, and stood inside the door of the car, and while so standing the car collided with another, throwing the passenger down and injuring him. In an action against the carrier to recover for the injuries, held, that the question whether the passenger was in the exercise of reasonable care was for the jury. Barden *v.* Boston, etc., R. Co., 121 Mass. 426.

80. Young *v.* Boston, etc., R. Co., 213 Mass. 267, 100 N. E. 541, 50 L. R. A., N. S., 450, Ann. Cas. 1914A, 635.

Going to door of car.—A passenger on an electric car, who had given notice on paying her fare where she wished to alight, was not negligent as matter of law in leaving her seat, and passing to the door while the car was still in motion, as it approached the station platform and slackened its speed. Schultz *v.* Michigan United Railways, 123 N. W. 594, 158 Mich. 665, 27 L. R. A., N. S., 503.

That a passenger left her seat and walked to the door as the car approached her station, and, on a lurch of the car throwing her against the door, involuntarily put her hand on it to steady herself, resulting, on the door being opened, in her hand being caught between the side of the door and the jamb, is not conclusive of contributory negligence. Larson *v.* Boston Elev. R. Co., 212 Mass. 262, 98 N. E. 1048.

81. Walking across upper deck of street car.—A passenger on a "double-decker" street car, consisting of two platforms, one above the other, who walks across the upper deck in order to descend to the platform attached to the lower deck, and is struck by a bridge projection while so doing, is not chargeable with inexcusable negligence, and the company's warnings not to get off the cars while in motion do not apply till he reaches the platform. Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

82. Station announced.—Newton *v.* Central Vermont R. Co., 30 N. Y. S. 488, 80 Hun 491, 62 N. Y. St. Rep. 387.

conductor a signal to stop,[83] but before the car has stopped;[84] certainly where a trainman held open the door,[85] and where he does so and is injured, the question whether he was guilty of contributory negligence is for the jury.[86] The rule is otherwise in case of aged and infirm passengers[87] and in the case of a passenger in a box car who places himself near the open door as the train approaches his destination.[88] And in Indiana[89] and Pennsylvania,[90] it has been held that it is negligence for a passenger to leave his seat while a car is slowing up near a station or elsewhere, if, had he remained until the car stopped, the accident would not have occurred.[91]

Going onto Platform.—In an action by a passenger for personal injuries, whether plaintiff was guilty of contributory negligence in going out on the platform, before reaching the station, is a question for the jury,[92] for it is not

83. Signal to stop car.—Where plaintiff was injured by being thrown from defendant's street car by a sudden jerk of the car while preparing to get off, after having given the conductor a signal to stop, the question of plaintiff's contributory negligence is for the jury. Bradley *v.* Fort Wayne, etc., R. Co., 94 Mich. 35, 53 N. W. 915.

Where it could be found that a passenger left his seat after signaling for the car to stop at a regular stopping place, which it was approaching and at which he had a right to expect that the car would slow down and stop to allow him to alight, the question of his due care was for the jury. Young *v.* Boston, etc., R. Co., 100 N. E. 541, 213 Mass. 267, 50 L. R. A., N. S., 450, Ann. Cas. 1914A, 635.

Where a passenger in an open street car, after having given the signal to stop, and after the car had slackened its speed, put herself near the edge, so as to be ready to step off as soon as the car should stop, and, instead of stopping, it increased its speed, causing her to fall off, she is not chargeable with contributory negligence. Demann *v.* Eighth Ave. R. Co., 10 Misc. Rep. 191, 30 N. Y. S. 926, 62 N. Y. St. Rep. 476.

84. On entering the depot, the locomotive was detached from the train, and the cars moved on after it, through the depot, and struck with great force a bumper at the end, throwing down a passenger. Held, such stoppage having been at the passenger's destination, that he was not guilty of negligence in having arisen from his seat before the train came to a complete stop. Wylde *v.* Northern R. Co., 53 N. Y. 156, 14 Abb. Prac., N. S., 213.

85. Door held open by trainman.—It is not negligent for a passenger in an elevated railway car to leave his seat, and go towards the door, which at the time is held open by one of the trainmen, as the train approaches the station. Colwell *v.* Manhattan R. Co., 57 Hun 452, 10 N. Y. S. 636, 32 N. Y. St. Rep. 991.

86. Newton *v.* Central Vermont R. Co., 30 N. Y. S. 488, 80 Hun 491, 62 N. Y. St. Rep. 387.

87. Aged or infirm passenger.—It is negligence in an infirm woman of over seventy years to leave her seat in a car, and attempt to reach the door before the train stops; and this though the brakeman has called the station, and taken her valise out upon the platform. Chicago, etc., R. Co. *v.* Means, 48 Ill. App. 396.

88. Passenger in a box car.—A passenger of a box car who places himself near the open door while the train is slackening speed for his destination can not recover for injuries received by being thrown out of the car by the stoppage of the train. Atchison, etc., R. Co. *v.* Johnson, 3 Okla. 41, 41 Pac. 641.

89. A passenger who went upon the steps of a railroad train nearly a quarter of a mile from the place where it was to stop to permit him to alight could not recover for injuries received by him through being thrown from the step by a sudden jerk of the train, since he was guilty of contributory negligence. Cincinnati, etc., R. Co. *v.* McClain, 148 Ind. 188, 44 N. E. 306.

90. Dunn *v.* Pennsylvania R. Co. (Pa.), 20 Phila. 258.

A passenger went onto the platform steps of the train while it was in motion and opposite the depot at which he desired to alight. While attempting to retrace his steps, the train gave a sudden jerk, and he fell down and was injured. Held, that his negligence precluded a recovery. Blue *v.* Pennsylvania R. Co. (Pa.), 1 Monag. 757.

91. Where a passenger leaves his seat while a car is slowing up, and reaches the part of the car from which passengers get off, before it stops, it is negligence for him to attempt to get off, unless he is sure from all the circumstances, that it is a permanent stop for the purpose of discharging passengers. Dunn *v.* Pennsylvania R. Co. (Pa.), 20 Phila. 258.

92. Going onto platform.—Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239; Davis *v.* Atlanta, etc., R. Co., 83 S. C. 66, 64 S. E. 1015; Norfolk, etc., R. Co. *v.* Prinnell (Va.), 3 S. E. 95.

Under Iowa Code, § 4811.—A passenger, who, while the train was in motion, leaves his seat and goes on the platform of the car to alight on the train coming

negligence per se for a passenger to go on the platform of a train,[93] or street car,[94] to alight, having reasons to believe that it is about to stop at his station or destination. Under this rule the question whether the injured passenger was negligent or not in going onto the platform, has been held to be for the jury, where he had notified the conductor of the train,[95] or signalled the conductor of the street car[96] where he wanted to alight, where there were unoccupied seats in the car,[97] where the injured passenger was encumbered with bundles,[98] and holding[99] or reaching for[1] the railing of the car with his free hand, where the plaintiff went onto the platform in the night time and did not hold the railing of the car,[2] where there was an accumulation of snow and ice on the

to a stop, does not violate Code, § 4811, prohibiting persons getting off a train while in motion, and is not guilty of contributory negligence as a matter of law precluding a recovery for injuries sustained in consequence of the sudden jerking of the train while he was on the platform. Forbes *v.* Chicago, etc., R. Co., 113 N. W. 477, 135 Iowa 679.

93. Not negligence per se.—Davis *v.* Atlanta, etc., R. Co., 83 S. C. 66, 64 S. E. 1015.

94. A street car passenger is not negligent as a matter of law in leaving his seat when the car is approaching his destination and going to the platform to alight when the car stops. Ranous *v.* Seattle Elect. Co., 92 Pac. 382, 47 Wash. 544.

95. Notifying conductor where he wanted to alight.—Where a passenger notified the conductor where he wanted to alight, and, on approaching it, the train began to slow up, the question whether he was negligent by going on the platform steps preparatory to alighting, while the train was still in motion, was for the jury. Watkins *v.* Birmingham R., etc., Co., 24 So. 392, 120 Ala. 147, 43 L. R. A. 297.

96. Signalling street car conductor to stop.—A passenger on a trolley car, who signaled to the conductor to stop, is not per se negligent in stepping on the running board before the car stopped, preparatory to alighting. McCullom *v.* Atlantic, etc., R. Co., 77 N. J. L. 603, 72 Atl. 87.

97. Unoccupied seats in car.—A passenger, while standing on the platform of a street car, was thrown therefrom by the jerking of the car. The passenger, when within about 300 feet of his destination, went to the platform to be ready to step off on the car reaching the point of destination. It was the custom for passengers to leave the car by way of the platform. Held, that the passenger was not guilty of contributory negligence as a matter of law, precluding a recovery, though there were unoccupied seats in the car. Wellmeyer *v.* St. Louis Trans. Co., 95 S. W. 925, 198 Mo. 527.

98. Passenger encumbered with bundles.—Houston, etc., R. Co. *v.* Johnson (Tex. Civ. App.), 103 S. W. 239.

99. Holding hand rail with free hand.—Plaintiff was injured while alighting from a train, drawn by a dummy which ran along certain streets, stopping at crossings for passengers. There was evidence that, as it approached a certain street, a signal from a person taking passage having been given, the train was brought nearly to a stop, and that thereupon plaintiff, with her left hand holding a bundle and her right the hand railing, descended to the steps of the car platform about the time the other passenger got aboard, and as she reached the bottom step, and was about to step from the train, its speed was quickened with a jerk, whereby she was thrown to the ground. Plaintiff testified that the dummy stopped regularly at the crossing. Held, that the question of plaintiff's contributory negligence was for the jury. Sweet *v.* Birmingham R., etc., Co., 33 So. 886, 136 Ala. 166.

1. Reaching for hand rail with free hand.—Plaintiff, while riding on defendant's street car, signaled the conductor to stop, and, the conductor having signaled the motorman (the car being about 300 feet from the crossing), plaintiff started to cross the platform, and was in the act of reaching with his left hand for the hand rail (his right hand holding an umbrella and parcel), when the car, running at the rate of twelve to fifteen miles an hour, struck a curve; and the resulting lurch of the car threw plaintiff into the street, injuring him. The curve was at the intersection of two streets, and plaintiff testified that, from long experience in riding on the line, he knew that the cars at the crossing were usually stopped before taking the curve. Held, that a motion for a nonsuit at the close of plaintiff's evidence was properly denied, since the evidence tended to establish negligence on the part of defendant, and did not show that plaintiff was guilty of contributory negligence, as matter of law. Babcock *v.* Los Angeles Tract. Co., 60 Pac. 780, 128 Cal. 173.

2. In an action for injury to a passenger from the sudden starting of the train while she was on the car platform preparatory to alighting, the plea alleged that in the nighttime plaintiff had gone on the steps of the car while it was going too rapidly for a woman to attempt to alight, that she had nothing in her hand and could easily have held the

platform,[3] and where the passenger was injured in a wreck after the train had slackened speed;[4] but where the evidence conclusively shows that the train was going at a dangerous rate of speed, then the passenger was guilty of contributory negligence as matter of law, in going onto the platform.[5]

Whether Posted Rules of Carrier Violated under California Statute.—Where a passenger, after the announcement of his station and the train had slackened its speed, left his seat in the coach and went on the platform, expecting to alight at the station, the question whether he violated the posted rules of the railroad prohibiting passengers from riding on the platform, so that he could not recover for a personal injury while on the platform, was for the jury.[6]

Going upon Running Board.—Whether a passenger was guilty of negligence in going upon the running board of the car preparatory to alighting, while it was in motion, is a question for the jury.[7]

Taking Position on Step of Coach.—Whether a passenger was negligent in leaving the coach and taking a position on the steps while the train was still in motion is a question for the jury.[8]

Taking Position on Steps of Street Car.—Whether a passenger was guilty of negligence in going from the platform to the step of a moving street car with an intent to alight is a question of fact for the jury,[9] as for instance where he

railing of the car, and had she done so the sudden starting of the car without warning would not have thrown her off. Held, that the question of contributory negligence was for the jury. Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195.

3. Snow and ice on platform.—A passenger in a street car, after signaling to the conductor to stop the car, left his seat, and stood for a moment, while the car was in motion, on the rear platform, upon which there was an accumulation of snow and ice, rendering the platform slippery, expecting that the car would stop so that he could alight, and omitted to take hold of the rail. The car jolted, and he was thrown off. Held, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received was a question of fact for the jury. Fleck *v.* Union R. Co., 134 Mass. 480.

4. Wrecked train having slackened speed.—In an action for death by the wreck of a train due to a misplaced switch, whether decedent was negligent in going to the front platform of the car in which he was riding, after his station had been announced, and the train had slackened speed, immediately before the accident, was for the jury. Thomas *v.* San Pedro, etc., R. Co., 95 C. C. A. 371, 170 Fed. 129.

5. Train running at dangerous rate of speed.—Where a passenger on a train going at a dangerous rate of speed stepped out on the platform, so as to be ready to get off when the train stopped, and the train suddenly increased its speed at the station, and threw plaintiff off, the railroad company was not liable. Scheiber *v.* Chicago, etc., R. Co., 61 Minn. 499, 63 N. W. 1034.

6. Whether posted rules of carrier violated under California statute.—Pruitt *v.* San Pedro, etc., R. Co., 161 Cal. 29, 118 Pac. 223, 36 L. R. A., N. S., 331.

7. Going upon running board.—Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Setzler *v.* Metropolitan St. R. Co., 227 Mo. 454, 127 S. W. 1.

A passenger on an electric railway car, who had frequently ridden over the line, in violation of a notice of warning conspicuously posted at each end of the car, stepped on the footboard while the car was in motion, and in preparing to alight struck against an iron post supporting the electric wires, standing seven inches from the footboard, and was killed. Held, that he was guilty of negligence precluding a recovery of damages for his death, and where such facts appeared from the undisputed testimony it was not error for the court to so rule as a matter of law. State *v.* Lake Roland, etc., R. Co., 84 Md. 163, 34 Atl. 1130.

8. Taking position on step of coach.—Louisville, etc., R. Co. *v.* Stillwell, 142 Ky. 330, 134 S. W. 202.

Passenger on freight train.—Where a freight train carrying passengers slackened its speed and approached slowly the platform at a station where it was required to stop to permit a passenger to alight, the passenger could act on the belief that the train would stop; and whether he acted with ordinary prudence when he left the caboose and proceeded to the steps thereof preparatory to alighting was for the jury. Kansas, etc., R. Co. *v.* Worthington, 101 Ark. 128, 141 S. W. 1173.

9. Taking position on steps of street car.—Peterson *v.* Chicago Consol. Tract. Co., 83 N. E. 159, 231 Ill. 324; Wabash River Tract. Co. *v.* Baker, 78 N. E. 196, 167 Ind. 262; Bendekovich *v.* Omaha, etc., St. R. Co., 80 Neb. 174, 113 N. W. 988.

went upon the steps after the car commenced to slow down,[10] where he had signalled to stop.[11]

§ 2915. Alighting from Moving Conveyance.—It is not contributory negligence in law for a passenger to alight from a moving train,[12] or street car,[13] when not instructed or directed to do so by some representative of the road;[14] and whether it is negligence so to do depends upon all the attendant circumstances,[15] and is a question of fact for the jury, where the evidence is

10. An interurban railway passenger, who had signified his desire to alight, was not negligent as a matter of law in taking a position on the car step after the car had commenced to slow down. Heinze *v.* Interurban R. Co., 139 Iowa 189, 117 N. W. 385, 21 L. R. A., N. S., 715.

11. After giving signal to stop.—The plaintiff, a passenger on a street car, for the purpose of alighting, rang the bell, and got upon the car step while the car was slowing, but, instead of stopping, the car suddenly started again with a jerk, throwing him to the ground. Held, that he had a right to assume that the car would stop, and not start again until he had alighted, and that therefore he was not guilty of contributory negligence in being upon the step while the car was in motion. Harmon *v.* Washington, etc., R. Co., 7 Mackey (18 D. C.) 255.

Where plaintiff, after requesting the driver to stop the car, that he might alight, got upon the step while the car was in motion, preparatory to alighting, he was not guilty of such negligence as to preclude a recovery for injuries sustained by his being thrown to the ground by the sudden starting of the horses after the speed of the car had been slackened. Nichols *v.* Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780.

12. *Arkansas.*—St. Louis, etc., R. Co. *v.* Rush, 86 Ark. 325, 111 S. W. 263; St. Louis, etc., R. Co. *v.* Fambro, 88 Ark. 12, 114 S. W. 230.

Georgia.—Southern R. Co. *v.* Clariday, 124 Ga. 958, 53 S. E. 461; Hill *v.* Louisville, etc., R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A., N. S., 432; Augusta, etc., R. Co. *v.* Snider, 118 Ga. 146, 44 S. E. 1005; Simmons *v.* Seaboard, etc., Railway, 120 Ga. 225, 47 S. E. 570.

Illinois.—Ardison *v.* Illinois Cent. R. Co., 155 Ill. App. 277, affirmed in 94 N. E. 501, 249 Ill. 300.

Indiana.—Lake Erie, etc., R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434.

Kansas.—Missouri Pac. R. Co. *v.* Irvin, 81 Kan. 649, 106 Pac. 1063, 26 L. R. A., N. S., 739.

Kentucky.—Chesapeake, etc., R. Co. *v.* Robinson, 149 Ky. 258, 147 S. W. 886; Sandlin *v.* Lexington R. Co., 33 Ky. L. Rep. 518, 110 S. W. 374; Chesapeake, etc., R. Co. *v.* Robinson, 135 Ky. 850, 123 S. W. 308.

Minnesota.—Holden *v.* Great Northern R. Co., 103 Minn. 98, 114 N. W. 365.

Missouri.—Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371.

Oklahoma.—Oklahoma R. Co. *v.* Boles, 30 Okla. 764, 120 Pac. 1104.

South Carolina.—Dobson *v.* Receivers, 90 S. C. 414, 73 S. E. 875; Sevier *v.* Southern Railway, 82 S. C. 311, 64 S. E. 390.

13. Moving street car.—*Alabama.*—Birmingham R., etc., Co. *v.* Willis, 143 Ala. 220, 38 So. 1016; Birmingham R., etc., Co. *v.* Harden, 156 Ala. 244, 47 So. 327.

Delaware.—Betts *v.* Wilmington City R. Co. (Del.), 53 Atl. 358, 3 Pen. 448.

Georgia.—Southern R. Co. *v.* Parham, 10 Ga. App. 531, 73 S. E. 763; Macon R., etc., Co. *v.* Castopulon, 11 Ga. App. 242, 75 S. E. 15.

Illinois.—Chicago Union Tract. Co. *v.* Olsen, 211 Ill. 255, 71 N. E. 985; Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; Bloomington, etc., Railway *v.* Zimmerman, 101 Ill. App. 184; Chicago City R. Co. *v.* Lundberg, 124 Ill. App. 144.

Indiana.—Crump *v.* Davis, 33 Ind. App. 88, 70 N. E. 886.

Iowa.—Root *v.* Des Moines City R. Co., 113 Iowa 675, 83 N. W. 904.

Kentucky.—Lexington R. Co. *v.* Herring, 29 Ky. L. Rep. 794, 96 S. W. 558, rehearing denied in 30 Ky. L. Rep. 269, 97 S. W. 1127.

Maryland.—United R., etc., Co. *v.* Rosik, 107 Md. 138, 68 Atl. 511.

Mississippi.—Yazoo, etc., R. Co. *v.* Beattie (Miss.), 49 So. 609.

North Carolina.—Thorp *v.* Durham Tract. Co., 159 N. C. 33, 74 S. E. 644.

Texas.—Haralson *v.* San Antonio Tract. Co., 53 Tex. Civ. App. 253, 115 S. W. 876, Galveston, etc., R. Co. *v.* Thornsberry (Tex.), 17 S. W. 521; St. Louis, etc., R. Co. *v.* Ratley (Tex. Civ. App.), 87 S. W. 407.

Virginia.—Newport News, etc., Elect. Co. *v.* McCormick, 106 Va. 517, 56 S. E. 281; Thompson *v.* Norfolk, etc., Tract. Co., 109 Va. 733, 64 S. E. 953.

14. Ardison *v.* Illinois Cent. R. Co., 155 Ill. App. 274, judgment affirmed in 249 Ill. 300, 94 N. E. 501.

15. It is not negligence as a matter of law for a passenger to alight from a moving train, but there may be circumstances attending an attempt to do so which will justify the court to declare such conduct negligence per se. Southern R. Co. *v.* Morgan, 171 Ala. 294, 54 So. 626.

conflicting,[16] to be determined from the facts of the particular case under proper instructions by the court,[17] unless the risk involved in the act[18] because of the speed of the car[19] or the fact that the passenger is heavily encumbered,[20] appears to be so great that an ordinarily prudent person would not incur it.[21] If it is shown that the plaintiff acted as those of ordinary prudence and caution usually act in getting off of moving street cars, the act should not be counted as negligence.[22]

Instances of Alighting from Street Car.—There are many instances in which this rule has been applied. Thus, whether the injured passenger was negligent in alighting from a moving car has been held to be a question for the jury, where the car was moving slowly and smoothly,[23] at the rate of from four to five miles an hour,[24] where the car had practically stopped at the usual stopping place,[25] where the injured passenger encumbered with small bundles stepped from the car in the dark while it was barely moving,[26] where the passenger has given the signal for the car to stop, and it has slowed up as if about to stop[27] and then increased its speed so that he concluded it was not

16. Evidence conflicting.—In an action for injuries to a passenger while attempting to alight, there being conflict in the evidence on the issue as to his alleged contributory negligence in stepping off the train while it was moving, it presents a question for the jury. Rutledge *v.* New Orleans, etc., R. Co., 129 Fed. 94, 63 C. C. A. 596.

On conflicting evidence as to whether a street car had come to a full stop before plaintiff attempted to alight, the question of plaintiff's due care is for the jury. Krock *v.* Boston Elev. R. Co., 101 N. E. 968, 214 Mass. 398.

In a street car passenger's action for personal injuries, where the evidence conflicted on whether the car had come to a full stop when the passenger attempted to alight and suddenly started while she was alighting, the question of plaintiff's contributory negligence was for the jury. Garland *v.* Boston Elev. R. Co., 97 N. E. 97, 210 Mass. 458.

When defendant's train arrived at the station at which plaintiff desired to alight the car gate at the front of the car leading to the station platform was closed, and the passengers began alighting from the other gate. Thinking that all had alighted, the conductor started the train, and immediately afterwards, seeing that some still desired to alight, stopped it. Plaintiff's evidence tended to show that he was on the car platform when the car stopped, and was thrown off and injured by the sudden stop; while there was evidence tending to show that he stepped off the car while in motion, supposing it motionless. Held, that the question of plaintiff's exercise of due care was properly submitted to the jury. Comerford *v.* New York, etc., R. Co., 63 N. E. 936, 181 Mass. 528.

17. Indianapolis St. R. Co. *v.* Hockett, 159 Ind. 677, 66 N. E. 39.

18. Except where the risk involved in stepping from a moving car appears to be so great that an ordinarily prudent person would not incur it, the question of negligence in the act is for the jury. Green *v.* Metropolitan St. R. Co., 99 S. W. 28, 122 Mo. App. 647.

19. Speed of train.—Unless it be shown that, at the time a passenger attempted to leave a moving car, it was running at such a high rate of speed as would render the attempt to alight obviously dangerous, the question whether such an attempt was or was not negligence on the part of the person attempting to alight is a question of fact to be determined by a jury. Coursey *v.* Southern R. Co., 38 S. E. 866, 113 Ga. 297; Posten *v.* Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391; Haskell *v.* Metropolitan St. R. Co., 161 Mo. App. 64, 142 S. W. 1091; Cooper *v.* Atlantic, etc., R. Co., 78 S. C. 562, 59 S. E. 704; Gyles *v.* Southern Railway, 79 S. C. 176, 60 S. E. 433.

20. Encumbered passenger.—Posten *v.* Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391.

21. Haskell *v.* Metropolitan St. R. Co., 161 Mo. App. 64, 142 S. W. 1091.

22. Indianapolis St. R. Co. *v.* Hockett, 66 N. E. 39, 159 Ind. 677.

23. Car moving slowly and smoothly.—United R., etc., Co. *v.* Weir, 102 Md. 286, 62 Atl. 588.

24. Car moving at rate of four to five miles per hour.—Whether it is contributory negligence to alight from an electric car moving at the rate of from four to five miles an hour is a question of law. Jagger *v.* People's St. R. Co., 36 Atl. 867, 180 Pa. 436, 38 L. R. A. 786.

25. Car practically stopped at usual place.—Finger *v.* Wichita R., etc., Co., 85 Kan. 172, 116 Pac. 366.

26. A passenger, incumbered with small bundles, who steps from an electric car in the dark, while it is slowing up to stop and is barely moving, is not guilty of contributory negligence as a matter of law. Birmingham R., etc., Co. *v.* Girod, 164 Ala. 10, 51 So. 242.

27. Car slowed up.—Whether a passenger alighting from a moving street car, after having signaled it to stop, and

going to stop,[28] or where, at the time that he makes the attempt to alight, he believes the car has stopped,[29] where the conductor gave the signal to stop and the car slowed up and then increased its speed,[30] where he attempted to alight about three feet from the end of a platform over which he was cast by the momentum of the car,[31] and where the car started as he attempted to alight.[32]

Instances of Alighting from Train.—Whether a passenger injured in attempting to alight from a moving train,[33] although the station was not announced;[34] whether a passenger injured in alighting from a moving train, after being cautioned against the attempt;[35] whether a passenger who attempts

it has slowed up as if about to stop, is guilty of contributory negligence, is for the jury. Ford *v.* Paducah City Railway, 96 S. W. 441, 29 Ky. L. Rep. 752.

28. Speed increased as if car not to stop.—Where a passenger on a street car signaled the car to stop for him to alight, and he testified that, on the car slowing up and then increasing its speed, he concluded it was not going to stop, whereupon he jumped off and was injured, the question of his contributory negligence was for the jury. Dallas Rapid Transit Co. *v.* Payne, 82 S. W. 649, 98 Tex. 211, reversing 78 S. W. 1085.

29. Belief that car had stopped.—It is not negligence per se for a street car passenger to attempt to alight at a usual stopping place if he has given the proper signal for the car to stop, and at the time that he makes such attempt he believes the car has stopped though it has not, but is moving so slowly that a prudent person under the same circumstances would alight. Burke *v.* Bay City Tract., etc., Co., 110 N. W. 524, 147 Mich. 172.

30. Increasing speed after signal to stop by conductor.—Where a passenger on a street car asked the conductor to stop at a certain street, and he said "All right," and, upon approaching the street, the conductor closed the gates on the platform side of the car, and left the gates open on the opposite side, and then gave the signal to stop, and plaintiff, with a grip in his hand stood at the open gate and when the car slowed down as though to stop alighted, but was thrown and injured by the car starting up at full speed, the passenger was not guilty of negligence as a matter of law. Marbourg *v.* Seattle, etc., R. Co., 94 Pac. 649, 49 Wash. 51.

31. By attempting to alight near end of platform.—Contributory negligence of boy in attempting to alight from moving car, about three feet from the end of a platform, over which he was carried by the momentum, is for the jury. Moeller *v.* United States R. Co. (Mo.), 147 S. W. 1009.

32. Car starting as passenger attempted to alight.—United R., etc., Co. *v.* Rosik, 107 Md. 138, 68 Atl. 511.

Where, in an action for injury to a street car passenger, plaintiff's theory was that, when the car had slackened its speed in obedience to a signal given to the conductor to permit him to alight, and he was in the act of preparing to alight, the motorman suddenly and violently started the car, throwing plaintiff to the street, and the theory of the company was that plaintiff, without giving any notice that he desired to alight, jumped from the car when the speed had not been reduced, and all the evidence in the case, including the testimony of plaintiff, established that he attempted to alight from the car before it stopped, an instruction that if plaintiff attempted to alight before the car was brought to a standstill, and in so attempting to alight he was injured, the verdict should be for the company, was erroneous, because in effect a peremptory instruction to find for the company. Sandlin *v.* Lexington R. Co., 110 S. W. 374, 33 Ky. L. Rep. 518.

33. Slowly moving train.—Bond *v.* Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30; Sevier *v.* Southern Railway, 82 S. C. 311, 64 S. E. 390.

It is not negligence per se for a passenger to alight from a slowly moving train. Indiana Union Tract. Co. *v.* Swafford (Ind.), 100 N. E. 840.

Where a passenger went on the platform when his station was called, and went down onto the lower step, and, as the train was moving very slowly in coming to a stop, stepped from the car to the station platform, and bumped into the station agent, causing them both to fall and the passenger to roll under the train, it was a jury question, in an action for such injuries, whether he was guilty of contributory negligence. Ardison *v.* Illinois Cent. R. Co., 94 N. E. 501, 249 Ill. 300.

34. Station not announced.—In an action for injuries to a passenger while alighting from a moving train at his station, evidence held to require the submission to the jury of the issue whether he exercised reasonable care in alighting, though the station was not announced. Chesapeake, etc., R. Co. *v.* Robinson, 135 Ky. 850, 123 S. W. 308.

35. Passenger cautioned against attempt.—Whether a passenger, attempting to alight from a train when in motion after he has been cautioned against making the attempt, was negligent, was for the jury. Kansas, etc., R. Co. *v.* Matthews, 39 So. 207, 142 Ala. 298.

to alight from a moving train, under the mistaken belief that it had stopped;[36] whether a passenger who attempted to leave a train which did not stop at the station,[37] or did not stop for a sufficient time to enable him to get off;[38] whether a passenger is guilty of negligence in alighting from a moving train just as it

36. Belief that train had stopped.—Plaintiff boarded a train bound to a small station. When the conductor took his ticket he said to plaintiff, "Don't be asleep when you get there." On approaching the station, plaintiff went to the front end of the car to be ready to alight. There was no light there, and, under the mistaken belief that the train had stopped, plaintiff attempted to alight and was injured. The station was closed, and there were no objects that could be seen from the platform of the car. Plaintiff and other passengers who got off at the same station all testified that they neither saw nor felt any motion of the train when plaintiff alighted. Held, that plaintiff was not negligent as a matter of law. Judgment, 105 N. Y. S. 522, 121 App. Div. 72, reversed in Bartle *v.* New York, etc., R. Co., 85 N. E. 1091, 193 N. Y. 362.

Plaintiff was a passenger upon one of defendant's vestibule trains. As it drew into the station, the conductor called out: "All out! Jersey City! Last stop!" Plaintiff, holding an umbrella and bag, then walked to the end of the car, and waited. According to his testimony, the conductor unfastened and opened the vestibule door, and plaintiff started to alight. The conductor was then facing him. The car was still in motion, but plaintiff did not know it. There was a light at the top of the steps, but it was dark outside. The motion of the car was perfectly smooth, and there was nothing to indicate to plaintiff that the car was not at rest. He held the side rail with one hand as he stepped down. As he attempted to step on the station platform, he was thrown down and run over. Held, that the question of plaintiff's contributory negligence was for the jury. Mearns *v.* Central R. Co., 48 N. Y. S. 366, 23 App. Div. 298, order reversed in 57 N. E. 292, 163 N. Y. 108.

37. Train not stopped at station.—Where the agent and employees of a railroad company negligently failed to bring the train to a stop at a station where a passenger is entitled to leave a train, whether his attempt to leave the train while in motion is negligence is a question for the jury. Turley *v.* Atlanta, etc., R. Co., 56 S. E. 748, 127 Ga. 594, 8 L. R. A., N. S., 695.

The conductor of the train having promised plaintiff that he would stop at a flag station to which plaintiff was going, the latter left his seat, and tried to make his way to the door of the car, in order to get off at that station, which the train was then approaching. It was a day of great public excitement, and the train was overloaded with people, who filled all the platforms, and even occupied the roofs of the cars. The train did not come to a full stop on reaching the station, and plaintiff, in making his way through the crowd, reached the platform, and, in the surging of the crowd, fell, or was pushed out on the platform, and down the steps of the car. After holding on with one hand for a short distance, he fell to the ground, and was injured. Held, that the question whether plaintiff exercised due care, and whether defendant negligently and improperly managed its train, should have been submitted to the jury. Treat *v.* Boston, etc., R. Corp., 131 Mass. 371.

Freight train.—Whether a passenger, injured while alighting from a slowly moving freight train on discovering that the train would not stop at his station was guilty of contributory negligence, held that under the evidence, for the jury. Kansas, etc., R. Co. *v.* Worthington, 101 Ark. 128, 141 S. W. 1173.

38. Train not stopped for a sufficient time.—Where a carrier either did not stop the train on which decedent was riding at all at the station where he desired to alight, or did not stop for a sufficient length of time to enable him to get off while the train was stationary, decedent was not per se negligent in alighting while the train was moving slowly. Puget Sound Elect. Railway *v.* Felt, 181 Fed. 938, 104 C. C. A. 402.

Where plaintiff testified that a train stopped fifteen seconds, and started suddenly, before she had time to get off, the court can not hold, as a matter of law, that she was negligent in not alighting in that time. Smitson *v.* Southern Pac. Co., 60 Pac. 907, 37 Ore. 74.

A large and corpulent man, about seventy years of age, took passage with a railroad company for a way station. There was a conflict of testimony as to the length of time the train stopped at this station, etc., but there was testimony to show that he was hindered in getting off the train by persons entering, and that he did not discover that the train was in motion until he had reached the last or next to the last step; and that, considering his age and weight, and the impetus of his descent, it was then too late for him to stop himself. Held, that the subjects of injury fairly presented by these facts were defendant's negligence on the one hand, and contributory negligence of the plaintiff on the other, and that both of these were questions of fact exclusively for the consideration of the jury. Pennsylvania R. Co. *v.* Peters, 116 Pa. 206, 9 Atl. 317.

is leaving the station;[39] whether a passenger, getting off a moving train on a dark night at the first crossing beyond his station, at which he had failed to alight because asleep, and after the train had slacked up, and he had been told to get off by the brakeman;[40] and whether a passenger unacquainted with railroad traveling, which fact he had stated to the defendant, alights from a moving train, in, as he though, pursuance of an invitation to that effect,[41] was negligent are questions of fact for the jury.

Manner of Alighting.—Whether or not a person alighting from a moving train was negligent in the manner in which he alighted is for the jury.[42]

Female Passenger.—Whether a female passenger is negligent in attempting to alight from a moving street car is for the jury.[43]

Boy.—Whether a boy was negligent in jumping from a moving train[44] is a question for the jury.

39. Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

Jumping from train moving from station.—Louisville, etc., R. Co. *v.* Eakin, 103 Ky. 465, 45 S. W. 529, 20 Ky. L. Rep. 736, 933, dissenting opinion, 46 S. W. 496, 47 S. W. 872; Illinois Cent. R. Co. *v.* Whittaker, 57 S. W. 465, 22 Ky. L. Rep. 395; Southern R. Co. *v.* Mitchell, 40 S. W. 72, 98 Tenn. (14 Pickle) 27.

Whether a person familiar with a depot was negligent in alighting from a train in the nighttime, in a dark place, when the train had just started from the depot and was moving at the rate of one or two miles an hour, was for the jury. Kansas, etc., R. Co. *v.* Matthews, 39 So. 207, 142 Ala. 298.

In an action for the death of a railroad passenger killed while alighting from a train after it had stopped at his destination and was moving again, held, under the evidence, a question for the jury whether he proceeded with ordinary prudence to reach the step or was in the act of stepping, and whether it was contributory negligence for him to attempt to alight while the cars were moving. Dilburn *v.* Louisviile, etc., R. Co., 156 Ala. 228, 47 So. 210.

Conflicting evidence as to length of stop.—Where there is a controversy as to the length of the stop at a station and plaintiff's diligence in alighting, the question of negligence in jumping from the train after it started, but before it passed the platform, is for the jury. Chicago, etc., R. Co. *v.* Byrum, 48 Ill. App. 41, affirmed in 153 Ill. 131, 38 N. E. 578.

Conflicting evidence as to caution not to jump.—Plaintiff was injured while attempting to alight at a station at night from defendant's vestibuled train, which had commenced to move after having stopped. Plaintiff and one who was with him testified that they did not know the train was moving. There was other testimony that the conductor had told plaintiff to wait, and he would stop the train; but the evidence as to whether plaintiff heard this, or could have heard it by exercising reasonable care, was conflicting. Held, that the question as to whether plaintiff was guilty of contributory negligence should have been submitted to the jury. Walters *v.* Chicago, etc., R. Co., 89 N. W. 140, 113 Wis. 367.

40. Lennon *v.* Chicago, etc., R. Co. (Iowa), 75 N. W. 671.

41. Doolittle *v.* Southern R. Co., 62 S. C. 130, 40 S. E. 133.

42. Manner of alighting.—Bishop *v.* Illinois Cent. R. Co., 25 Ky. L. Rep. 1363, 77 S. W. 1099.

It is not negligence in all cases, as a matter of law, for a passenger to step off a moving car at right angles therewith, since the speed of the car must materially influence the determination of the question. Birmingham R., etc., Co. *v.* Harden, 156 Ala. 244, 47 So. 327.

Whether a passenger was negligent in attempting to alight on his left foot from a train moving to his left at a rate of one or two miles an hour was for the jury. Kansas, etc., R. Co. *v.* Matthews, 39 So. 207, 142 Ala. 298.

Where a passenger attempts to alight from a railroad car without having noticed that the train has started until her foot is placed on the depot platform, the question of her contributory negligence is for the jury. Atchison, etc., R. Co. *v.* Loewe, 69 Kan. 843, 74 Pac. 234, judgment affirmed on rehearing, 76 Pac. 431.

43. Female passenger.—Brown *v.* Seattle City R. Co., 47 Pac. 890, 16 Wash. 465.

44. Boy jumping from train.—Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

In an action by a boy fourteen years old for injuries sustained in jumping from a moving train, where there was evidence tending to the conclusion that plaintiff did and defendant failed to do what an ordinary man would have done, the question of contributory negligence was properly submitted to the jury. Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

Whether a boy was negligent in jumping from a moving train held to be for the jury, where his associates were in the habit of jumping and the trainmen never suggested that it was dangerous. Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

In Emergencies.—See post, "Acts in Emergencies," § 2919.

§ 2916. Alighting from Conveyance at Place Other than Station or Platform.—The question of a passenger's contributory negligence in getting off when the train stopped at a place other than a station;[45] as, for instance, a crossing,[46] or water tank;[47] is for the jury, although the station had been announced.[48] This rule applies to passengers on freight trains who alight at places other than where passengers usually alight from passenger trains,[49] and to caretakers of live stock in transit who alight to look after the stock in their charges.[50]

45. Alighting from conveyance at place other than station or platform.—Larson *v.* Minneapolis, etc., R. Co., 85 Minn. 387, 88 N. W. 994.

46. Crossing.—Larson *v.* Minneapolis, etc., R. Co., 85 Minn. 387, 88 N. W. 994.

In going to R., over defendant's railroad, it was necessary to change at O., from the D. division of defendant's road to its F. division, the change being made just before the M. railroad was crossed. Plaintiff on returning, on a dark, rainy night, from R., she having for the first time gone over the F. division that morning, was thrown by the car starting while she was attempting to alight, as she saw others doing, just after the car stopped at the M. tracks; O. having been called out by the conductor just before. Held, that the question of contributory negligence was for the jury. Smith *v.* Detroit United Railway, 119 N. W. 640, 155 Mich. 466.

47. Water tank.—Where a passenger got off when the train stopped at a water tank, not a station, and fell into an opening on the bridge on which the train was standing, and the trainmen had announced that the next stop would be at a certain station, and he had not intended to end his journey at the next station, and his purpose in leaving the car was not disclosed, the question of his negligence was for the jury. Watters *v.* Philadelphia, etc., R. Co., 86 Atl. 1021, 239 Pa. 492.

48. Station announced.—In an action to recover for injuries received by the sudden backward starting of defendant's train while plaintiff was alighting therefrom at a point beyond her station, the question of plaintiff's contributory negligence in attempting to leave the car immediately after the brakeman had announced the station was for the jury. Taber *v.* Delaware, etc., R. Co., 71 N. Y. 489, reversing 4 Hun 765.

Plaintiff, a passenger on defendant's train, testified that as it approached his station, which was at an opening 332 feet long in a tunnel, the station platform being at the bottom of a deep cut, the conductor twice hurriedly cried out in the smoker, where he was seated, "All out for Pennsylvania Avenue Station;" that he arose and passed down the aisle, the speed of the car decreasing, it being soon difficult to determine whether or not it had stopped; that, as the conductor closed the door of the ladies' car, plaintiff stepped out of the smoker; that the conductor then went down to the steps and leaned out, looking ahead; that then plaintiff started down, having satisfied himself that the car had stopped, and just as he got to the bottom step the conductor sprang up the steps of the ladies' car; that plaintiff turned his head to see what the conductor was going to do, and saw him take hold of the door of the ladies' car, and supposed he was going to let the ladies alight; that then he looked out and found himself confronted by darkness and in the tunnel; and that then there came a surge, and he lost his hold and fell. Held, that the question of contributory negligence was for the jury. Baltimore, etc., R. Co. *v.* Jean, 57 Atl. 540, 98 Md. 546.

49. Passengers alighting from freight trains.—Whether a passenger alighting from a freight train at a place other than the place where passengers usually alight from passing trains acted with due diligence is for the jury. Southern R. Co. *v.* Burgess, 42 So. 35, 143 Ala. 364.

A passenger on a freight train was injured while alighting. The point where the caboose stopped was not the usual place for passengers to alight from passenger trains. The evidence showed that the carrier was in the habit of allowing passengers to alight from freight trains where the caboose stopped, and that the caboose was not usually carried to the platform for passengers to alight from passenger trains. Held, that whether the passenger was justified in assuming that the place where the caboose stopped was the place where the carrier expected that she would alight was for the jury. Southern R. Co. *v.* Burgess, 42 So. 35, 143 Ala. 364.

50. Caretaker of live stock.—Whether a caretaker for live stock in transportation was negligent in alighting from the train while it was standing on a bridge, resulting in his injury, held, under the evidence, for the jury. Otto *v.* Chicago, etc., R. Co., 127 N. W. 857, 87 Neb. 503, 31 L. R. A., N. S., 632.

A caretaker of stock, when the train stopped at a regular station, told the conductor that he wanted to look at the stock before the train left, and was notified that there was not time, but that

Knowledge That Trains Made a Stop before Reaching Station.—Where a passenger was injured by stepping from a train before it reached the station, the question whether he was guilty of contributory negligence in doing so, when the night was dark and rainy, the street lights out, and the brakeman had just announced the station without warning the passengers that the stop was not for the station, his conduct together with the movements of other passengers, indicating that the station had been reached, was for the jury, though he knew that trains, in entering the city, made a stop before reaching the station.[51]

The absence of the customary depot lights, which the injured passenger knew were maintained at the station, was not such a fact tending to suggest to him that the station had not been reached as to make him guilty of contributory negligence as a matter of law in stepping from the train, but the question of negligence is for the jury.[52]

§ 2917. Crossing or Walking on Track after Alighting from Car.—A passenger before crossing a track at a railroad station while leaving a train is not required, as a matter of law, to look and listen for approaching trains, but is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury.[53] Thus, whether a passenger injured by being struck by a train while making his way from the point where he alighted to the station,[54] or while leaving the station,[55] where he fell under a train while walking along the track to the station,[56] or where he endeavored to reach the station by going

the train would back up for water, and that he would then have plenty of time to look after his stock. When the engine stopped at the water tank, the caboose stood on a trestle twenty-three feet above the ground, of which the caretaker was ignorant; it being so dark that he could not see the trestle. Supposing that he was going to step upon the ground, he made no investigation and stepped off the caboose, falling through the trestle. Held that he was not negligent as matter of law. Burnside *v.* Minneapolis, etc., R. Co., 125 N. W. 895, 110 Minn. 401.

51. Knowledge that trains made a stop before reaching station.—Wolf *v.* Chicago, etc., R. Co., 131 Wis. 335, 111 N. W. 514.

52. Wolf *v.* Chicago, etc., R. Co., 131 Wis. 335, 111 N. W. 514.

53. Crossing or walking on tracks after alighting from car.—Chicago, etc., R. Co. *v.* Stepp, 164 Fed. 785, 89 C. C. A. 431, affirming 151 Fed. 908; St. Louis, etc., R. Co. *v.* Cleere, 76 Ark. 377, 88 S. W. 995.

54. Ray *v.* Aberdeen, etc., R. Co., 141 N. C. 84, 53 S. E. 622.

In an action against a carrier for injuries to a passenger, alleged to have resulted from tripping on the rails of defendant's main track as plaintiff was leaving the train, which had not stopped at the regular platform, the question whether plaintiff was guilty of contributory negligence is for the jury. Judgment 91 N. Y. S. 601, 100 App. Div. 161, affirmed in Hancock *v.* New York, etc., R. Co., 76 N. E. 1096, 184 N. Y. 540.

At a station a passenger was deposited from a train directly opposite the depot, the two tracks being between her and it. Along the side of the track was a path which led to a road which crossed the tracks one hundred feet away. The space from the platform to where she alighted was filled and leveled up by the railroad company. She started directly across the tracks, and as she was stepping onto the depot platform was struck by a train. There was evidence that the space in front of the platform was filled and leveled up to enable passengers to cross going to and from the trains and the depot, and that this was the usual and customary way for them; also that the train, coming rapidly and without signal, did not come in sight round a curve near at hand, till she had started across the last track. Held, that the case could not be taken from the jury on the ground that she was guilty of contributory negligence. Girton *v.* Lehigh Valley R. Co., 48 Atl. 970, 199 Pa. 147.

55. While leaving station.—Wiley *v.* Rutland R. Co. (Vt.), 86 Atl. 808.

A passenger leaving a station and seeing a freight train standing on the track some distance away might assume that she would not be endangered by the backing up of the train, and was not, as a matter of law, guilty of contributory negligence in not again looking at it or in not keeping a constant lookout. Wiley *v.* Rutland R. Co. (Vt.), 86 Atl. 808.

56. Falling under train while walking close to track.—Where a passenger, after alighting on a dark night, goes along a narrow elevated unlighted walk close to

onto a flat car which formed part of the train and jumping to the ground, breaking his leg,[57] was guilty of contributory negligence are each questions for the jury.

Crossing Street Car Tracks.—Whether a passenger on a street car who, after alighting, passed around the end of the car and was struck by another car on a parallel track,[58] was guilty of contributory negligence, is a question for the jury.

Electric Railway Passenger.—An alighting electric railway passenger, while crossing double tracks to a station shed in the night time, was struck by a train running in the opposite direction without headlight displayed or giving warning, is not guilty of contributory negligence as matter of law, though he failed to look and listen after alighting from his train, but the question is for the jury.[59]

Passenger Ejected from Train.—In an action for death of a passenger after ejection from a train by being struck by another train while walking to his destination, whether deceased was negligent in pursuing an unsafe way was for the jury.[60]

§ 2918. Acts by Permission or Direction of Carrier's Employees.—Ordinarily it is a question for the jury whether an act generally regarded as negligent, amounts to contributory negligence on the part of an injured passenger when it is done in response to the invitation or direction of the employees in charge of the train.[61] But if the act is plainly contrary to reasonable prudence, it is negligence per se.[62]

Instances.—There are many instances in which this rule has been applied. Thus, whether a passenger injured as a result of attempting on invitation or direction of the carrier's employee, acting within the scope of his authority,[63] to

the track and in some way falls between the wheels of a passing car and is instantly killed without any actual witnesses of the occurrence, the question of decedent's contributory negligence is for the jury. Tucker *v.* Pittsburgh, etc., R. Co., 75 Atl. 991, 227 Pa. 66.

57. Plaintiff, a passenger aged sixty-seven, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the roadbed being closely fenced with barb wire, but soon came to a bridge to cross which he had to mount a flat car. Reaching the front of the car, and being anxious lest the train start, he, having first examined the ground, jumped from the coupling outward with one hand on the car in front, and in landing broke his leg. Held, that plaintiff's contributory negligence was a question for the jury. Adams *v.* Missouri Pac. R. Co., 100 Mo. 555, 12 S. W. 637, 13 S. W. 509.

58. Passing behind car on to adjoining track.—Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198; Louisville R. Co. *v.* Mitchell, 138 Ky. 190, 127 S. W. 770.

In an action against a street railroad for the death of a passenger who had alighted from a car and was run over by one of defendant's cars coming from the opposite direction, the plaintiff's proof tended to show that when the car struck deceased it was going at the rate of fifteen or eighteen miles an hour and carried deceased across one street and thirty feet beyond. Defendant's testimony was that deceased was carried only thirty or thirty-five feet, and its motorman testified that he saw deceased when within about fifty feet of him, and that he appeared to be about to cross the track; that he noticed deceased halt as though he had determined to let the car pass; that witness turned on the power, but at that moment deceased went on the track, and that witness then used every effort to prevent the car from striking deceased, but failed. Held no error in refusing peremptory instruction for defendant. Louisville R. Co. *v.* Hartman, 83 S. W. 750, 26 Ky. L. Rep. 1174.

59. Electric railway passenger.—Washington, etc., R. Co. *v.* Vaughan, 111 Va. 785, 69 S. E. 1035.

60. Passenger ejected from train.—Tilburg *v.* Northern Cent. R. Co., 221 Pa. 245, 70 Atl. 723.

61. Acts by permission or direction of carrier's employees.—Montgomery, etc., R. Co. *v.* Stewart, 91 Ala. 421, 8 So. 708.

62. South, etc., R. Co. *v.* Schaufler, 75 Ala. 136; Vimont *v.* Chicago, etc., R. Co., 71 Iowa 58, 32 N. W. 100.

63. Porter.—St. Louis, etc., R. Co. *v.* Leamons, 82 Ark. 504, 102 S. W. 363.

Conductor.—Staines *v.* Central R. Co., 72 N. J. L. 268, 61 Atl. 385.

board a moving train,[64] a crowded street car,[65] or a freight car some distance ahead of the caboose as the train was leaving the station;[66] to pass from one car to another;[67] to ride on the platform of the car;[68] to ride on the engine;[69] to walk alongside a freight train in order to close the door of a freight car;[70] to return to his seat by a board along the side of the car, after selling excursion tickets on the train, as directed by the conductor;[71] to pass into the baggage car

64. Attempting to board moving train.—Whether a passenger, attempting to board a moving train on the invitation of the conductor, was guilty of contributory negligence depends on the particular facts and is for the jury. Larson *v.* Chicago, etc., R. Co. (S. Dak.), 141 N. W. 353. See ante, "Boarding Moving Conveyance," § 2909.

Speed of train.—The question whether a passenger, attempting to board a moving train on the invitation of the conductor, is guilty of contributory negligence may not be determined, as a matter of law, by the speed of the train, unless the train is going at such speed that no ordinarily prudent person, with common understanding, will undertake the hazard. Larson *v.* Chicago, etc., R. Co. (S. Dak.), 141 N. W. 353.

Boarding slowly moving train.—A passenger invited by the conductor to board a slowly moving train is not, as a matter of law, guilty of negligence. Roberts *v.* Atlantic, etc., R. Co., 155 N. C. 79, 70 S. E. 1080.

Evidence that a conductor of a street car saw plaintiff coming towards the car or attempting to get aboard, and either expressly or by implication assented thereto, would make a question for the jury as to plaintiff's exercise of due care. Lauchtamacher *v.* Boston Elev. R., 100 N. E. 1068, 214 Mass. 103.

65. Boarding crowded car.—Whether it was negligence to board a car in its crowded condition, when urged by the conductor to "Crowd on! This is the last car for the city," is a question of fact for the jury. Alton, etc., Tract. Co. *v.* Oliver, 75 N. E. 419, 217 Ill. 15, 4 L. R. A., N. S., 399, affirming judgment Alton, etc., Tract. Co. *v.* Oller, 119 Ill. App. 181.

66. Freight car ahead of caboose.—Where one traveling on a stock shipper's pass was suddenly notified that his train was leaving the station, and, on reaching the moving train, was ordered by the conductor to board a freight car some distance ahead of the caboose, and fearing that if he waited for the caboose he would be unable to board it because of the increasing speed of the train, and not knowing of the danger attempting the boarding of a freight car, attempted to obey the order and received injuries, the question whether he was guilty of contributory negligence was for the jury. Missouri Pac. R. Co. *v.* Tietken, 68 N. W. 336, 49 Neb. 130, 59 Am. St. Rep. 526.

67. Passing from one car to another.—Whether a passenger on a street car, who passed from one car to another for the purpose of procuring a seat, pursuant to the direction of the conductor, was negligent, is a question for the jury. Chicago City R. Co. *v.* McCaughna, 74 N. E. 819, 216 Ill. 202, affirming judgment 117 Ill. App. 538.

Where a passenger, under coercion or by the direction of the carrier's employees, attempted to go from one car to another while the train was rounding a curve at a high rate of speed, and fell from the train, the question as to whether the passenger was guilty of negligence was for the jury. Dougherty *v.* Yazoo, etc., R. Co., 36 So. 699, 84 Miss. 502.

68. Riding on platform.—A passenger with numerous bundles attempted to enter an open summer car, and the conductor, after accepting his fare, directed him to occupy the platform. Held, that the passenger, in following the directions of the conductor, was not guilty of negligence as a matter of law. Mittleman *v.* Philadelphia Rapid Transit Co., 70 Atl. 828, 221 Pa. 485, 18 L. R. A., N. S., 59%.

69. Riding on engine.—Where a conductor had no express authority to waive a provision of a shipper's contract requiring him to ride in the caboose, or to invite persons to ride on the engine, the question whether the conductor's invitation to a shipper to ride on the engine was a waiver of the provision of the contract requiring him to ride in the caboose was one of fact for the jury. Illinois Cent. R. Co. *v.* Jennings, 75 N. E. 457, 217 Ill. 140, reversing judgment 119 Ill. App. 317.

70. Walking along side train to close freight car door.—Where a passenger on a freight train is injured while walking alongside the train in order to close the door of a freight car, at the order of one of the trainmen, it is for the jury to determine whether he was rightfully where he was at the time of the accident. Chicago, etc., R. Co. *v.* Rayburn, 153 Ill. 290, 38 N. E. 558, affirming 52 Ill. App. 277.

71. Return to seat by a board along side car.—Where a passenger, who is selling tickets for an excursion, is instructed by the conductor to sell the rest of the tickets after the train starts, and does so, and, in attempting to return by a board along the side of the car, the only means of getting to the seat he first took, is injured by striking a coal bin, which he might have avoided had he looked in time, his negligence is for the jury. Dickinson *v.* Port Huron, etc., R. Co., 53 Mich. 43, 18 N. W. 553.

preparatory to getting off as ordered by the conductor;[72] to jump from the platform of the car while alighting;[73] to alight from a moving train,[74] or street car; although the passenger stated that he knew it was dangerous to obey;[75] to pass over flat cars to leave a mixed train where the brakeman accompanied the passenger to carry her packages;[76] to walk across a trestle where there had been a

72. To pass into baggage car.—In an action against a railroad company for personal injuries, plaintiff's evidence showed that, when the train was approaching the station at which plaintiff desired to get off, the conductor told plaintiff that he must hurry off, as the train did not have time to stop; that the train was running three or four miles an hour; and that plaintiff received certain injuries in attempting to pass from the car in which he was sitting to the baggage car to get his baggage, preparatory to getting off, as ordered by the conductor. Held that, as the facts did not disclose negligence per se in plaintiff, it was a question for the jury whether plaintiff was guilty of contributory negligence. And whether there was apparent danger in attempting to obey the conductor was a question for the jury. Davis *v.* Louisville, etc., R. Co., 69 Miss. 136, 10 So. 450.

73. Jumping from platform of car.—Where a passenger when alighting from a car was told by the conductor to jump, as the train was in motion, which was not a fact, as the passenger could have readily ascertained, and he jumped and was injured; whether he was guilty of contributory negligence was for the jury. Staines *v.* Central R. Co., 61 Atl. 385, 72 N. J. L. 268.

74. Alighting from moving train.—In an action by a passenger for personal injury alleged to have been sustained in getting off a moving train under the direction of the trainmen, the question of contributory negligence is for the jury under proper instructions. St. Louis, etc., R. Co. *v.* Leamons, 82 Ark. 504, 102 S. W. 363. See ante, "Alighting from Moving Conveyance," § 2915.

In an action for injuries to plaintiff while alighting from defendant's passenger train, the declaration showed that upon reaching her destination the train stopped on a side track, and she started to get off and walk to the depot, when defendant's porter directed her to remain in her seat as the train would soon pull up and stop at the depot; that the train finally started, and the porter announced the station and told the passengers to get off; that all the passengers obeyed the order and alighted while the train was slowly moving, but plaintff, being the last of the passengers, was thrown to the ground by a sudden start of the train; that the train did not in fact come to a full stop at the station. Held, that it was error to sustain a demurrer to the declaration; the question of contributory negligence of plaintiff being one for the jury. King *v.* Yazoo, etc., R. Co., 39 So. 810, 87 Miss. 270.

Rate of speed of train.—Whether a person who, by mistake of an employee of the railroad company, has taken the wrong train, is negligent in jumping off on the conductor's suggestion while the train is moving out of the yards at three or three and one-half miles an hour, is for the jury. Jones *v.* Baltimore, etc., R. Co., 4 App. D. C. 158.

Where a railroad fails to stop its train at the destination of a passenger, and while it is passing the station the conductor directs the passenger to alight from the train while moving about four miles an hour, the question of whether the passenger is guilty of contributory negligence held for the jury. Walters *v.* Missouri Pac. R. Co., 109 Pac. 173, 82 Kan. 739, 28 L. R. A., N. S., 1058.

Under Iowa statute.—While under Code, § 4811, it is a crime for one not employed on a train, etc., to get on or off a moving railroad car without the consent of the person in charge thereof, such act is not conclusively negligent if done with the consent or assistance of an employee authorized to act with reference to the transportation of the passenger on the car. Gannon *v.* Chicago, etc., R. Co., 117 N. W. 966, 141 Iowa 37, 23 L. R. A., N. S., 1061.

75. Where plaintiff left a train while it was in motion, at the conductor's direction, his statement that he knew it was dangerous to obey the conductor is not conclusive of the question, as it was for the jury to say whether in fact it was apparent that there was danger. Davis *v.* Louisville, etc., R. Co., 69 Miss. 136, 10 So. 450.

76. Passing over flat car accompanied by brakeman.—In an action against a railroad company for personal injuries it appeared that plaintiff, a lady sixty years old, was a passenger on defendant's mixed train; that at her destination defendant had no depot or platform; that where the train stopped the snow was very deep, and the engine cut loose from the train, and left it standing; that most of the passengers passed over four flat cars, and walked away; that a brakeman beat down the snow by the passenger car for her to stand until an engine removed the forward cars; that, after standing there some time, she objected to remaining longer; that the brakeman suggested that if she could pass over the flat cars she could leave the train, and told her there was no other way of leaving it;

washout in order to take a car at the other end;[77] or to cross a parallel track by going over the platform of one of the cars of a train which blocked the way,[78] was guilty of contributory negligence, are each questions for the jury to be determined from all the evidence in the case under proper instructions from the court.

Fact of Consent and Scope of Authority of Trainmen.—The question whether the consent of the conductor can be inferred from his acts, is also for the jury.[79] And where the general management of a train is vested in the conductor, and the brakemen are under his authority, and there is a conflict in the evidence as to the exact powers and duties of the brakeman, it is proper to leave to the jury the question whether a brakeman had authority to consent to a passenger's leaving the train while in motion.[80]

§ 2919. Acts in Emergencies.—Leaping from Train or Car.—Whether a passenger acted with ordinary prudence in leaping from a car in motion, under apprehension of danger which did not exist, under circumstances about which reasonable men might differ, is a question of fact for the jury.[81] In other words, whether a passenger who was put in imminent peril acted rashly or recklessly in leaping from a train, or whether he should have remained upon it, or have sought to leave it in some other manner, are questions for the jury.[82] It has been so held where a collision with another train seemed certain,[83] where the

that he carried her packages and assisted her to alight; and that in getting down from the car her clothes caught in the coupling pin, causing her to fall. Held, that the question of her contributory negligence was properly submitted to the jury. Hartzig *v.* Lehigh Valley R. Co., 154 Pa. 364, 26 Atl. 310.

77. Walking across trestle.—On a street car coming to a trestle where there was a washout, the conductor said that no car would cross that night, but that the passengers could walk over and take a car at the other end. One of them, in doing so, was struck by a car coming from the other end. Held, that whether she was negligent in attempting to cross in the nighttime, there being no walk for pedestrians, was a question for the jury; the fact that she could not see how high the trestle was, that it was necessary to walk across to avoid delay, that she had been invited by the conductor to cross, and told by him that no car would cross over that night, and that other passengers were crossing, being circumstances which would tend to convince a reasonably careful person that she might cross in safety. Bugge *v.* Seattle Elect. Co., 103 Pac. 824, 54 Wash. 483.

78. Crossing train on parallel track.—A passenger who, after alighting from a trolley car of defendant, found one of its trains blocking the way, and after waiting a while for it to move, during which time several passengers from such car crossed the train by going over the platform of one of its cars, was injured by the train starting up on signal from the conductor while she was crossing it, can not be held to have been guilty of contributory negligence as matter of law; she testifying that she started to cross on the conductor calling to her, as she stood beside the train, to "Come ahead!" as this authorized a finding that he assured her it was safe to attempt to cross. O'Brien *v.* Brooklyn Heights R. Co., 96 N. Y. S. 857, 109 App. Div. 833.

79. Fact of consent and authority of trainmen.—In action to recover damages for injuries received in jumping from defendant's train while in motion, there was no evidence to show that plaintiff was an employee or an officer in the performance of his duty, and no direct evidence to show that the conductor in charge had consented thereto. There was a verdict for plaintiff, and defendant moved for a new trial, on the ground that the evidence did not sustain the verdict. Held that, to entitle the plaintiff to recover, one of these facts must be proved (Acts 16th Gen. Assem. c. 148, § 2), and the question of whether or not consent can be inferred from the acts of the conductor, at the time, is one of fact for the jury to determine, and not for the court; and that the motion should have been sustained. Raben *v.* Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621.

80. Galloway *v.* Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447.

81. Leaping from train or car.—Mannon *v.* Camden Interstate R. Co., 49 S. E. 450, 56 W. Va. 554.

82. Jumping from moving train or car in case of accident.—Georgia R., etc., Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944.

83. Collision.—Whether a passenger on a train, who, when a collision with another train seemed certain, jumped from the car, and, falling face downward on the track, where danger from the cars still threatened her, rolled from the track, and in doing so was carried down an embankment, was guilty of contribu-

coaches left the track,[84] where the car broke loose from the train and started back down the grade,[85] where an explosion occurred in the controller box of a street car and flames issued therefrom, the injured passenger being a boy of twelve,[86] and in numerous other cases.

Team of Public Carriage Running Away.—Where a passenger in a carriage is placed in imminent peril by the running away of the horses, and the driver calls on her to jump out, the question whether she is guilty of contributory negligence in so doing is for the jury.[87]

Car Starting While Passenger in Act of Boarding.—Where a person boarding a car grasped the bar on hand rail in attempting to get on the car before it was put in motion, and, the car then starting, was dragged along the street and injured, it is a question of fact for the jury whether his injuries were the result of his want of care in not releasing his grasp in time to prevent being so dragged. Whether he exercised the care reasonably to be expected of an ordinary person at the time is to be determined from all the surrounding circumstances, among which is the emergency under which he was called upon to act.[88]

Riot on Car.—The act of a woman passenger in jumping from a car, in which an outbreak of other passengers had occurred, before the train had come to a full stop, was not negligence as a matter of law.[89]

Insult from Unknown Person.—Whether an insult received by plaintiff from an unknown person, who laid hold of her on a former occasion when driven into the car barn, was sufficient to justify her belief that she was avoiding an actual impending danger, and to justify her leaving the car while in motion and being driven to the barn, after she had rung the bell, at which the driver looked around but drove on, is a question of fact for the jury.[90]

Explosion Setting Fire to Dress of Female Passenger.—Where an explosion occurred beneath the floor of an electric car, accompanied by an outburst of flame, which set fire to the dress of a female passenger, whether she was guilty of contributory negligence in overestimating the danger, and injuring herself by suddenly jumping to one side, was a question for the jury, though the evidence showed that, if she had remained in her seat, she would have suffered no injury.[91]

tory negligence, is a question for the jury. Green *v.* Pacific Lumber Co., 62 Pac. 747, 130 Cal. 435.

84. **Derailment.**—The coaches of a train being full, plaintiff, with others, went into the baggage car. The coaches left the track at a certain point where the train was moving slowly. Plaintiff leaped from the platform of one of the coaches, and was injured. There was evidence that he had been scuffling and playing while in the baggage car. Held, that the question of whether such scuffling contributed to the injury should have been submitted to the jury, and an instruction limiting them merely to a consideration of plaintiff's acts at the moment of the accident was erroneous. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

85. **Car breaking loose from train.**—Evidence, in an action by a passenger for injuries sustained in jumping from a car which had broken loose from the train and had started back down the grade, held sufficient to warrant submission to the jury whether plaintiff left the train on account of the peril he apprehended from a threatened wreck. Prescott, etc., R. Co. *v.* Morris, 123 S. W. 392, 92 Ark. 365.

86. **Explosion in controller box of street car.**—Where plaintiff, a boy twelve years of age, was injured by jumping from a moving street car on hearing an explosion and seeing flames issuing from the controller box nearly to the roof of the car, whether he was guilty of contributory negligence was for the jury, though other passengers remained seated, and if he had done so he would not have been injured. Paine *v.* Geneva, etc., Tract. Co., 101 N. Y. S. 204, 115 App. Div. 729.

87. **Team of public carriage running away.**—Budd *v.* United Carriage Co., 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279.

88. **Car starting while passenger in act of boarding.**—Guenther *v.* Metropolitan R. Co., 23 App. D. C. 493.

89. **Riot on car.**—Nute *v.* Boston, etc., Railroad, 214 Mass. 184, 100 N. E. 1099.

90. **Insult from unknown person.**—Ashton *v.* Detroit City R. Co., 78 Mich. 587, 44 N. W. 141.

91. **Explosion setting fire to dress of female passenger.**—Steverman *v.* Boston Elev. R. Co., 205 Mass. 508, 91 N. E. 919.

Driving Across Country Where Train Refused to Stop.—Where a train having failed to stop at 1:45 a. m. on plaintiff's signal to take him on, and plaintiff, whose home was near the station, drove across country to his store, reaching there about 8:00 a. m. The night being very cold, with a north wind and sleet, and his only object in making the night trip being to avoid the possible loss of a few dollars by failing to open his store on time in the morning the facts are insufficient to justify submission to the jury of whether the company's refusal to stop the train was the proximate cause of the sickness resulting from the explosure.[92]

Going on Platform to Avoid Imminent Peril.—See ante, "Riding on Platform," § 2911.

§ 2920. Question of Last Clear Chance.—Where there is evidence in an action for injury to a passenger from which the jury might find that the conductor did not use proper care, after becoming aware of the peril of a passenger, to protect him, though the passenger was negligent in getting in the position, the question of the negligence of the conductor should be submitted to the jury.[93]

§ 2921. Wanton Conduct Excusing Contributory Negligence.—In an action against a carrier for injuries to a passenger, the question whether or not the wanton conduct of defendant's servants excused contributory negligence is one for the jury.[94]

§§ 2922-2967. Instructions—§§ 2922-2953. General Consideration—§ 2922. Duty of Court Generally.—In an action for injury to a passenger, it is always the duty of the court, where the issue of contributory negligence is raised by the pleadings and evidence, to charge the law applicable thereto, and a failure to do so would be reversible error,[95] but where the facts of the case do not raise the question, the court is not required to submit a charge on it.[96]

§ 2923. Necessity for Requests.—In an action for injury to a passenger the rule that the party wishing an instruction on an issue in the case must ask it, applies to instructions on the question of contributory negligence. Thus, an instruction that a street-car company is liable for an injury to a passenger through its failure to exercise the highest degree of care, if the passenger is not himself negligent, is not erroneous because it fails to add an unrequested

92. Driving across country where train refused to stop.—Judgment (Tex. Civ. App.), 93 S. W. 1081, reversed in International, etc., R. Co. *v.* Addison, 97 S. W. 1037, 100 Tex. 241, 8 L. R. A., N. S., 880.

93. Question of last clear chance.—Rodgers *v.* Choctaw, etc., R. Co., 76 Ark. 520, 89 S. W. 468, 1 L. R. A., N. S., 1145, 113 Am. St. Rep. 102.

Where in an action for injuries to a passenger attempting to board a train, the evidence showed that the conductor saw the passenger attempting to board the train and saw a trunk placed by the trainmen near the track, and that the conductor could have stopped the train in time to prevent injury to the passenger by coming in contact with the trunk, the court properly submitted the issue of last clear chance. Roberts *v.* Atlantic, etc., R. Co., 155 N. C. 79, 70 S. E. 1080.

94. Wanton conduct excusing contributory negligence.—Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

95. Seaboard, etc., Railway *v.* Bostock, 1 Ga. App. 189, 58 S. E. 136; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Jackson *v.* Georgia R., etc., Co., 7 Ga. App. 644, 67 S. E. 898. See post, "Conformity to Pleadings and Issues," §§ 2927-2934.

96. Plaintiff was a passenger on defendant's train, and was sleeping in a car, and just before reaching his station, the conductor woke him, and notified him that they were nearing his destination. Plaintiff got up, and stood in the aisle eight or ten feet from the smoking compartment while the train was still moving at its usual speed. While plaintiff was thus standing, the train struck a freight car, by negligence of defendant's servants, and threw plaintiff against the smoking compartment, and injured him. The freight car had been driven partly onto the main track by a storm. Held, that in an action for the injury the court was not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. Gulf, etc., R. Co. *v.* Bell, 57 S. W. 939, 93 Tex. 632.

charge that only ordinary care is required on the part of the passenger to exonerate him from contributory negligence.[97]

§ 2924. Correct Declaration of Law.—In an action for injuries to a passenger, an instruction as to contributory negligence must correctly declare the law or it is error to give it;[98] whilst in all cases and as a general proposition a requested instruction might not be good, probably would not be good, yet where under the facts of the case at bar it is good it is error to refuse it.[99]

§ 2925. Terminology—Technical Language.—In an action against a carrier for injuries to a passenger, the court does not err in its general charge in eschewing the technical expressions as to contributory negligence, where the charge correctly lays down the rule in language intelligible to the jury.[1] Thus, omitting the word "proximately"[2] or using the word "directly" instead of "thereof"[3] is not error. So also the use of word "danger" instead of "apparent danger" is not error.[4]

Use of Words "Clear Chance" to Avoid Injury.—In a passenger's suit against a railroad company to recover damages for personal injuries it is not error to charge that if the jury found from the evidence that the plaintiff had a "clear chance" to avoid the consequences of the defendant's negligence, there could be no recovery. The words "clear chance" are of ordinary significance and easily understood by the jury, and it was not necessary for the court to define their meaning. If the plaintiff had a "clear chance" to avoid the consequences of the defendant's negligence, it follows that he could have avoided such negligence by the exercise of ordinary care. Nor is this instruction improper because it is equivalent to telling the jury what is or is not negligence.[5]

§ 2926. Clearness and Definiteness.—See post, "Degree of Care Required of Passenger," § 2936.

§§ 2927-2934. Conformity to Pleadings and Issues—§ 2927. In General.—In an action for injuries to a passenger in which the defense of contributory negligence is interposed, the instructions must conform to the pleadings and issues in the case; the court in its charge should set before the jury the issues which had been presented at the trial,[6] and not inject new issues,

97. Conner *v.* Citizens' St. R. Co., 45 N. E. 662, 146 Ind. 430.

98. Correct declaration of law.—Dowd *v.* Metropolitan St. R. Co., 222 Mo. 58, 120 S. W. 772.

Leaping from car to avoid derailment.—See ante, "Acts in Emergencies," § 2919.

99. Joyce *v.* Metropolitan St. R. Co., 219 Mo. 344, 118 S. W. 21.

1. Terminology—Technical language.—I. & G. N. R. Co. *v.* Ormond, 64 Tex. 485.

2. Proximately.—In an action to recover for injuries received in alighting from a train, where it was claimed that plaintiff heedlessly jumped from the train while it was in motion, an instruction that she could not recover if her negligence contributed to the accident is not erroneous for omitting the word "proximately," as in such case any negligence which contributed to the accident must have contributed proximately. Craven *v.* Central Pac. R. Co., 72 Cal. 345, 13 Pac. 878.

3. "Directly" instead of "proximately."—An instruction, in an action against a railroad company for injuries to a passenger alighting on the wrong side of the train, that if the passenger was under the influence of liquor and that was the cause of his failure to get off on the right side, and he thereby "directly contributed" to his injury, he was guilty of contributory negligence and could not recover, even if the carrier was guilty of negligence, was not prejudicial to the carrier because of the use of the word "directly," instead of the word "proximately." Ruffin *v.* Atlantic, etc., R. Co., 55 S. E. 86, 142 N. C. 120.

4. Use of word "danger" instead of "apparent danger."—See ante, "Acts in Emergencies," § 2919.

5. Use of words 'clear chance" to an injury.—Seaboard, etc., Railway *v.* Bostock, 1 Ga. App. 189, 58 S. E. 136; Atlanta, etc., R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Jackson *v.* Georgia R., etc., Co., 7 Ga. App. 644, 67 S. E. 898.

6. Conformity to pleadings and issues.—Cody *v.* Duluth St. R. Co., 94 Minn. 74, 102 N. W. 201, 397.

not presented by the pleadings and not litigated into the case.[7] The effect of an instruction in this respect is determined by considering it as a whole.[8] Where the pleadings do not put in issue the question of contributory negligence,[9] it is error to instruct the jury to consider whether or not a person in the exercise of ordinary care would, under the same circumstances, have acted as the injured passenger did.

7. Cody *v.* Duluth St. R. Co., 94 Minn. 74, 102 N. W. 201, 397.

Where plaintiff alleged that, while alighting from defendant's train at a station, he was violently thrown down and injured by defendant's negligence in starting the train suddenly, and defendant alleged that plaintiff's injuries were due to his negligence in jumping from a moving train, the only issue raised was as to which party was negligent; rendering an instruction as to proximate cause erroneous, as misleading. Gulf, etc., R. Co. *v.* Rowland, 38 S. W. 756, 90 Tex. 365.

Where the petition of plaintiff, in an action against a street railroad for personal injuries, alleged as defendant's only negligence the sudden starting up of the car, after it had stopped and while plaintiff was alighting, an instruction on contributory negligence that, if the plaintiff attempted to alight from defendant's car while it was in motion and running at such a rate of speed that a reasonably prudent person in the exercise of ordinary care ought not to have attempted to alight, he could not recover, is erroneous, since it inferentially permits plaintiff to recover on a ground not averred by the petition. Central Kentucky Tract. Co. *v.* Combs, 136 S. W. 1045, 143 Ky. 529.

8. Instructions must be considered as a whole.—Although a portion of an instruction when considered by itself would seem to inject into the case a question not litigated, yet, if when considered with the entire charge, and especially with that portion directed to contributory negligence, it is not necessarily misleading, and is not fairly open to that objection; it does not require a reversal. If the charge is otherwise clear and distinct on the issues submitted at the trial, language susceptible of a construction in conflict therewith, requires counsel to call the attention of the court thereto if it is deemed to be misleading. Cody *v.* Duluth St. R. Co., 94 Minn. 74, 102 N. W. 201, 397.

A complaint charged negligence in that the car, having stopped to permit plaintiff to alight, was suddenly started, and plaintiff was thrown to the ground. Defendant attempted to show that plaintiff was guilty of contributory negligence in alighting before the car had come to a stop. The court, in its charge, defined the general duties of defendant as a common carrier, defined contributory negligence, and then stated that there were two controlling issues in the case: First, was defendant negligent and were the injuries proximately caused by such negligence? Second, was plaintiff negligent, and did her negligence proximately cause or contribute to her injury? After charging on the first phase of the case, the court stated that with reference to plaintiff's negligence the jury should consider where the car was when plaintiff arose from her seat, whether it was moving, and, if so, at what speed, and then continued that, if plaintiff got off the moving car, the question whether or not a person of ordinary care would have jumped off the steps of the car under the same circumstances under which plaintiff was placed was a question of fact for the jury. Held, that the concluding clause of the charge did not, when considered with the entire charge, and especially with that portion directed to contributory negligence, inject a question not litigated into the case, and was not necessarily misleading. Judgment, 102 N. W. 201, reversed in Cody *v.* Duluth St. R. Co., 102 N. W. 397, 94 Minn. 74.

9. Defense of contributory negligence not in issue.—A complaint alleged negligence of defendant street car company in starting its car while standing still, throwing plaintiff, a passenger, to the ground. Defendant claimed that the passenger jumped from a rapidly moving car at a considerable distance from the place of the alleged injury. Held error to instruct that, if plaintiff jumped off the car while in motion, the jury should consider whether a person in the exercise of ordinary care under the same circumstances would have jumped off; such issue not having been tendered by the pleadings or litigated. Cody *v.* Duluth St. R. Co., 94 Minn. 74, 102 N. W. 201, judgment reversed in 102 N. W. 397.

In an action for injuries sustained by a passenger, it was error to instruct the jury to find for defendant if they believed from the evidence that plaintiff attempted to alight from defendant's car while it was in motion; there being no allegation of that fact, and no plea of contributory negligence. Brown *v.* Louisville R. Co., 53 S. W. 1041, 21 Ky. L. Rep. 995.

Where no question of contributory negligence arises.—Where a passenger is in his proper place on the car, and makes no exposure of his person to danger, there can be no question of contributory negligence, and instructions relative thereto need not be given. Louisville, etc., R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434.

Ignoring Question of Contributory Negligence.—In an action for injuries to a passenger when an issue of contributory negligence is raised by the pleadings which the evidence tends to support, the court should charge the jury with respect thereto,[10] and it is proper to refuse a charge which ignores that question.[11] In such case a charge as contributory negligence can not be prejudicial.[12]

Failure to Recognize Plaintiff as Passenger.—Where the real issue is as to plaintiff's mere contributory negligence in attempting to board defendant's car, instructions are not objectionable because they do or do not recognize him as a passenger.[13]

§ 2928. Must Be Germane to Issue.—In an action for injury to a passenger, an instruction on the defense of contributory negligence must be germane to the issue,[14] not a mere abstract statement of law[15] and not too

10. Ignoring question of contributory negligence.—In an action by a passenger against a railroad company to recover damages for injuries sustained while leaving a car, defendant alleged plaintiff's want of care "while attempting to alight from said train." The evidence for plaintiff was that the accident was due to the insufficiency of a bench at the foot of the car step, the manner in which it was placed, and the absence of the brakeman to assist her in alighting. She had delayed going out because of her bundles; and the brakeman, supposing that all the passengers had alighted, was attending to other matters. She testified that the "bench was slippery and narrow, and too far away;" that it was too long a step for her to take; and that she stepped upon it and fell, "seeing it all the time, and knowing where it was, and how far off it was." The train had arrived at the end of the route, and there was no need for haste. Held, that it was error to instruct the jury to find that plaintiff was not guilty of any want of ordinary care "if she left the car with reasonable diligence," because "no other want of care" was imputed to her "either in the pleadings or in the evidence," as taking from the jury any negligence of plaintiff in alighting. McDermott *v.* Chicago, etc., R. Co., 82 Wis. 246, 52 N. W. 85.

Where plaintiff alleged that the injury was caused by the negligence of defendant, and defendant denied this, and alleged contributory negligence on the part of plaintiff, it is error for the court in instructing the jury not to present the effect of contributory negligence as well as the carelessness of defendant. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490.

11. In an action for personal injuries, where there is some evidence of contributory negligence, it is proper to refuse to charge that if plaintiff was injured while a passenger on defendant's railroad, caused by the negligence and want of care of defendant's employees having control of the cars, defendant would be liable though the jury may be satisfied that the negligence was not gross, but slight, in its character, as the charge ignores the question of plaintiff's negligence. Thompson *v.* Duncan, 76 Ala. 334.

In an action for personal injuries, where there is some evidence of contributory negligence, it is proper to refuse to charge that if plaintiff was a passenger on defendant's railroad car, and was injured by an accident occurring while such passenger, and if such accident could have been avoided by the use of very great care and diligence by those in charge of the movement of the car, then defendant would be liable, as the charge ignores the question of contributory negligence. Thompson *v.* Duncan, 76 Ala. 334.

12. Where the evidence showed that plaintiff with a market basket in her hand boarded a street car, and that while she was going in the door of the car, or immediately after she stepped inside, the car started with a violent jerk, causing her to be thrown against a seat, injuring her, a charge on contributory negligence was not prejudicial. Howard *v.* Louisville R. Co., 105 S. W. 932, 32 Ky. L. Rep. 309.

13. Failure to recognize plaintiff as passenger.—Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331.

14. Must be germane to issue.—Thus where in an action against a street railway company, the only negligence complained of was the violent starting of the car without warning while plaintiff was on the running board, getting off, a requested instruction that the plaintiff assumed all the risk of stepping or walking over the street in the condition it was then in was properly refused as not germane. Indianapolis St. R. Co. *v.* Whitaker, 66 N. E. 433, 160 Ind. 125.

15. In an action against a carrier for injuries to a passenger where the issue necessarily involved the relation and attitude of the parties, and there was evidence tending to show that plaintiff had insisted on getting off the train where she did, an instruction that, while it is the duty of railroad companies to use a high degree of care, they are not in-

broad.[16]

§ 2929. Applicability to Evidence.—In an action against a carrier for injuries to a passenger, an instruction on contributory negligence as a defense must be applicable to the evidence.[17] If there is no evidence to support the instruction it should be refused and the charge confined to the acts of negligence presented[18] but such error may be harmless.[19] For instance, a charge based upon the legal effect of excitement—as tending to excuse what might otherwise be considered a rash act—[20] or upon the last clear chance doctrine,[21] should be

surers of the safety of passengers, but that passengers must themselves use reasonable care, could not be said to be irrelevant. Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017.

16. Charge too broad.—A person attempting to board a front platform of a moving car from a station platform which sloped upward from nine inches high at one end to four feet at the other, and was caught between the train and the high part of the platform, and crushed, was not under a sudden emergency in making the attempt, if he was not invited by the conductor; and hence a charge that if he was not acting under a sudden emergency, and was not invited, he was negligent, was erroneous as being too broad. Hunter *v.* Cooperstown, etc., R. Co. (N. Y.), 24 Wkly. Dig. 21.

17. Applicability to evidence.—Covington *v.* Western, etc., R. Co., 81 Ga. 273, 6 S. E. 593.

18. In an action for injuries by falling from a platform while boarding a railway car, the evidence showed no negligence on plaintiff's part until he had purchased tickets, he then remaining in the waiting room after being notified to get on board. Held, that the charge was properly confined to acts of negligence thus presented. Gulf, etc., R. Co. *v.* Fox (Tex.), 6 S. W. 569.

19. Harmless error, no evidence of contributory negligence.—Where, in an action against a street car company for personal injuries, the evidence showed that the car steps were defective, and the driver grossly negligent in starting the car before plaintiff had alighted, an instruction that the company, if guilty of gross negligence, was liable, even though plaintiff herself was negligent, could work no injury to defendant, where there was no evidence of plaintiff's negligence. Wilson *v.* Fourteenth St. R. Co., 90 Cal. 319, 27 Pac. 210.

20. Acts in emergencies—Excitement.—A charge that excitement, under circumstances such as naturally produce it, in a prudent person, may be taken into account, even where the person is not menaced with bodily harm, is properly refused, if there is no testimony that plaintiff was excited when he jumped off. Covington *v.* Western, etc., R. Co., 81 Ga. 273, 6 S. E. 593.

In an action by a passenger for injuries caused by jumping from the train of the defendant where there is no evidence that the passenger was placed in an emergency which called upon him to decide instantly, without time for deliberation, whether or not it would be safe for him to jump from the train and no proof of any negligence on the part of the company giving rise to circumstances calculated to excite him or throw him off his guard, except that he had been carried past his station, it is error to give a charge based upon the theory that he was called upon to act in a sudden emergency tending to produce excitement or perturbation, and this is true even though he was induced to jump from the train by the advice or direction of the conductor. East, etc., R. Co. *v.* Waldrop, 114 Ga. 289, 40 S. E. 268.

21. Last clear chance.—An instruction that, though plaintiff was negligent in attempting to board the moving train, still, if those in charge thereof could, by using ordinary care after discovering him, have prevented the injury, the verdict should be for plaintiff, while correct in the abstract, is properly refused, where there is no evidence that the train could have been stopped, after plaintiff was seen getting on, so as to have prevented the accident. Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

Plaintiff was handing a cooling board, which was thirty-seven inches long and twenty-seven inches wide, over the gate of a south bound electric car, when a north bound car slowly approached. The motorman of the approaching car told plaintiff to look out, and he replied, "All right," and stepped on the step of the standing car, but got down, and started alongside of it to the rear, when the motorman on the standing car told him to go around in front. Plaintiff was caught between the two cars, and his ribs fractured. Held, that it was error to modify an instruction that plaintiff could not recover if the jury should find him guilty of contributory negligence by inserting, "Unless the defendant's motorman could have avoided the accident by the exercise of due care after he saw, or ought to have seen, plaintiff's peril," since the instruction, as modified, was not warranted by the evidence. Baltimore Consol. R. Co. *v.* Armstrong, 48 Atl. 1047, 92 Md. 554, 54 L. R. A. 424.

refused as unwarranted by the evidence; where there is no evidence that the passenger was excited at the time or that the accident could have been avoided by the exercise of due care after the servant of the carrier saw or ought to have seen the peril of the passenger. Other instances of the application of the rule are given in the footnotes.[22]

§ 2930. Assuming Facts or Matters in Issue.—In an action for injuries to a passenger, requests for instructions which assume as a fact a matter in issue, are bad and should be refused. On the other hand a request which does not assume any issuable fact and is germane to the issue should be allowed and its refusal is error.[23] Thus, a charge is erroneous which assumes a circumstance, the negligence of which is a question for the jury, to be negligence per se,[24] which assumes that the railroad company was guilty of negligence in moving the train forward without warning before reaching the station,[25] or which

22. Denial of fact of injury.—Where plaintiff sued for injuries caused by being shoved from a train, and the defendant railroad company denied that she was so treated, or even fell when being assisted from the train, an instruction on contributory negligence was properly refused as inapplicable to the evidence. Cincinnati, etc., R. Co. *v.* Halcomb, 78 S. W. 205, 25 Ky. L. Rep. 1444.

Alighting from moving train.—And where, in an action for injuries to a passenger, the evidence showed that while the train was in motion he left his seat and went on the platform to alight on the train coming to a stop, and that in consequence of the jerking of the train he was thrown from the platform, the refusal to charge that he was guilty of contributory negligence in getting off a moving train was proper. Forbes *v.* Chicago, etc., R. Co., 113 N. W. 477, 135 Iowa 679.

Where, in an action for injuries to a passenger, the evidence showed that while the train was in motion he left his seat and went on the platform to alight on the train coming to a stop, and that by the jerking of the train he was thrown from the platform, an instruction that if he attempted to alight while the train was, to his knowledge, in motion, he could not recover, was not erroneous as limiting contributory negligence to the act of stepping off the train in motion, under Code, § 4811, prohibiting passengers from getting off a train while in motion. Forbes *v.* Chicago, etc., R. Co., 113 N. W. 477, 135 Iowa 679.

Knowledge that footstool not adjusted for alighting.—In an action against a railroad company for personal injuries resulting from stepping from a passenger coach onto a defective footstool, an instruction which pretermits plaintiff's discovery or knowledge of the way the stool was adjusted in time to stop was properly refused, where there was evidence that she had no such knowledge. Atlanta, etc., Railway *v.* Wheeler, 154 Ala. 530, 46 So. 263.

23. Assuming facts or matters in issue.—In an action for the death of a passenger while riding on a caboose car in defendant's train, the court refused instructions requested by defendant that it was negligence per se for a passenger to ride on top of a caboose car, except in an emergency requiring it, where there was a regular passenger car provided, and if a passenger goes into a passenger coach and afterward leaves such car and goes on the top of a cabooce car, a place of obvious danger, and not intended for passengers, and is injured by reason of his being on such car, and if his riding on top of the caboose car caused or contributed to his injury as a proximate cause, and his injury would not have occurred had he been in the car provided for passengers, he is guilty of contributory negligence as a matter of law, and can not recover. Held, that the requested instructions did not assume any issuable fact and left to the jury whether decedent's going on top of the caboose contributed proximately to his death, and their refusal was error. McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 1071, 81 S. C. 100, 18 L. R. A., N. S., 763.

24. Charge assuming circumstances to be negligence per se.—In an action for personal injuries caused by alighting from a train in motion, at the direction of the conductor, a refusal to instruct the jury to find for the defendant if they believed, from the evidence, that, after the train had stopped at the station for a reasonable length of time to enable plaintiff to alight, he, failing to so alight, leaped from the train while in motion, and in doing so was injured, is not error because it seeks to make circumstances, of which the negligence is to be determined by the jury, negligence per se. St. Louis, etc., R. Co. *v.* Person, 49 Ark. 182, 4 S. W. 755.

25. Suddenly moving train without warning before reaching station.—In an action for the death of plaintiff's wife, while attempting to alight from defendant's train, an instruction that if the jury found that the train on which deceased was a passenger was approaching her destination, and the employees announced the name of the station, and raised the

assumes that there was testimony tending to show that the passengers were warned not to board the train at the point where the injury occurred.[26]

§ 2931. Sufficiency of Evidence.—In an action for injuries to a passenger, the court should give appropriate instructions on an issue of contributory negligence when there is evidence on which to find a verdict. On the other hand it is error to submit such issue on evidence on which a verdict, if found, would have to be set aside. Evidence tending to show that the injured person was a passenger,[27] and evidence of contributory negligence in moving toward door preparatory to alighting,[28] or in alighting,[29] and conflicting evidence as to whether the door of an elevator shaft into which plaintiff stepped was only partly open and further opened by him,[30] has been held sufficient to justify an instruction on the issue of contributory negligence.

Segregated Portions of Evidence.—In an action for injuries to a passenger a party has a right to ask a question based upon segregated portions of the evidence, but the conclusion thus arrived at must be consistent with the truth and all other facts in evidence.[31]

§ 2932. Party by Whom Contributory Negligence Proved.—It is of

platform of the vestibuled coach in which she was a passenger, and, upon the train slowing down, deceased, believing that the station had been reached, left her seat and went to the platform to alight when the train should fully stop, but the train suddenly moved without notice or warning, thereby throwing her off and killing her, it would be for the jury to say whether her conduct contributed to her death, was erroneous in assuming that the company in moving the train suddenly forward before reaching the station would be negligent, since there was no invitation to passengers to alight until the train had stopped, and defendant's employees were not obliged to assume that passengers would be in such a position on the steps as to be injured by sudden train movements. St. Louis, etc., R. Co. *v.* Rush, 111 S. W. 263, 86 Ark. 325.

26. Passenger warned not to board train.—In an action by a husband for negligently starting a train when his wife was attempting to board it, the only evidence of any warning being given to plaintiff's wife, or the passengers generally, not to get on the train at the point where she was injured, being proof of directions not to rush, because there was plenty of time and room, an instruction assuming that there was testimony tending to show that the passengers were warned not to board the train at that point, and directing the jury to find for defendant, if such a warning was given, and plaintiff's wife heard or might have heard it by the use of ordinary care, is not warranted by the evidence. Baltimore, etc., R. Co. *v.* Kane (Md.), 17 Atl. 1032.

27. That injured person a passenger.—In an action for death of a passenger, where defendant contended that deceased was not a passenger, and plaintiff offered evidence tending to show that deceased came into the negro coach, and went to the water cooler and took a drink, and had in his hat a check similar to those given other passengers for the same station, an instruction that, "if you find from the evidence that the deceased was a passenger on defendant's train and went from the white coach into the negro coach to get a drink of water, he was not negligent to stand there while drinking the water, unless the standing there was protracted," was supported by the evidence. St. Louis, etc., R. Co. *v.* Evans, 99 Ark. 69, 137 S. W. 568.

28. Moving to door preparatory to alighting.—Instruction that it was not negligence per se for a passenger to move towards the door of the car to alight as it was approaching a crossing where he intended to alight, and after it had slowed down for the purpose, held justified by the evidence. Thorp *v.* Durham Tract. Co., 159 N. C. 33, 74 S. E. 644.

29. Evidence of negligence in alighting.—Where, in an action against a railroad for injuries to a passenger in alighting from defendant's car, the answer alleged contributory negligence, and there was some evidence on which to base it, an instruction on such point was proper. Louisville, etc., R. Co. *v.* Mount, 101 S. W. 1182, 31 Ky. L. Rep. 210.

30. Door in elevator shaft only partly open.—In an action for injuries by stepping into an elevator shaft, an instruction that if plaintiff, on approaching an elevator, found the door partly open, and further opened it to step into the elevator, there could be no recovery is not erroneous, in view of conflicting evidence on the issue whether the door was only partially open. Wheeler *v.* Hotel Stevens Co. (Wash.), 127 Pac. 840.

31. Segregated portions of evidence.—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

no consequence by which party to the suit contributory negligence is proved, and it is error to instruct that to be a defense such negligence must be proved by the defendant. Hence, where, in an action for injuries while standing on the rear platform by a collision, defendant pleaded contributory negligence, and plaintiff's testimony contained evidence from which the jury could have found contributory negligence, the court erred in charging that, if the jury found the facts stated in plaintiff's prayer, plaintiff was entitled to recover, unless "defendants showed" either that the injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on plaintiff's part.[32]

§ 2933. Pretermitting or Ignoring Proof.—In an action for injuries to a passenger, a requested charge ignoring or pretermitting a fact established by some evidence is properly refused as where it ignored the plaintiff's physical condition,[33] his age, the fact that he did not know the train was approaching and that no warning was given him.[34]

Ignoring Circumstances of Injury as Testified to by Plaintiff.—In an action against a carrier for injuries to a passenger, an instruction is bad which ignores the exact circumstances under which the injury occurred as testified to by the injured person. Thus, in an action by a passenger injured by slipping on a car platform, where plaintiff testified that she was about to alight with a grip, which she was handing to her husband, when she fell, it was error to refuse to charge that if plaintiff could have avoided slipping by grasping the hand rail with both hands, or by grasping the hand rail on each side of the platform, or by use of some other platform, then she could not recover, provided a person of ordinary care would have attempted to so avoid slipping down, since it ignored the exact circumstances under which the injury occurred, as testified to by plaintiff. Such an instruction without the proviso was properly refused.[35] And where plaintiff was injured by a rear-end street-car collision, while standing on the rear platform of the car that was struck, and testified that he got on the platform, and as he was about to enter the car, and before he could get inside, the accident happened, the court properly refused to charge that if plaintiff took an exposed and dangerous position on the car, and was injured by reason thereof, he could not recover.[36]

§ 2934. Sufficiency of Pleadings.—Answer Setting Up Plea of Contributory Negligence.—Where a passenger on a street car sues for injuries caused by negligence of the company, an answer alleging that plaintiff's injuries were caused by her own act in stepping from the car while in motion sets up

32. Party by whom contributory negligence proved.—United R., etc., Co. *v.* Riley, 71 Atl. 970, 109 Md. 327.

33. Pretermitting or ignoring proof.—In suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the conductor refused to stop the car where asked, and that the plaintiff carefully, and without negligence, stepped off, is erroneous, because the plaintiff's condition at the time is ignored, and the contributory negligence is left to the jury to find as a matter of fact, without any explanation of what would, on the evidence, constitute such contributory negligence. Wyatt *v.* Citizens' R. Co., 62 Mo. 408.

34. Where deceased, a seventeen year old boy, while waiting for his connection at a junction station, was jostled by an express truck, and struck and killed by defendant's passenger train, which approached without warning or signal; an instruction that, if just prior to the accident deceased could have gone around, or stepped out of the way of the truck, by moving toward the depot instead of toward the track, it was his duty to have done so, and his failure so to do was negligence, requiring a verdict for defendant, was erroneous as pretermitting proof that deceased did not know of the approach of the train, that no warning was given, and also deceased's age, holding him to the highest degree of discretion and judgment under the circumstances. St. Louis, etc., R. Co. *v.* Shaw, 94 Ark. 15, 125 S. W. 654.

35. Ignoring circumstances of injury as testified to by plaintiff.—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

36. United R., etc., Co. *v.* Riley, 109 Md. 327, 71 Atl. 970.

a plea of contributory negligence, and invites an instruction on such doctrine, unless there is no proof in support thereof.[37]

§ 2935. Explanation or Definition of Contributory Negligence.—The court should in its general charge explain to the jury what facts would constitute contributory negligence, and instruct them that, if they found such facts in the case, plaintiff could not recover if the accident resulted wholly or in part therefrom. It is not sufficient merely to state the general principle that contributory negligence would defeat a recovery,[38] and an instruction which conveys no clear idea of what constitutes contributory negligence should not be given.[39]

§ 2936. Degree of Care Required of Passenger.—In an action by a passenger for personal injury caused by the negligence of a carrier, where the question of contributory negligence is raised by the evidence, the jury should be instructed that the passenger was bound to use that degree of care which a prudent person would have exercised under all circumstances, to avoid the injury; and if a reasonably prudent person exercising his faculties would have observed and avoided the danger or if the danger was apparent and easily avoidable, by a person exercising reasonable care, as defined above, plaintiff can not recover.[40] But an instruction that the prudence required of him is simply such as ordinary men usually exercise is too indefinite,[41] and it is error to authorize the jury to charge the carrier with an injury only provided the injured passenger was using his senses, good or bad,[42] or to instruct the jury that a recovery

37. Answer setting up plea of contributory negligence.—Behen *v.* Metropolitan St. R. Co., 85 Kan. 491, 118 Pac. 73, Ann. Cas. 1913A, 328.

38. Explanation or definition of contributory negligence.—New York, etc., R. Co. *v.* Enches, 127 Pa. 316, 17 Atl. 991, 14 Am. St. Rep. 848, 4 L. R. A. 432.

In suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the conductor refused to stop the car where asked, and that the plaintiff carefully, and without negligence, stepped off, is erroneous, because the plaintiff's condition at the time is ignored, and the contributory negligence is left to the jury to find as a matter of fact, without any explanation of what would, on the evidence, constitute such contributory negligence. Wyatt *v.* Citizens' R. Co., 62 Mo. 408.

39. In an action against a steamboat owner for injuries to a passenger received when standing near the gangway, an instruction that it was not contributory negligence for plaintiff to be there, "unless such location would have been considered by a man of ordinary prudence dangerous under the circumstances, and unless the employees of the boat had given plaintiff sufficient warning to enable him to avoid it," conveyed no clear idea of what constitutes contributory negligence, and should not have been given. Gulzoni *v.* Tyler, 64 Cal. 334, 30 Pac. 981.

40. Degree of care required of passenger.—Prothero *v.* Citizens' St. R. Co., 134 Ind. 431, 33 N. E. 765.

In an action by a passenger against a street railway company for personal injuries caused by the negligence of defendant's servants, it appeared that plaintiff, on leaving one of defendant's cars, stepped into its transfer car, situated about two feet above the ground, entered by steps, and used as a waiting room; that, while in the latter, defendant's servant suddenly opened the door by means of a lever operated on the opposite side of the car; that plaintiff was unacquainted with the premises, the car was filled with passengers, and plaintiff was standing near to or against the door; and when it was opened she fell, and was injured. Held, that the jury was properly instructed that plaintiff was bound to use that degree of care which a prudent person would have exercised under all the circumstances, to avoid the injury; and if "a reasonably prudent person, exercising her faculties of sight and hearing, would have seen or heard and avoided the danger, or if the danger was apparent and easily avoidable to a person exercising reasonable care, as before defined," plaintiff can not recover. Prothero *v.* Citizens' St. R. Co., 134 Ind. 431, 33 N. E. 765.

41. Definiteness.—Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

42. Passenger using his "senses."—Plaintiff, on the approach of a train, walked up the platform, passing the express freight standing thereon, and, the night being dark and drizzly, he fell off the platform. The court instructed that if plaintiff was going along, using his senses, with the ordinary care that one would naturally use, he would not lack ordinary care, because different persons may have different temperaments, and one do a thing safely which another could

can be had if the passenger used "that degree of care a person would use under similar circumstances." [43]

Slightest Negligence on Part of Plaintiff.—An instruction that the slightest negligence on plaintiff's part would defeat a recovery should be refused as leading the jury to believe that the highest degree of care was required of plaintiff, and because the slighest variation from ordinary care can not be measured.[44]

Imposing Greater Measure of Care on Passenger than Law Requires.—In an action against a carrier for injuries to a passenger, an instruction is bad which imposes a greater measure of care upon the passenger than is required by law; as, for instance, where,[45] in an action by a passenger injured by slipping on a car platform, where plaintiff testified that she was about to alight with a grip, which she was handing to her husband, when she fell, and defendant requested a charge that if plaintiff could have avoided slipping by grasping the hand rail with both hands, or by grasping the hand rail on each side of the platform, or by use of some other platform, then she could not recover, provided a person of ordinary care would have attempted to so avoid slipping down. Such an instruction without the proviso was properly refused.[46]

Holding Passenger to Exercise of Extraordinary Care.—An instruction that, in order to recover for injuries, a passenger must have been free from all fault or negligence contributing to produce the injury, is erroneous, as holding him to the exercise of extraordinary care, and preventing a recovery though the negligence was slight, and did not amount to a want of ordinary care.[47]

Duty to Observe Apparent Defects in Appliances.—An instruction in an action for injuries to a passenger which imposes upon the passenger a greater degree of care in looking for defects than the law requires him to exercise under the circumstances of the case is error. Thus, in an action for injuries received in alighting from defendant's train because of a defect in the platform, it is proper to refuse to charge the jury that passengers must exercise ordinary care for their safety, and "if there is an apparent defect about the appliances * * * which are in use, they must look, and, unless some reasonable excuse is given, they are guilty of negligence if they do not look." [48]

Knowledge of Custom of Railroad.—A charge, which makes the ordinary care on the part of a passenger dependent entirely on what was usual with the railroad, without reference to his knowledge of it, or the circumstances of the particular case, should be refused.[49]

§ 2937. Must Postulate Negligence of Passenger's Act.—In a passenger's action for injuries an instruction on the defense of contributory negligence must postulate negligence of the passenger's act. Thus, in an action for injuries sustained by suddenly starting a street car while plaintiff was alight-

not, and the company could not require extraordinary care. Held erroneous, as authorizing the jury to charge the company with an injury on their platform only provided the party injured was using his senses, good or bad. Renneker *v.* South Carolina R. Co., 20 S. C. 219.

43. Use of degree of care a person would use under similar circumstances.—In an action for an injury to a passenger in alighting from a train, the court charged that she could not recover if she was negligent, and did not use proper care, and that she was bound to use "ordinary care," which it defined as "that degree of care a person would use under similar circumstances." Held prejudicial to defendant. St. Louis, etc., R. Co. *v.* Finley, 79 Tex. 85, 15 S. W. 266.

44. Slightest negligence on part of plaintiff.—Wise *v.* Columbia R., etc., Co., 94 S. C. 254, 77 S. E. 924.

45. Imposing greater measure of care on passenger than law requires.—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

46. Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

47. Holding passenger to exercise of extraordinary care.—Jerolman *v.* Chicago, etc., R. Co., 108 Iowa 177, 78 N. W. 855.

48. Duty to observe apparent defects in appliances.—Ohio, etc., R. Co. *v.* Stansberry, 132 Ind. 533, 32 N. E. 218.

49. Knowledge of custom of railroad.—Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979.

ing, an instruction that, even if plaintiff was injured by defendant's negligence, he could not recover if his own act or conduct directly contributed to the injury, was erroneous in not requiring that plaintiff's act or conduct which contributed to the injury be negligent.[50]

§ 2938. Must Hypothesize State of Facts Authorizing Conclusion of Contributory Negligence.—In a passenger's action for injuries, instructions as to contributory negligence must hypothesize such a state of facts and circumstances as would authorize the legal conclusion that the injured passenger was contributorily negligent.[51] Thus, in a passenger's action for injuries, instructions that it was negligence, as a matter of law, to alight from a moving train at right angles to the direction in which it was moving, that if plaintiff stepped off the car while moving, without other necessity therefor than his desire to alight at that point, causing injury which could have been avoided by remaining on the car, he was guilty of negligence defeating a recovery, that if he voluntarily stepped off the car while in motion he assumed the risk of alighting safely and could not recover, and that it was negligence, as a matter of law, for an old man, not accustomed to getting on or off moving trains, to alight from a moving train at right angles to the direction in which it was moving, were properly denied, because they did not hypothesize such a state of facts and circumstances as to authorize the legal conclusion that plaintiff was contributorily negligent in leaving the platform or steps of the car.[52] Other instances are given in the footnotes.[53]

§§ 2939-2944. Proximate and Contributory Cause of Injury—§ 2939. In General.—In an action against a carrier for injuries to a passenger, an instruction that, if negligence on the part of defendant had been proved, and plaintiff "was in no manner and to no material degree negligent that contributed to his injury, he was entitled to recover," was proper,[54] but an instruction that a passenger could not recover if he contributed to his injury

50. Must postulate negligence of passenger's act.—Dowd *v.* Metropolitan St. R. Co., 222 Mo. 58, 120 S. W. 772.

51. Must hypothesize state of facts authorizing conclusion of contributory negligence.—Southern R. Co. *v.* Morgan (Ala.), 59 So. 432.

52. Southern R. Co. *v.* Morgan (Ala.), 59 So. 432.

53. Failure to require finding that stepping from moving train voluntary.—Where the evidence would have justified the jury in finding that the train was suddenly started while plaintiff was preparing to alight, and that in attempting to recover an equilibrium he involuntarily stepped from the car, an instruction that, if, under conditions specified, the plaintiff stepped from the train while it was moving so rapidly as to cause him to fall he could not recover was properly refused, because it did not require the jury to find that he voluntarily stepped from the train. Southern R. Co. *v.* Morgan (Ala.), 59 So. 432.

Slipping or falling from platform—Use "thereupon" for "therefrom."—In a passenger's action for injuries, where it appeared that the passenger had gone on the platform or steps for the purpose of alighting, and either stepped off or was thrown off while the car was in motion, an instruction that, if the passenger's destination was a flag stop, if the trainmen stopped the train there a sufficient length of time for the passengers to get on and off, and if plaintiff failed to avail himself of this opportunity to alight, but thereafter, when the trainmen were not aware of his presence, and after they had given the signal to start, went on the platform or steps and stepped "thereupon," the jury should find for defendant was properly denied, since by the use of the word "thereupon," probably in place of "therefrom," the instruction predicated contributory negligence on a condition which did not show such negligence. Southern R. Co. *v.* Morgan (Ala.), 59 So. 432.

Knowledge of arrival at destination.—Where a passenger was killed while alighting after the train had started to leave his destination, requests to charge with reference to his contributory negligence, failing to hypothesize knowledge on his part that he had arrived at his destination, or that the train had stopped there, or that he was notified of the train's arrival, or failing to require that such negligence, if any, was the proximate cause of his death, etc., were properly refused. Louisville, etc., R. Co. *v.* Dilburn (Ala.), 59 So. 438.

54. Proximate and contributory cause of injury.—Matthieson *v.* Burlington, etc., R. Co., 125 Iowa 90, 100 N. W. 51.

in a "material" degree was erroneous, and could not be interpreted as merely intending that his negligence must have directly or approximately contributed to it.[55]

§ 2940. Must Hypothesize Negligent Act of Passenger as Proximate Cause.—In an action against a carrier for injuries to a passenger where the defense is contributory negligence, an instruction which fails to hypothesize that the plaintiff's negligence therein referred to as the proximate cause of his injury,[56] or that it in fact contributed to his injury,[57] is bad. Thus a requested instruction, in an action against a railway company for the death of a passenger, that, if in attempting to alight from the train he failed to do what a prudent man would have done, he was guilty of contributory negligence barring a recovery, is properly refused for failing to hypothesize that his negligence contributed to his injury.[58] And in an action for injuries to a passenger, claimed to have been caused by a sudden jerk of the car, throwing him off, a charge that, if the injury resulted from the passenger's riding on the platform, he could not recover, was properly refused, as it did not hypothesize such riding as the proximate cause.[59] Other instances are given in the footnotes.[60]

§ 2941. Requiring Plaintiff's Negligence to Be Sole Cause.—An instruction in a passenger's action for injuries requiring the jury to find that plaintiff's negligence was the sole cause of the injury before they could find for the defendant is erroneous.[61] But an instruction that a passenger injured in

55. Root *v.* Des Moines R. Co., 122 Iowa 469, 98 N. W. 291.

56. Must hypothesize negligent act of passenger as proximate cause.—Louisville, etc., R. Co. *v.* Dilburn (Ala.), 59 So. 438; Kansas City, etc., R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207.

57. Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847.

58. Kansas City, etc., R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207.

59. Birmingham R., etc., Co. *v.* James, 121 Ala. 120, 25 So. 847.

60. In an action against a railroad company for personal injuries, an instruction to find for defendant if plaintiff was negligent in the slightest degree in any way set up in any of the defendant's pleas, which contributed to any of her alleged injuries, was properly refused for failure to postulate that plaintiff's negligence proximately contributed to her injury. Atlanta, etc., Railway *v.* Wheeler, 154 Ala. 530, 46 So. 263.

An instruction that if plaintiff, a passenger, was injured while attempting to alight, by reason of defendant's negligence, a recovery could not be defeated because of contributory negligence, unless it appeared that plaintiff failed in the exercise of ordinary prudence, "and such failure so contributed to the injury that it would not have occurred if he had been without fault," was not objectionable because limited by the clause quoted. Without such qualification the instruction would authorize the jury to find against a plaintiff who failed in the exercise of ordinary care, when such failure was not a contributing cause to the injury. Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603.

In a passenger's action for injuries, an instruction that, if plaintiff attempted to get off the train while in motion, after being warned not to do so, the jury should find for defendant was properly refused, since it did not require a finding that the passenger's act in this respect was a proximately contributing cause of his injury. Southern R. Co. *v.* Morgan (Ala.), 59 So. 432.

Defendant guilty of gross negligence.—In an action by a passenger against a carrier for injuries, a charge that, though defendant was guilty of gross negligence contributing in part to the injury, yet, if plaintiff was guilty of any want of ordinary care contributory to the injury, he could not recover, was erroneous as precluding plaintiff's recovery, though his negligence did not contribute proximately to the injury. Reid *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

In an action by a passenger for injuries from a collision while he was riding in the caboose cupola of a freight train, a charge that, if the injury resulted partly from plaintiff's act in riding in the cupola and partly due to defendant's gross negligence, plaintiff could not recover, was erroneous as barring recovery, though plaintiff's negligence did not contribute proximately to the injury. Reid *v.* Yazoo, etc., R. Co., 94 Miss. 639, 47 So. 670.

61. Requiring plaintiff's negligence to be sole cause.—In an action against a street car company for personal injuries alleged to have been received by plaintiff while alighting from a car, because of defendant's negligence, there being some evidence of contributory negligence, the jury was instructed that, if

alighting from a street car could not recover from the company if he would not have been injured but for his failure to use ordinary care is not objectionable as requiring a verdict against the company unless his negligence was the sole cause of the injury,[62] before they could find for the defendant, is erroneous.

§ 2942. Requiring Plaintiff's Negligence Alone to Be Proximate Cause.—In an action against a railroad company for injuries, a charge that where the plaintiff was careless himself, and the injury was primarily due to plaintiff's own carelessness, and his own conduct was the proximate cause of the injury, he can not recover, though defendant was careless; that when such was the case the jury must find for defendant; that it was not sufficient for defendant to show that plaintiff had been to some extent negligent, but the jury must find such negligence the proximate cause of the injury, was not erroneous on the ground that it impressed on the jury that plaintiff's negligence alone would be considered the proximate cause, without pointing out to them that, if any negligence on the part of plaintiff contributed to the injury, there could be no recovery.[63]

§ 2943. Requiring Passenger's Negligence to Contribute to Injury.—In such action against a carrier for injuries to a passenger, charges which submit the question as to whether the negligent act of the passenger contributed to his injury, in such form as to mislead the jury and to impress on their minds that although the passenger was guilty of negligence in doing an act which necessarily caused his injury, they might yet find for the plaintiff, if they found it did not contribute to his injury, are positive errors.[64] Such charges submit as an issue to be determined by the jury that about which the evidence left no question, since the supposed negligence of the passenger, if established, must necessarily have contributed proximately to his injury. But charges which merely state all the elements of contributory negligence, are correct statements of the law upon the subject, and, as they direct only a verdict in favor of the defense if the supposed facts exist, there is no positive error in them. When the case justifies a fuller or more pointed instruction, it becomes the duty of the defendant to ask for it. Such a charge does not direct the jury to inquire whether or not the negligence of the passenger contributed to the occurrence, and that, should they find it did not, the verdict should be for the plaintiff, and herein lies the true distinction between the two classes of cases passed upon by the court. In the first, the charge in effect directs the jury to make inquiry as to the existence of the fact which the evidence conclusively established, and told them that, if they found that it did not exist, the plaintiff would not be defeated by his own negligence; in other words, the jury were told that, although the plaintiff may have done the thing charged against him as negligent, and although it may have been negligent, he could still recover if it did not proximately contribute to this injury, when the patent fact was that it did contribute. This is what the court held to constitute affirmative error, because it, in effect, informed the jury that the fact was in issue when it was not, and authorized them to find for the plaintiff in opposition to the uncontroverted

the injuries complained of were caused by plaintiff's own "negligence or want of care when leaving the car, then the law is for defendant, and the jury should so find." Held, that the instruction was erroneous, as it required the jury to find that plaintiff's negligence was the sole cause of the injury before they could find for defendant. Central Pass. R. Co. *v.* Stevens, 14 Ky. L. Rep. 803, 22 S. W. 312.

62. Louisville R. Co. *v.* Meglemery, 25 Ky. L. Rep. 1587, 78 S. W. 217, rehearing denied in 25 Ky. L. Rep. 2062, 79 S. W. 287.

63. Requiring plaintiff's negligence alone to be proximate cause.—Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938.

64. Requiring passenger's negligence to contribute to injury.—Parks *v.* San Antonio Tract. Co., 100 Tex. 232, 94 S. W. 331, 98 S. W. 1100, following San Antonio, etc., R. Co. *v.* Lester, 99 Tex. 214, 89 S. W. 752.

evidence.[65] The following is an instance of a correct charge within the above rule: Where, in an action for injuries to a passenger while alighting from a street car, defendant claimed that plaintiff jumped from the car while it was still in motion and offered evidence to such effect, an instruction that, if plaintiff was guilty of contributory negligence in alighting from the car, and such negligence proximately caused the injury, plaintiff was not entitled to recover, was not erroneous as submitting as an issue the question whether the supposed negligence of plaintiff, if established, necessarily contributed to his fall about which there was no question.[66]

§ 2944. Concurring Negligence of Plaintiff and Defendant.—In an action against a carrier for personal injuries to a passenger, an instruction that if defendant was negligent, and plaintiff was also negligent, and these two acts of negligence, moving together, brought about the disaster, plaintiff could not recover, is not an erroneous charge on contributory negligence.[67]

Carrier's Negligence Contributing Cause.—An instruction that if a carrier is properly discharging its duties, and a passenger is hurt from a cause disconnected, over which the carrier has no control, or if the passenger is hurt through his own misconduct, and the act of the carrier in no way contributed to it, or if the passenger's misconduct was the primary or real reason of his injury, the carrier would not be liable, is not open to the construction that, though the carrier was properly discharging its duty, it would be liable for injury to the passenger unless its cause was wholly disconnected with the operation of the train, or that, even if the injury resulted from a cause to which the passenger contributed, the carrier would be liable if its acts in any way contributed; it being subsequently charged that if the passenger contributed to his injury, or by ordinary care might have avoided the consequences of the carrier's negligence, or if the injury was caused by the mutual default of both, he could not recover.[68]

§ 2945. Omitting One of Two Acts of Contributory Negligence.—An instruction in an action against a carrier for an injury to a passenger in which two acts of contributory negligence be alleged should not omit one of the acts charged so as to limit the passenger's negligence to one of the acts and exclude the other. Where the instruction taken as a whole and in connection, with others defining the acts of contributory negligence alleged and stating the rule as to burden of proof, does not authorize a verdict for the plaintiff till he has proven to the satisfaction of the jury that the injuries complained of were the result of the defendant's negligence as defined in other instructions, is not objectionable. An instance of a correct instruction is given in the note.[69]

65. Parks *v.* San Antonio Tract. Co., 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100.

66. Parks *v.* San Antonio Tract. Co., 100 Tex. 222, 94 S. W. 331, remanding S. C. 93 S. W. 130, which is reversed in 98 S. W. 1100.

67. Concurring negligence of plaintiff and defendant.—Shealey *v.* South Carolina, etc., R. Co., 67 S. C. 61, 45 S. E. 119.

68. Carrier's negligence contributing cause.—Wade *v.* Columbia Elect. St. R., etc., Co., 51 S. C. 296, 29 S. E. 233, 64 Am. St. Rep. 676.

69. Omitting one of two acts of contributory negligence.—In an action against a railroad company for injuries to a passenger, caused by falling on a greasy platform as he was stepping off a train which he had boarded, thinking it the train he wanted, defendant alleged that plaintiff was negligent in stepping off the train while in motion, and also in failing to make proper inquiry as to whether it was his train. The court instructed that, on proof of certain facts, plaintiff was entitled to recover, if not guilty of any want of ordinary care in stepping from the train. In another instruction the two acts pleaded by defendant as contributory negligence were distinctly defined, and in still another the jury were told that, while it was the duty of defendant to furnish plaintiff information to enable him to find his train, it was also his duty to use ordinary diligence to obtain such information, and if defendant furnished such service, and plaintiff failed to avail himself of it, defendant was not responsible for his getting on the wrong train. Held that, taken as a whole, the instruction first quoted

§ 2946. Ignoring Negligence of Defendant.—In an action for injuries to a passenger, a charge on the question of contributory negligence asked by the defendant, which ignores the negligence of its servants in the management of its train or cars, should be refused.[70]

§ 2947. Enunciating Theories of Case.—The court may state the plaintiff's and defendant's theories of the case and charge to the jury the law applicable to each theory, not as abstract propositions of law, to the effect that a passenger could not be said to be in the exercise of due care who attempted the act in question, but in connection with the two theories of the case so that the jury, if they find the plaintiff's theory correct, may find in his favor, and if they find the defendant's theory of the accident correct, they may find that he was not entitled to recover.[71]

Effect of Refusal of Proper Requests.—In an action against a carrier for injuries to a passenger, a request for an instruction, based upon evidence in the case, which presents one of the theories of defense, not squarely presented in any instruction given, it is error to refuse the instruction.[72]

Enunciating Inconsistent Theories.—In an action against a carrier for injuries to a passenger, an instruction is bad which enunciates inconsistent theories; as, for instance, where,[73] in an action by a passenger injured by slipping

was not objectionable as limiting plaintiff's contributory negligence to one of the acts pleaded by the answer, and excluding the question of his negligence in not making proper inquiry for his train. Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

70. **Ignoring negligence of defendant.**—Deceased, a shipper of stock, was entitled to transportation from the switch yard to the stock yards. The only means furnished were the top of a stock car or the engine. By direction of the engineer, he got upon the foot-board of the engine. The defendant asked for the instruction that common prudence dictated that he should put himself in the safest place possible, and, if the engine was not as safe as the car, he was guilty of negligence. Held, that the instruction was properly refused, as it ignored the negligence of defendant's servants, in the management of the engine. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

71. **Enunciating theories of case.**—In an action against a street railway company for personal injuries, the plaintiff's theory was that she motioned the driver to stop the car; that he stopped it; and that, while she was getting on, the car suddenly started, and threw her, causing the injury. Defendant's theory was that while the car was in motion, at a place where, by the rules of defendant, the driver had no right to stop, plaintiff rushed from the sidewalk towards the car; that the driver called out to her not to come near the car; that she paid no attention to the warning, but attempted to seize the forward part of the car; that a passenger standing on the front platform stepped on the step of the car, and put his arm out to prevent plaintiff from seizing the car; that she ran against his arm, and was thrown down, and did not touch the car at all. The court charged that, if plaintiff attempted to get upon the car while it was in motion, the car not having been stopped for her to get on it, and the motion of the car threw her down, she assume the risk, and was not in the exercise of due care if she was injured thereby. The jury were also instructed that, if the car was stopped for her to get upon it, and she stepped on the step, and then, while she was in the act of stepping, the car was needlessly started, so as to throw her down, the defendant would be responsible. Held, that the instructions were not given as abstract propositions of law that a person was not in the exercise of due care who attempted to get on a horse car while it was in motion, but were given in connection with the two theories of the case, and were correct. Gallagher *v.* West End St. R. Co., 156 Mass. 157, 30 N. E. 480.

72. **Effect of refusal of proper requests.**—Joyce *v.* Metropolitan St. R. Co., 219 Mo. 344, 118 S. W. 21. See, also, Tannehill *v.* Birmingham R., etc., Co. (Ala.), 58 So. 198.

There was evidence that, when the car started, plaintiff was some three feet from it, and did not have hold of it, and that he attempted to board it after it was in motion. Held, that an instruction that if plaintiff attempted to get upon the car while it was in motion he assumed the risk of danger, and that his injuries resulting therefrom were caused by his own negligence and the verdict should be for defendant, was improperly refused. Joyce *v.* Metropolitan St. R. Co., 118 S. W. 21, 219 Mo. 344.

73. **Enunciating inconsistent theories.**—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

on a car platform, where plaintiff testified that she was about to alight with a grip, which she was handing to her husband, when she fell, and defendant requested a charge that if plaintiff could have avoided slipping by grasping the hand rail with both hands, or by grasping the hand rail on each side of the platform, or by use of some other platform, then she could not recover, provided a person of ordinary care would have attempted to so avoid slipping down. Such an instruction without the proviso was properly refused.[74]

Defendant's Instructions Showing His Side of Plaintiff's Theory of Case.—Where a passenger, in his petition against a street railway company, alleged, and his evidence tended to prove, and his requests for instructions assumed, that the car had stopped when he attempted to alight therefrom and was injured, he can not complain of instructions, on defendant's request, that, if the injuries were caused by his leaving the car before it had stopped, or if he got off the car while it was yet moving, the company is not liable.[75]

§ 2948. Conflicting and Inconsistent Instructions.—Where the instructions in an action for injuries to a passenger, taken as a whole, correctly inform the jury as to the governing rules of law, no more is required. It will be assumed that the jury was not mislead by one instruction which is less exact than another in its statement of the law of contributory negligence.[76] In an action against a street railway by a passenger for personal injuries, there was no inconsistency between an instruction that defendant was held to the exercise of extraordinary care and caution to prevent injury to plaintiff, and that plaintiff was bound to exercise only ordinary care and caution, and an instruction that if plaintiff was not guilty of contributory negligence, and was injured by reason of defendant's negligence, she was entitled to recover.[77]

Instructions as to Last Clear Chance and Concurrent Negligence.—Where, in an action for death of an intending passenger asleep on a track at a station, defendant pleaded contributory negligence, and the court charged as to concurrent negligence and last clear chance, an instruction that, if deceased was guilty of carelessness contributing to the injury, there could be no recovery unless defendant came within the exceptions to the rule precluding the defense of contributory negligence was applicable, and not in conflict with those expressly stating the last clear chance doctrine.[78]

§ 2949. Misleading Instructions.—In an action for injury to passengers, it is error to give a charge which would mislead the jury and when requested it should be refused. There are many instances of instructions held to be misleading. A few are given. Thus an instruction that might lead the jury to believe that the passenger was held to the highest degree of care;[79] an instruc-

74. Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

75. **Defendant's instructions showing his side of plaintiff's theory of case.**—Peck *v.* St. Louis Trans. Co., 178 Mo. 617, 77 S. W. 736.

76. **Conflicting and inconsistent instructions.**—In an action for injury to a street railway passenger, the court charged that whether a passenger was negligent in alighting was for the jury, and that, if the injury sustained was due to negligence in starting the car before plaintiff had time to alight, then he was entitled to recover, provided that he was not guilty of negligence which proximately caused the accident. The court also charged that, even if defendant was negligent, yet, if plaintiff was guilty of any negligence proximately contributing to his injury and without which it would not have happened, then he could not recover. Held that, though the latter instruction was the more exact statement of the law of proximate cause, yet they were not so at variance as to require a reversal, and that the instructions taken as a whole were correct. Rangenier *v.* Seattle Elect. Co., 100 Pac. 842, 52 Wash. 401.

77. Hutcheis *v.* Cedar Rapids, etc., R. Co., 128 Iowa 279, 103 N. W. 779.

78. **Instructions as to last clear chance and concurrent negligence.**—Tempfer *v.* Joplin, etc., R. Co., 89 Kan. 374, 131 Pac. 592.

79. **Degree of care required of plaintiff.**—An instruction that the rule that a carrier of passengers is required to exercise the highest degree of care for their safety, consistent with the practical operation of its railway, does not "in any

tion which might lead the jury to think that ordinary care required a passenger to look out for danger;[80] an instruction open to the construction that the jury must find for defendant if plaintiff's conduct remotely contributed to his injury;[81] and an instruction which questioned the plaintiff's status as a passenger, there being no evidence that he did not take the car as a passenger;[82] these have each been held misleading.

Instances Where Instruction Not Misleading.—A few instances of instructions which were held to be not misleading follow. In an action for injuries to a passenger, an instruction that, though defendant's negligence was the proximate cause of the injury, plaintiff could not recover if his negligence contributed to the injuries he received was not calculated to mislead.[83] And in an action for injuries to a passenger, an instruction that plaintiff must satisfy the jury that she was injured by defendant, and when this is done defendant must show it was not to blame, and if defendant fails to do this, it having been made to appear that the injury was inflicted by it or its agents, plaintiff should recover such damages as are just, was not calculated to mislead the jury; there being a distinct instruction that if plaintiff by ordinary care could have avoided the consequence of defendant's negligence there could be no recovery, and that if she was not injured at all no recovery could be had.[84] So, also, where, in an action for the death of intestate, who was struck while awaiting another, it appeared that the train striking him was a new one, and nothing showed that intestate knew of any habitual violation of the speed ordinance by those in charge, an instruction that the jury might consider in determining the question of care by intestate that he had the right to presume the train would probably not exceed the speed allowed by the ordinance was not misleading, though in case of a regular train habitually running at a high speed, one who knows the fact can not presume the contrary.[85]

§ 2950. Instruction Invading Province of Jury.—In an action for injuries to a passenger, requested instructions which invade the province of the

degree" excuse passengers from the duty of exercising ordinary care for their own safety, was not erroneous, in that the use of the words quoted might mislead the jury to believe that plaintiff was held to the highest degree of care. Harvey *v.* Chicago, etc., R. Co., 77 N. E. 569, 221 Ill. 242, affirming judgment 116 Ill. App. 507; 123 Ill. App. 442.

80. Construction that ordinary care requires passenger to look out for danger.—Instructions in action for injuries to a passenger on a street car, that if plaintiff could have avoided the consequence of defendant's negligence by ordinary care in looking out for danger, and if there was a safe place on one side of the car and she chose to alight on the other side, and its unsafe condition would have been apparent had she used ordinary care in looking out for danger, were erroneous, as they may have led the jury to understand that the court charged as a matter of law that ordinary care required plaintiff to look out for danger. Turner *v.* City Elect. R. Co., 68 S. E. 735, 134 Ga. 869.

81. Construction where passenger's conduct contributed remotely to injury.—In a street car passenger's action for injuries in a collision with a railroad train at a crossing, a requested charge that if the jury believed that plaintiff was negligent in riding on the street car platform and his negligence contributed to his injury, they must find for defendant, unless the injury was wanton, willful, or intentional, was properly refused as misleading; it being open to the construction that the jury must find for defendant if plaintiff's conduct contributed, even remotely, to the injuries. Alabama, etc., R. Co. *v.* Ventress, 171 Ala. 285, 54 So. 652.

82. Questioning whether plaintiff a passenger.—In an action against a horse railroad company for injuries sustained while attempting to board a moving car, the court properly refused, as obscure and confusing, the charge that, "if plaintiff had no right to be where he was at the time of the accident, then defendant is not answerable for the injury, unless it was done willfully;" there being no evidence that plaintiff did not take the car as a passenger thereon. North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672.

83. Instances where instruction not misleading.—Behm *v.* Cincinnati, etc., Tract. Co., 86 O. St. 209, 99 N. E. 383.

84. Atlantic, etc., R. Co. *v.* Johnson, 125 Ga. 483, 54 S. E. 91.

88. Collison *v.* Illinois Cent. R. Co., 88 N. E. 251, 239 Ill. 532.

jury should be refused,[86] and it is reversible error to give them.[87] But an instruction that to charge plaintiff with contributory negligence the burden is upon defendant, and if in attempting to charge negligence upon a defendant, it appears that plaintiff was negligent, then there is a case in which the court should say, as matter of law, that no recovery can be had, does not amount to a charge that the plaintiff was not guilty of contributory negligence.[88]

§ 2951. Repetition of Instructions.—In an action against a carrier for injuries to a passenger, a requested instruction, even though it embraces correct legal principles, is properly refused, when such principles have been fully covered by other instructions or charges given in the case.[89] But in an action against a railroad company for injuries to a passenger, who was struck by a passing train while attempting to board another train, in which there was evidence that he voluntarily went to a dangerous place, at which passengers were not ordinarily received, a charge which defined contributory negligence in the abstract, and stated that all the circumstances in evidence should be considered in determining whether plaintiff was guilty of negligence; is not a sufficient application of the law to the facts in the case to justify a refusal of a charge to find for defendant if said evidence was believed.[90]

Same Facts Constituting Contributory Negligence and Assumption of Risk.—Where, in an action for injuries to a passenger while alighting from an interurban car, the same facts which would constitute contributory negligence would also constitute assumption of risk, there was no occasion to charge

86. Instruction invading province of jury.—There being evidence that it was quite usual for the gates on the car in question, and others like it, to only partially open for the admission of passengers, as they did for plaintiff, a charge that if the gates were not opened as they usually were for the admission of passengers, but were partially closed, so that their edges were not over eight or ten inches apart, such opening would not be an invitation to get on the car, but a plain suggestion of an unusual condition, was properly refused, the request if given would have been a positive direction to the jury on a question it had the right to determine for itself. Blades *v.* Des Moines City R. Co., 146 Iowa 580, 123 N. W. 1057.

87. Whether a passenger was negligent in leaving the coach and taking a position on the steps while the train was still in motion being a question for the jury, it was error to instruct that the carrier was liable for injuries from being thrown from the steps by the jerking of the train, unless the passenger was negligent after taking his position on the steps. Louisville, etc., R. Co. *v.* Stillwell, 134 S. W. 202, 142 Ky. 330.

88. Shutt *v.* Cumberland Valley R. Co., 149 Pa. 266, 24 Atl. 305.

89. Repetition of instructions.—Thompson *v.* Green, 174 Fed. 404, 98 C. C. A. 621; Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

Instances.—Plaintiff, a woman, was injured in alighting from a train by stepping down onto a box, which tipped. Held, that an instruction that if plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby, the jury should find for defendants, was properly refused; a proper instruction on contributory negligence having been given. Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

Where the court charged that plaintiff was required to prove that she was pushed or thrown from defendant's car and injured, as alleged, or she could not recover, it was not error to refuse to charge that plaintiff could not recover unless the jury believed from a preponderance of the evidence that plaintiff was in fact pushed and thrown from the car to the street, as charged in the declaration. Chicago Union Tract. Co. *v.* Newmiller, 74 N. E. 410, 215 Ill. 383, affirming judgment in 116 Ill. App. 625.

In an action against a railroad company for the death of a passenger, who was killed by the derailment of the car while entering a station and when he was standing on the platform, where the court instructed the jury fully as to the provisions of Civ. Code Cal., § 483, applicable to the case, it was not error to refuse an instruction requested, laying down an arbitrary rule which would bar recovery, and to submit the question of contributory negligence, in view of the statute, to the jury. San Pedro, etc., R. Co. *v.* Thomas, 187 Fed. 790, 109 C. C. A. 638.

90. St. Louis, etc., R. Co. *v.* Casseday, 50 S. W. 125, 92 Tex. 525.

on assumption of risk after instructions as to contributory negligence.[91]

§ 2952. Objections Obviated by Other Instructions.—In an action for injuries to a passenger, the rule that the general charge of the court and such special charges as may be given at the instance of the parties are to be regarded as parts of one entire instrument, all to be considered together, and if there is an error in one portion which is corrected in another so as to prevent misleading the jury, the judgment will be upheld and not reversed for that reason, applies with all its force.[92]

§ 2953. Harmless Error.—See ante, "Applicability to Evidence," § 2929.

§ 2954. Law of State Where Injury Occurred.—In a passenger's actions for injuries received in another state, it is proper for the trial court to charge the law as to contributory negligence as it prevails in the state where the injury occurred, such law being set up in the pleading and admitted or proved.[93]

§ 2955. Assumption of Risk.—In a passenger's action for injuries where the defense is assumption of risk, it is proper to charge the jury that where a passenger is injured while voluntarily and without necessity exposing himself to risk of injury from an accident, such as the one which occurred, and he was injured by such accident, which injury would not have occurred had he not so exposed himself, he can not recover.[94]

91. Same facts constituting contributory negligence and assumption of risk.—McGovern *v.* Interurban R. Co., 136 Iowa 13, 111 N. W. 412, 13 L. R. A., N. S., 476.

92. Objections obviated by other instructions.—North Chicago St. R. Co. *v.* Brown, 178 Ill. 187, 52 N. E. 864.

Failure to define reasonable care.—If an instruction is objectionable in not defining "reasonable care," the objection is obviated by a subsequent instruction that a person attempting to alight from a street car is bound to use ordinary care to avoid injury, under any and all circumstances, and if she fails to use such care, and is injured by reason thereof, she can not recover. Judgment, 76 Ill. App. 654, affirmed in North Chicago St. R. Co. *v.* Brown, 52 N. E. 864, 178 Ill. 187.

Instruction as to burden of proof.—An objection that an instruction casting the burden of proof on a railway company to show negligence of a passenger in alighting from its train by a preponderance of the evidence may deprive the company of relying on any proof of the passenger showing his negligence, is met by an instruction that the jury will find for the company if the testimony shows that the passenger's negligence occasioned his injury. St. Louis, etc., R. Co. *v.* Baker, 55 S. W. 941, 67 Ark. 531.

Omitting question whether plaintiff's negligence proximate cause.—If an instruction that if plaintiff, while alighting from defendant's car, was using reasonable care, and defendant negligently caused the car to be set in motion, and plaintiff was thereby injured, the jury should find defendant guilty, is objectionable in omitting the question whether the negligence of plaintiff was the proximate cause of the injury, the objection is obviated by a subsequent instruction that, if plaintiff was negligent in alighting, and such negligence was the cause of the injury, a verdict of not guilty should be returned. Judgment, 76 Ill. App. 654, affirmed in North Chicago St. R. Co. *v.* Brown, 52 N. E. 864, 178 Ill. 187.

93. Law of state where injury occurred.—Where the whole case turned on the question whether plaintiff was prompted by the conductor to leap off a train on defendant's road, gross contributory negligence being otherwise clearly proved, inasmuch as a charge under the law of Georgia regarding contributory negligence would not change the result, a charge under the law of Alabama, where the accident happened, is no ground for a new trial. Dixon *v.* Mobile, etc., R. Co., 80 Ga. 212, 5 S. E. 496.

Where, in an action against a carrier for an injury received by plaintiff while a passenger in another state, it is admitted that under the law of such other state the plaintiff may recover, though he may have been guilty of negligence contributing to his injury, providing the negligent act of the carrier was the direct and proximate cause of such injury, it is proper to give to the jury the law of the state where the injury occurred as to contributory negligence as admitted by the pleadings. Louisville, etc., R. Co. *v.* Harmon, 64 S. W. 640, 23 Ky. L. Rep. 871.

94. Assumption of risk.—In an action for personal injuries occurring while plaintiff was attempting to board a street car, the court charged that if he "started to get on the one car when the other car was coming [and one of the witnesses says he had to turn out of his course a little, because the horses hesitated a moment or stood still]; and that, choosing between the risks when the

Must Embrace Element of Common Prudence.—In an action to recover for the death of a person killed while riding in a car with stock, an instruction that a person who voluntarily places himself in a dangerous position, and thereby contributes to an injury, can not recover for such injury, is properly qualified so as to embrace the element of common prudence.[95]

§ 2956. Care Required of Children and Others under Disability.—Care Required of Infant.—In an action for injuries to an infant passenger, where the plaintiff's age and experience is alleged in his petition and there is evidence tending to support the allegation, the court in its charge as to contributory negligence should state that the plaintiff was only required to exercise the degree of care which children of his age, intelligence and experience might reasonably be expected to exercise under like circumstances.[96] But where under the testimony it may be assumed that the infant passenger knew of the dangers he encountered in riding in a place not intended for passengers, the law applicable to adult passengers similarly situated will apply.[97]

Mother Putting Child on Platform of Moving Car.—In an action by the father, as administrator, for the death of a child by being jerked off the platform of a train after it was placed thereon by its mother preparatory to taking passage, it was error to instruct that attempting to board a moving train before it comes to an absolute stop is contributory negligence, and if the train stopped at the station, and decedent's mother put her on the platform, and the slack of the train caused her to fall under the wheels, the jury must find for defendant.[98] In such case it was error to instruct that if the child's mother put it on the platform before the passengers were notified to get aboard, and did not use ordinary care in doing so, and it was jerked off and killed, the company was not liable.[99]

Deaf Persons.—Where one struck by an approaching car was somewhat deaf, a charge to the jury that the fact that he was partially deaf would not affect the degree of care required of him,—that care being the degree of care

cars were so near together, he was caught between the two cars, and hurt; now, if that was the way it happened, as I should suppose you would infer from the testimony of these witnesses,—if the plaintiff did take the risks—he must suffer the consequences. * * * A man can not take such risks with passenger railway cars, and then, if he gets hurt, ask the company to pay him damages." Held no error. Rose *v.* West Philadelphia R. Co. (Pa.), 12 Atl. 78.

Same facts contributory negligence and assumption of risk.—See ante, "Objections Obviated by Other Instructions," § 2952.

95. Must embrace element of common prudence.—Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634.

96. Care required of infant.—In an action for injuries to a passenger, where the court charged that a boy of fourteen, was "only" required to exercise the degree of care which boys of his age, intelligence, and experience might reasonably be expected to use under like circumstances, and if he was, just before and at the time of receiving his alleged injuries, exercising such care, then he was exercising all the care the law required of him; the use of the word "only" was not objectionable as tending to belittle the degree of care required, nor was the instruction objectionable in the use of the words "just before and at the time of receiving his alleged injuries," as limiting too closely the time within which plaintiff was required to exercise ordinary care. Peterson *v.* Chicago Consol. Tract. Co., 83 N. E. 159, 231 Ill. 324.

97. Plaintiff, a boy twelve years old, was injured by falling from a street car while riding on the front platform of the car. He alleged in his petition that he did not know that it was dangerous and unsafe to ride on the platform of the car, but did not say a word in his testimony in support of such statement. He had ridden on street cars before and had some education and was a newsboy. Held, that it may be assumed that he knew it was safer in the car than on the platform, and because of such knowledge propositions of law announced by the court as to the rights and liabilities of street car passengers who are adults and ride on the platform will apply to plaintiff. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490.

98. Mother putting child on platform of moving car.—Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

99. Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

which every prudent man would exercise under similar circumstances,—is not error, as requiring of defendant no greater care than would have been required if his hearing had been good.[1]

Intoxication.—In a passenger's action for injuries, it is improper to instruct that if just before being injured the passenger became intoxicated, and thereby became careless and negligent contributing to his injury, he could not recover.[2] The charge in such case should state the law to be that the questions being tried are the negligence of the defendant and the contributory negligence of the plaintiff, not whether the plaintiff was at the time intoxicated; that drunkenness on the part of plaintiff would not relieve the defendant from liability if guilty of negligence, and that, drunk or sober, if the plaintiff, by want of ordinary care, contributed to the injury, he can not recover regardless of his condition. A charge in an action against a street railway company for injuries to a passenger who was thrown from the running board, where he was riding to the effect that intoxication was not negligence, and that, if plaintiff used that degree of care incumbent on him "under the circumstances," his intoxication would not prevent a recovery; that defendant, in order to prove contributory negligence, must show that the passenger did not exercise ordinary care, without reference to his intoxication, as the question was not whether he was intoxicated, but whether he exercised ordinary care; and that if the passenger was intoxicated, and in a place of danger, and the company's motorman knew it, the motorman was bound to exercise more care, is not erroneous, as eliminating the question of a passenger's intoxication, or as imposing on the passenger, if intoxicated, the duty of using only the care required of intoxicated persons.[3]

Intoxicated Passenger Injured after Alighting at Destination.—An instruction in an action for the death of an intoxicated passenger alighting from a train at his destination, and entering the track where he remained till struck by another train, which deals with the subject of the carrier's liability for injury to a drunken passenger known by trainmen to be in a dangerous position, and helpless, and which states that the carrier is liable if it fail to exercise reasonable care to prevent injury, and which declares that a man can not voluntarily place himself in a condition whereby he loses such control of himself as a man of ordinary prudence in the possession of his faculties will exercise, thereby contributing to an injury to himself and then require of one ignorant of his condition recompense therefor, is sufficiently favorable to plaintiff on the issue of voluntary drunkenness.[4] The application of the charge on the subject of contributory negligence is limited to those "ignorant of the condition" of the drunken man. In other words, it advised the jury, what the law was, not respecting those who knew the passenger's perilous plight concerning which it had already fully charged the jury, but respecting those who were ignorant of his plight, manifestly referring to the agents of the train which struck plaintiff and who were charged with negligent conduct in operating their train. Treating this matter, therefore, as an independent subject of inquiry, based, not on the last clear chance theory, but upon the primary negligence of the agents of the train, which struck plaintiff, there is no error in the charge, but it was fully as favorable to him as the facts and pleadings warranted.[5]

§ 2957. Awaiting and Seeking Transportation.—Use of Station Platform.—In an action for the death of a passenger as he reached a station platform, by reason of the overhanging of a train which passed the platform

1. **Deaf persons.**—Atlanta Consol. St. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41.
2. **Intoxicated passenger.**—Hughes *v.* Chicago, etc., R. Co., 150 Iowa 232, 129 N. W. 956.
3. Lawson *v.* Seattle, etc., R. Co., 34 Wash. 500, 76 Pac. 71.
4. **Intoxicated passenger injured after alighting at destination.**—Winfrey *v.* Missouri, etc., R. Co., 194 Fed. 808, 114 C. C. A. 218.
5. Winfrey *v.* Missouri, etc., R. Co., 194 Fed. 808, 114 C. C. A. 218.

at a high rate of speed, an instruction that if deceased did anything that a man of prudence under the circumstances would not have done, or omitted to do anything that a man of prudence would have done, and that deceased had a right to assume that the platform was so related to the track that the train would not sweep over any portion of it, which the court modified on defendant's objection so as to charge that deceased had a right to assume generally that the train would not sweep him off, and that it was his duty to use the platform with ordinary care and prudence, was not erroneous.[6]

Duty to Look Where Stepping.—An instruction that it was the duty of the passenger to exercise reasonable care, while walking on a station platform, to look where he was stepping, and, if he did not do so, and by reason thereof fell, which produced his injuries, and if he had looked he could have avoided the fall, he could not recover, limits his contributory negligence to the question of his failure to look where he was stepping, and should be refused.[7]

Stepping on Defective Board.—A requested instruction in an action by a passenger to recover for personal injuries resulting from a defective board in a platform at one of defendant's stations, declaring without qualification that the injured person was guilty of negligence if he stepped into a hole or on a rotten board without looking or taking any precaution to ascertain the danger, should be refused, as the situation may have been such that he could not see the hole, or the appearance of the plank may not have indicated a defect.[8]

Unlighted Platform at Place Having No Depot.—In an action against a railroad company for injuries caused by defendant's negligence in maintaining a platform for passengers without lighting it, where there was no depot, it was not error to refuse to charge that, if the night in question was dark, and such platform was not properly lighted, it was incumbent on plaintiff, before he could recover, to show that he took greater care than he would have taken had the night been light, and the platform well lighted.[9]

Right to Presume That Train Will Not Exceed Speed Ordinance.—See ante, "Misleading Instructions," § 2949.

§ 2958. Entering Conveyance.—In an action against a street railroad company for injuries received in getting on a street car, where there was evidence which justified the court in submitting the question of plaintiff's negligence in getting on the car as one of fact, it was not error to omit to state what facts, if found to be true would constitute negligence on his part.[10]

Entering Car before Time for Entering Arrived.—A charge that if plaintiff, knowing that the time for entering the car had not arrived, nevertheless entered same in violation of the rules of the railroad, she contributed to her injury, and that if she jumped from the car from apprehension of nonexisting danger, or if such jumping was not a reasonable act of prudence, then they must find for defendant, sufficiently presents the defense of contributory negligence.[11]

Boarding Moving Train.—It is not error to refuse to charge that failure to stop at a station "does not justify a person in attempting to board a train in motion," where the jury have already been told that plaintiff can not recover if he attempted to board the train while in motion, and when an ordinarily pru-

6. **Use of station platform.**—Lehigh Valley R. Co. *v.* Depont, 128 Fed. 840, 64 C. C. A. 478.

7. **Duty to look where stepping.**—Matthieson *v.* Burlington, etc., R. Co., 125 Iowa 90, 100 N. W. 51.

8. **Stepping on defective board.**—Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936.

9. **Unlighted platform at place having no depot.**—Missouri, etc., R. Co. *v.* Turley, 1 Ind. T. 275, 37 S. W. 52.

10. **Entering conveyance.**—Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

11. **Entering car before time for entering arrived.**—Western Maryland R. Co. *v.* Herold, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

dent man would not have made the attempt.[12]

Boarding Moving Street Car.—In a passenger's action for injuries received in boarding a moving street car where the defense is contributory negligence, on instruction that if the danger of boarding a moving car on the wrong side would be apparent to a person of ordinary care plaintiff was negligent in doing so was improperly refused;[13] and an instruction that if plaintiff attempted to board the car while running at ordinary speed, he was guilty of negligence, was not prejudicial, where his theory was that the car was running at a slow rate.[14] But it was proper to refuse to charge that it is negligence to hold on to the hand rail of the car till it started and then attempt to board it,[15] or that under an ordinance the carrier had no right to stop its cars except on the further crossing of the street, where there was no evidence that the conductor refused to stop.[16]

Boarding Car Stopped a Reasonable Time.—In an action for injuries claimed to have been caused by the premature starting of a street car while boarding it, where the evidence showed that the car stopped at a usual place and for the usual time, and plaintiff testified that he was waiting for the car and that he heard and understood the signal to start, and another testified that she boarded the car at the rear and had walked through it when the signal to start was given, an instruction was proper, as going to plaintiff's negligence, that, if the car stopped at the usual place a reasonable length of time to enable plaintiff to board it in safety by exercising ordinary care, the jury should find for defendant.[17]

Attempt to Board Train at Unusual and Dangerous Place.—Where in an action against a railroad company for injuries to a passenger who was struck by a passing train while attempting to board another train, there being evidence that he voluntarily went to a dangerous place, at which passengers were not ordinarily received, a charge which defines contributory negligence in the abstract, and states that all the circumstances in evidence should be considered in determining whether plaintiff was guilty of negligence; is not a sufficient application of the law to the facts in the case to justify a refusal of a charge to find for defendant if said evidence was believed.[18]

12. Boarding moving train.—Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711.

13. Boarding moving street car.—Wise *v.* Columbia R., etc., Co., 94 S. C. 254, 77 S. E. 924.

14. In an action for injuries alleged to have been caused while attempting to board a moving street car, an instruction that, if plaintiff attempted to get upon the front platform while the car was running at the ordinary speed, he was guilty of negligence, was not prejudicial, where plaintiff's theory was that the car was running at a slow rate at which the attempt would not necessarily have been negligence. Woo Dan *v.* Seattle Elect. R., etc., Co., 5 Wash. 466, 32 Pac. 103.

15. In an action for injuries while attempting to board a street car by being caught between the car and a railing extending from the station platform parallel with the track across a viaduct, an instruction requested by defendant that if the jury found that, when the car started, plaintiff was standing on the platform of the viaduct holding onto the hand rail of the car, intending to board such car, and that after the car started, and while it was in motion attempted to get upon the car and was injured, their verdict must be for defendant, was properly refused as worded. Joyce *v.* Metropolitan St. R. Co., 118 S. W. 21, 219 Mo. 344.

16. In an acton against a horse railroad company for injuries sustained in boarding a car, where it was admitted that the car was in motion, and no claim was made that the driver or conductor refused to stop the car when plaintiff boarded it, the court properly refused to charge that, under a city ordinance, the company had no right to stop its cars except on the further crossings of street intersections. North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672.

17. Boarding car stopped a reasonable time.—Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46.

18 Attempt to board train at unusual and dangerous place.—Judgment 48 S. W. 6, reversed in St. Louis, etc., R. Co. *v.* Casseday, 50 S. W. 125, 92 Tex. 525.

§ 2959. Conduct in Transit.—In a passenger's action for personal injuries received while in actual transit where the defense is contributory negligence, it is error to instruct the jury that it was the duty of a passenger, when going upon defendant's car, "to exercise due care and caution, use his eyes, and act with reasonable care and judgment, for his own safety, more especially if he found the car unusually overcrowded with passengers," but the court should instead have instructed the jury that it was incumbent on him while on the car "to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as he was." [19]

Standing Up in Car.—An instruction that if "plaintiff acted with reasonable and ordinary care in not taking hold of a strap, or in not moving further forward, though if had done so the accident would not have happened, and as a prudent man would ordinarily have acted," he was using all the care and diligence, required, being correct in itself, can not be assigned for error, as inferentially excluding other circumstances relied on by defendant to show contributory negligence.[20] But a charge that if plaintiff took an unsafe position standing up between the seats there was no provision for passengers, he can not recover, should be refused as excluding the effect of the carrier's invitation to take such position.[21]

Riding on Platform.—Where it appeared that the train was very crowded, and the evidence was conflicting as to whether there were seats or standing room unoccupied inside the cars, the court properly refused to charge that, if there were seats or standing room in any of the cars, the injured passenger, who was thrown from a platform by a collision, should have been inside.[22] And an instruction that, if the testimony showed that there was room in any car for the injured passenger and that he could have entered the same, and that he remained on the platform, where he was injured, without the knowledge of the conductor, or against his objection, or that of any agent of the company, the verdict should be for defendant, was more favorable for the defense than it should have been upon the facts.[23]

Standing on Platform While Train at Station.—An instruction in an action against a carrier for injuries to a passenger, that the platform of cars is intended for the use of passengers in getting on and off, and they have no right to stand on the platform, either while the cars are in motion or standing still, and if they do so they assume all risks incident to the operation of the train, where the evidence shows that, while the train was standing still at a regular station waiting for another train, during which time the engine was detached, plaintiff, who was between nine and ten years of age, and her mother, finding it hot in the car, and being unable to raise the windows or pull down the blinds, stood on the platform in order to be more comfortable, was properly denied. It is too broad and calculated to mislead the jury.[24]

19. Conduct in transit.—Davis *v.* Paducah R., etc., Co., 113 Ky. 267, 24 Ky. L. Rep. 135, 68 S. W. 140.

20. Standing up in car.—Dougherty *v.* Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

21. In an action against a horse car company for personal injuries, the evidence showed that plaintiff, while standing up between the seats of an open horse car, there being no unoccupied seats therein, was thrown down and injured, in consequence of the rapid driving of the car around a curve. The defendant requested the court to charge the jury that, if they believed the plaintiff took an unsafe position in standing up between the seats in an open car, and if she took a position where there was no provision for passengers, she can not recover. Held, that requests were properly refused, as it would have led to the inference that, even if plaintiff took her position with full consent of defendant, or at its implied invitation, she could not recover. Lapointe *v.* Middlesex R. Co., 144 Mass. 18, 10 N. E. 497.

22. Riding on platform.—Chesapeake, etc., R. Co. *v.* Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271, 19 Ky. L. Rep. 65.

23. Chesapeake, etc., R. Co. *v.* Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271, 19 Ky. L. Rep. 65.

24. Standing on platform while train at station.—Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

Misleading instruction.—See ante, "Misleading Instructions," § 2949.

Riding on Steps of Street Car.—An instruction, in an action for injury claimed to have been received by plaintiff being jolted off a street car, that it was a question for the jury whether it was a careless thing for plaintiff to get down on the step of the car, can not be complained of because stating that, if they believed that "that carelessness" contributed to his being jolted off, he could not recover.[25]

Releasing Hold on Guard Rail While Riding on Steps.—Where plaintiff testified that when he fell off a street car he had both feet upon the steps and was holding to the guard rails with both hands, and rode a short distance in that position, until a passenger discovered that her child had not entered the car and began to scream, when plaintiff released his hold with one hand, thinking the woman was going to jump off, and was thrown off by a jerk, but it was not shown that the jerk was unusual; the car being then crossing other tracks, it is proper to instruct that if plaintiff got on and rode some distance in a reasonably safe position, and thereafter let go one of his handholds and fell off, the jury should find for defendant.[26]

Riding on Inner Running Board of Street Car.—Where, in an action against a street railway company for injuries to a passenger received by his being knocked from the inner foot board by collision with a passenger on the inner foot board on a car going in the opposite direction, the issue as to plaintiff's contributory negligence was sharply presented by the pleadings, and there was substantial evidence introduced tending to establish plaintiff's negligence, it was proper to instruct that it was the plaintiff's duty in going upon the inner foot board to exercise such care as the position rendered reasonably necessary to prevent his being struck by passengers on the car, or by the car passing on the other track, and, if he could by standing upright thereon have avoided being struck by a passenger on or by the passing car and failed to do so, in consequence of which he was injured, he is not entitled to recover.[27]

Standing at Door as Train Coming to Stop.—In an action against a railroad for injuries to a passenger caused by a fall resulting from her leaving her seat and standing at the door before the stopping of the train, the jury should have been instructed that, even if defendant was negligent in the manner of stopping the train, if the passenger failed to exercise ordinary care for her own safety, considering her age and condition, but for which want of care she would not have been injured, she could not recover.[28]

Preparing to Alight before Car Stops.—See post, "Alighting from Moving Conveyance," § 2961.

§ 2960. Leaving Conveyance in General.—In a passenger's action for injuries received in leaving or alighting from a car where the defense is contributory negligence, the court should instruct the jury that it is the duty of the defendant to exercise care and caution and if by so doing when the accident happened, it would have been avoided, and failed to do so, the jury could not find plaintiff guilty of contributory negligence.[29]

25. Riding on steps of street car.—Foster *v.* Union Tract. Co., 199 Pa. 498, 49 Atl. 270.

26. Releasing hold on guard rail while riding on steps.—Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46.

27. Riding on inner running board of street car.—Simonton *v.* St. Louis Trans. Co., 207 Mo. 718, 106 S. W. 46.

28. Passenger seventy-six years of age.—Illinois Cent. R. Co. *v.* Jolly, 117 Ky. 632, 78 S. W. 476, 25 Ky. L. Rep. 1735.

29. Leaving conveyance in general.—In an action for damages for injuries resulting to plaintiff by being thrown from defendant's street car, it appeared from the testimony submitted by plaintiff that she was a passenger in defendant's open car, and had directed the conductor to let her off at a certain point, to which he agreed; that at a point beyond her destination the car stopped; that, two minutes after the car had stopped, plaintiff, with her arms full of bundles, attempted to alight, and in stepping down from the first to the second step of the car was violently thrown to the ground by the sudden starting of the car, and injured. The motorman and conductor of the car testified for defendant that they did not see

Notice to Conductor of Intention to Alight.—In an action by a passenger on a street car for injuries received, where the instructions required the jury to find that plaintiff could not recover unless she was in the exercise of due care for her own safety, and that the giving of notice in some way to the conductor that she desired to alight was involved in her exercise of due care, it sufficiently presented to the mind of the jury the question of notice to the conductor.[30]

Choice between Perilous and More Safe Way.—In an action by a passenger for injuries received in alighting from a train, the court should refuse to charge that where there are two ways of leaving a train, one safe and the other less safe, and a passenger, leaving by the latter way, is injured, he can not recover, because, in selecting the more perilous way, "he was guilty of contributory negligence;" contributory negligence being a question for the jury.[31]

Duty to Alight with Reasonable Promptness.—Where, in an action for injuries to a passenger while alighting from the train at a station, it did not appear that there was any other passenger behind her, and there was evidence that there were several in advance of her, who had all alighted and walked off of the station platform, and were no longer in sight, before plaintiff started to descend the car steps, there was evidence justifying an instruction that it was plaintiff's duty to leave the train with reasonable promptness, and if she was negligent in that respect, which negligence directly contributed in any degree to the accident, plaintiff could not recover.[32]

Failure to Take Hold of Hand Rail.—As it is not, as a matter of law, contributory negligence for a street car passenger to fail to take hold of the rail or bar of the car while riding on the platform preparatory to alighting, it is proper to refuse an instruction, in an action for injury in being thrown off by the sudden starting of the car, that such failure of a passenger would be contributory negligence.[33]

Fall Attributable to Misstep.—Where plaintiff testified that she followed the conductor out of the car and attempted to alight as soon as he placed the stool on the ground, before she discovered it had been placed under the car steps, an instruction that, if plaintiff left the car hurriedly and the fall was attributable solely to a misstep which she made in a hurry, then the company was not liable, was proper.[34]

Leaping from Box Car.—Where a passenger, was injured by leaping from a box car while the train was stopped at a station to which he had taken passage; no means of descent being provided; an instruction to the effect that if he leaped from the car without being in peril or having reason to believe that he was in peril, and the injury thereby resulted, he could not recover, was correctly refused because it did not contain the further element that the circumstances were such that the plaintiff might reasonably have apprehended injury from the leap.[35]

Alighting at Unusual Place—Injury by Sudden Movement of Car.—In an action for injuries to a passenger while alighting from a car through an al-

plaintiff fall, and that if she had fallen they would have seen it. Held, that the court properly instructed the jury that "it was the duty of defendant to exercise care and caution, and if by doing so when the accident happened, if it did happen, it might have been averted, and it failed to do so, the jury could not find plaintiff guilty of contributory negligence." Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

30. Notice to conductor of intention to alight.—Chicago Union Tract. Co. *v.* Hanthorn, 211 Ill. 367, 71 N. E. 1022.

31. Choice betwen perilous and more safe way.—Brodie *v.* Carolina Mid. R. Co., 46 S. C. 203, 24 S. E. 180.

32. Duty to alight with reasonable promptness.—Philadelphia, etc., R. Co. *v.* Hand, 101 Md. 233, 61 Atl. 285.

33. Failure to take hold of hand rail.—Chicago Union Tract. Co. *v.* Hanthorn, 211 Ill. 367, 71 N. E. 1022.

34. Fall attributable to misstep.—Tucker *v.* Central, etc., R. Co., 50 S. E. 128, 122 Ga. 387.

35. Leaping from box car.—Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

leged negligent jerk thereof, an instruction that, if plaintiff got off the car at a place where it was not usual to discharge passengers, it was not negligence for defendant's servants to cause the car to suddenly jerk, was properly refused, since, if not otherwise bad, it hypothesized the departure of plaintiff from the car, whereas, if so, the jerk of the car could not be negligent under such circumstances.[36]

Applicability to Evidence.—See ante, "Applicability to Evidence," § 2929.

§ 2961. Alighting from Moving Conveyance.—Degree of Care.—Where there is evidence of carelessness of a passenger in jumping off a moving train, it is error to refuse to charge that it is the duty of every person about to get on or off the car to exercise due care commensurate with the danger.[37]

Alighting Proximate Cause of Injury.—Where, in an action for injuries to a passenger on a street car, there was evidence that he attempted to get off while the car was still moving, and before he was invited to alight, it was error to refuse to charge that, if the proximate cause of his injury was so alighting before the car stopped, he could not recover, whether he exercised due care or not.[38]

Charging Contributory Negligence as Matter of Law.—In an action for injuries to a passenger received in alighting from a street car, instructions in effect charging that plaintiff was guilty of contributory negligence as matter of law if he attempted to alight from a moving car,[39] are erroneous, although plaintiff was an old woman.[40] The instruction in such case must be definite as to the speed of car,[41] upon which the question of negligence in stepping therefrom depends; must not ignore the plaintiff's physical condition at the time, as where he was suffering from a prior injury;[42] or the fact that he was encum-

36. Alighting at unusual place—Injury by sudden movement of train.—Birmingham R., etc., Co. *v.* Harden, 156 Ala. 244, 47 So. 327.

37. Degree of care.—Florida, etc., R. Co. *v.* Geiger, 64 Fla. 282, 60 So. 753.

38. Alighting proximate cause of injury.—Knoxville Tract. Co. *v.* Carroll, 113 Tenn. 514, 82 S. W. 313.

39. Birmingham R., etc., Co. *v.* Lide (Ala.), 58 So. 990.

In an action for injuries to a passenger in alighting from a street car, the court charged that if plaintiff, in the exercise of due care and prudence on her part and while the car was standing still, was in the act of getting off, and the car was started before she had a reasonable opportunity to do so, etc., she was entitled to recover. Another instruction charged that, though the conductor failed to stop the car when requested while in its usual stopping place, such failure did not justify plaintiff in attempting to leave the car while in motion, and if she did so she assumed the risk, and her injury by reason of such attempt was contributory negligence barring a recovery; also that if plaintiff, "without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, she could not recover." Held, that such instructions were erroneous as in effect charging that plaintiff was guilty of contributory negligence as a matter of law if she attempted to alight from a moving car. Paul *v.* Salt Lake City R. Co., 83 Pac. 563, 30 Utah 41.

40. Aged woman.—An instruction, in an action for injuries to a street car passenger, who was a woman sixty-four years of age, that if the car had not come to a full stop plaintiff was guilty of contributory negligence in stepping off, as she took the chances by stepping off while the car was in motion, is erroneous, for charging that plaintiff was conclusively guilty of contributory negligence under the facts stated. Marsh *v.* Rhode Island Co., 86 Atl. 724, 35 R. I. 270.

41. Definiteness as to speed of car.—In an action against a street railway for injuries to a passenger, a request to charge that, if plaintiff jumped or stepped off the car while in motion, he could not recover, should be refused because it is indefinite as to the speed of the car on which the question of negligence in stepping therefrom would depend. Judgment, 102 N. W. 201, reversed in Cody *v.* Duluth St. R. Co., 102 N. W. 397, 94 Minn. 74.

42. Plaintiff's physical condition.—In a suit against a street railway company for damages sustained by plaintiff in stepping off a car, it was shown that at that time he was suffering from a prior injury. Held, that a charge to the effect that if the car was moving faster than usual when plaintiff got off, and he knew the risk and danger, and was not in-

bered with bundles.[43] The court must explain what would on the evidence constitute contributory negligence.[44] But in Massachusetts,[45] Michigan,[46] and Pennsylvania,[47] it is proper to charge negligence in alighting from a moving car as matter of law.

Failure to Stop Does Not Give Right to Jump Off.—Where, in an action for injuries to a passenger by the alleged premature starting of a street car while he was attempting to alight, defendant claimed that plaintiff attempted to alight while the car was in motion, and before it was brought to a stop, defendant was entitled to an instruction that, while it was defendant's duty to stop the car to afford plaintiff an opportunity to alight, yet its failure to do so would not give plaintiff the right to jump from the moving car.[48]

Getting Off Train Which Started after Coming to Stop.—Where plaintiff, who was injured while alighting from a train, testified that he had several bundles, and started to get off as soon as he could after the train stopped, there is error in a charge to the jury to find for plaintiff if he used reasonable diligence to get off, conditioned as he was, and the train started with a jerk, and caused him to fall, while he was using ordinary care, but that, though the train did not stop long enough, the jury should find for defendant if he tried to get off while the train was moving, and in so doing was himself guilty of a want of ordinary care; and that plaintiff could not recover if the train stopped long enough, and he negligently remained on the train until it started, and then tried to get off.[49] But an instruction in such case which in effect states that unless plaintiff showed an absence of all care in alighting he can recover, is erroneous.[50]

fluenced by the request of the conductor to jump, this was evidence of a want of care, was objectionable as not referring to plaintiff's prior injury, and in not directing the attention of the jury to facts which, if satisfactorily proved, would constitute negligence. Wyatt *v.* Citizens' R. Co., 62 Mo. 408.

43. Encumbered with bundles.—See Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

44. Wyatt *v.* Citizens' R. Co., 62 Mo. 408.

45. The Massachusetts court has held that where the controlling issue was as to whether the car had come to a standstill before plaintiff attempted to alight, the failure to instruct in substances that if it had not come to a stop the defendant was not liable was prejudicial error. Krock *v.* Boston Elev. R. Co., 101 N. E. 968, 214 Mass. 398.

46. Plaintiff, after the conductor of a street car had rung the signal bell to stop the car, was proceeding to alight, holding a parcel under one arm, when he fell and there was a conflict of evidence as to where plaintiff fell, which involved the questions whether the car had stopped and moved on again as plaintiff was in the act of alighting, or whether he attempted to alight before it was at a standstill; an instruction that, if plaintiff attempted to alight before the car was at a standstill, then he could not recover,—the court having also called the jury's attention to the conflict of evidence as to the place of the accident, was sufficient on the question of contributory negligence. Kirchner *v.* Detroit City R. Co., 91 Mich. 400, 51 N. W. 1059.

47. There being no evidence as to whether a passenger got off a street car before it stopped, or did not leave it till it stopped, and it started with a sudden jerk while she was getting off, causing her to fall, and nothing to take case out of the rule that it is negligence for a passenger to alight from a moving train, it is error to charge that, if the jury take the version that the car had not stopped when she undertook to get out, they might find her guilty of contributory negligence, and in that case she would not be entitled to recover, and that, if she undertook to get off the car before it stopped, they might ascertain that she ought to have waited. Neff *v.* Harrisburg Tract. Co., 43 Atl. 1020, 192 Pa. 501, 73 Am. St. Rep. 825.

48. Failure to stop does not give right to jump off.—McDonald *v.* City Elect. R. Co., 137 Mich. 392, 100 N. W. 592.

49. Getting off train which started after coming to stop.—Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

50. An instruction, in an action for injury to a passenger while alighting at a station after the train had started up, that, if the train remained at a standstill for a time reasonably long enough for plaintiff to alight, and she negligently delayed to do so till it was in motion, and got off while it was so in motion, and her injuries were the result of her contributory negligence, she could not recover; and that the meaning of negligence as used in the instruction was the want or

Alighting from Street Car after It Started.—In an action against a street railroad company for injuries received in getting off a street car after it started, where there was evidence which justified the court in submitting the question of plaintiff's negligence in getting off the car as one of fact, it was not error to omit to state what facts, if found to be true, would constitute negligence on plaintiff's part;[51] but an instruction in such case which leaves the jury to treat the necessity that was to govern plaintiff's conduct under the circumstances as an absolute necessity, is error.[52] And where, in an action for injuries to a passenger, the court positively charged that if plaintiff undertook to leave the car after it had started and when it was in actual motion she could not recover, an instruction that if a reasonable stop was made, if plaintiff had given no notice that she desired to alight, if after the car started it occurred to plaintiff that she ought to have gotten off, when she attempted to alight while the car was in motion, and by reason thereof she fell off and was injured, she could not recover, was not objectionable as including elements not necessary to be passed on to acquit defendant of liability.[53]

Construction as Authorizing Passenger to Alight after Train Started.—An instruction, in an action against a railroad company, that if decedent was a passenger, and, when the train was approaching her destination, defendant's employees announced the name of the station, and the train came to a stop within the city limits, but before reaching the depot, and decedent went upon the platform steps under such circumstances as would lead a reasonably prudent person to believe that the train had stopped for passengers, and that, in attempting to get off, the train moved suddenly without sufficient time for her to alight, throwing her from the car, the jury should find for plaintiff, only meant that defendant was liable if decedent went to the platform under the circumstances stated, and, in attempting to alight while the train was standing still, was injured by its sudden movement, and was not objectionable as instructing that decedent could alight after the train started.[54]

Preparation to Alight before Car Stops.—An instruction that the jury must believe that plaintiff was not negligent in preparing to alight from defendant's car while it was in motion sufficiently calls the jury's attention to evidence respecting plaintiff's negligence in attempting to alight from a moving car.[55]

Instruction Presenting Defendant's Theory of Case.—An instruction in its original form which correctly presents defendant's defense of contributory negligence should be given without modification unless the same theory of de-

absence of care, is erroneous in stating in effect that, unless she showed an absence of all care in alighting, verdict should be for her; as her choice to get off, if the train is started before she has time, must not be exercised negligently or unreasonably. Louisville, etc., R. Co. *v.* Coons, 76 S. W. 45, 25 Ky. L. Rep. 509.

51. Alighting from street car after it started.—Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

52. Necessity for plaintiff's conduct.—A requested instruction that if the jury find that plaintiff signaled for the car to be stopped, and after it had stopped stepped on the footboard, but "voluntarily and without necessity" stepped to the ground while the car was in motion, verdict should be for defendant, is objectionable as leaving the jury to treat the necessity that was to govern plaintiff's conduct under the circumstances as an absolute necessity; the evidence showing she was crippled in her left limb from rheumatism, that when the car started she was in the act of putting her left foot on the ground, and that in the effort to alight she was holding to the handle bar of the car; she thus, by defendant's negligence, being put in a position of danger calculated to alarm and disconcert her and prevent exercise of clear judgment, and therefore being held only to ordinary care under the circumstances. United R., etc., Co. *v.* Beidelman, 52 Atl. 913, 95 Md. 480.

53. Champane *v.* La Crosse City R. Co., 121 Wis. 554, 99 N. W. 334.

54. Construction as authorizing passenger to alight after train started.—St. Louis, etc., R. Co. *v.* Rush, 93 Ark. 631, 123 S. W. 804.

55. Preparing to alight before car stops.—Judgment, 71 Ill. App. 162, affirmed in Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884.

fense has been embodied in an instruction.[56]

Repetition of Instructions.—In an action against a street railroad for injuries to a passenger, where the court charged that, if plaintiff attempted to alight from the car after it had started, and such act was negligence on his part, the jury should find for defendant, it was not error to refuse a requested charge that, if plaintiff attempted to alight from the car while it was in motion, he could not recover.[57] But where, in an action for death of a passenger by being thrown from a street car, certain instructions presented the theory that if deceased voluntarily placed herself in a position of peril or voluntarily left the car "without the knowledge of the conductor or motorman in charge of the car or before they could interpose to prevent her," the carrier was not liable, such instructions did not cover an instruction that if decedent of her own volition got off the car while in motion and in consequence of her own act was thrown to the ground, and sustained injuries of which she afterwards died, the verdict must be for defendant, whether the conductor or motorman knew or might have known that she was in the act of getting off the car, or whether they took any steps to prevent her doing so.[58]

§ 2962. Disobedience of Rules of Carrier.—In a passenger's action for injuries, where the evidence that a certain rule had been established was uncontradicted, and there was no evidence of any positive act abolishing it, a charge requiring the jury to determine whether the "company had no such rule," or whether, in case such rule had been established, "the same had been abrogated by positive act of the company," submitted questions not raised by the evidence.[59]

Degree of Attention to Be Given Notice.—An instruction, in an action by a passenger against a carrier for injuries sustained by falling off a poorly-lighted depot platform, that it was the duty of the passenger to exercise such attention to a notice given to passengers not to leave the train at a certain place "as a passenger of ordinary attention would have done," was erroneous and misleading.[60]

Whether Rule Abrogated.—Where the jury are to determine whether a certain rule has been so generally disregarded as to authorize the belief that it has been abrogated, it is improper to instruct that such rule might be regarded as abrogated if it has not been "kept in full force and effect."[61]

§ 2963. Acts by Permission or Direction of Carrier's Employees.—In a passenger's action for injuries sustained by reason of acting on the invitation

56. Theory of case.—See ante, "Enunciating Theories of Case," § 2947.

In an action for death of a passenger by being thrown from a street car, defendant requested the court to charge that if deceased, of her own volition, got off from the car while in motion, and in consequence of her own act in getting off was thrown to the ground and sustained injuries from which she died, plaintiff could not recover though the car had not sufficient guards to the seats or was unduly crowded or was running at an unusual rate of speed, or though the track was rough and caused jerks and shocks of the car as it proceeded over the same. The court modified the instruction by adding a clause, unless the jury believe that the crowded condition of the car, the insufficiency of the guards on the seats or the running at an unusual speed or the roughness of the tracks, jerks, etc., or all combined, was the proximate cause of the injury. Held, that the instruction in its original form correctly presented defendant's defense of contributory negligence, and that the modification was improper. Van Horn *v.* St. Louis Trans. Co., 95 S. W. 326, 198 Mo. 481.

57. Repetition of instructions.—West Chicago St. R. Co. *v.* McCafferty, 220 Ill. 476, 77 N. E. 153. See ante, "Repetition of Instructions," § 2951.

58. Van Horn *v.* St. Louis Trans. Co., 198 Mo. 481, 95 S. W. 326.

59. Disobedience of rules of carrier.—Houston, etc., R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

60. Degree of attention to be given notice.—Texas, etc., R. Co. *v.* Taylor (Tex. Civ. App.), 58 S. W. 166, reversed on rehearing 58 S. W. 844.

61. Whether rule abrogated.—Houston, etc., R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

or obeying the directions of the employees of the carrier in charge of its conveyance where the defense is that the passenger acted voluntarily without suggestion, order or direction from the employees in charge, the instructions should not ignore the question whether the injured passenger was directed to take the place he did by the carrier's servants,[62] or exclude the idea of his voluntarily taking the position,[63] and does not do so where the charge stated that the plaintiff insisted that the person injured "was ordered off by the party in charge of the train or car," and it is incumbent on him to satisfy the jury of the fact.[64]

What Amounts to An Instruction.—In an action for injuries received in attempting to step from a train, it was not error to refuse to instruct that the brakeman's calling the station was not an invitation to alight from the train, or, if it was, that it was not an invitation to alight until the train had come to a stop at the station, where the court instructed that plaintiff "was bound to use due care to ascertain whether the train reached the place designed for passengers to alight, and had no right to assume it simply because the brakeman had announced the station, and the train had stopped. She must use her senses."[65]

Act of Passenger Such as Prudent Person Would Not Attempt.—In an action for injuries to a passenger by reason of his compliance with the order or direction of the servants in charge of the carrier's conveyance, the court should charge that where the act of the injured passenger is such as a person of ordinary prudence would not attempt, there can be no recovery.[66]

Riding on Engine.—An instruction to the effect that if the jury believe the injured passenger was rightfully on the engine by invitation and direction of defendant's servant, that he used ordinary care for his personal safety, and was injured by the carelessness of defendant's servants, the plaintiff could recover, but if they did not believe a man of ordinary care and prudence would ride upon an engine as the injured passenger is shown to have done, plaintiff could not recover, are not erroneous, as unfair statements of the issues, and do not tend to mislead the jury into understanding that plaintiff might recover,

62. Deceased, a shipper of stock, was entitled to transportation from the switch yard to the stock yards. The only means furnished were the top of a stock car or the engine. By direction of the engineer, he got upon the footboard of the engine. The defendant asked for the instruction that common prudence dictated that he should put himself in the safest place possible, and, if the engine was not as safe as the car, he was guilty of negligence. Held, that the instruction was properly refused, as it ignored the question whether the deceased was directed to take the place he did by defendant's servants. Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

63. An instruction that if defendants' agents permitted a person to take a position on the steps of one of their cars, and while standing there he was killed, then deceased was guilty of no negligence, is incorrect, as excluding the idea of his voluntarily taking the position, there being no evidence to the point. Huelsenkamp *v.* Citizens' R. Co., 34 Mo. 45.

64. In an action for injuries sustained in alighting from a train, objection that the court failed in its charge to submit to the jury the defense relied on by defendant, namely, "that if plaintiff voluntarily, and without any suggestion or order or direction from either the conductor or other employee of defendant company in charge of said train, left the train, then she would not be entitled to a recovery," is without merit, where the judge charged the jury that the plaintiff insisted that the person injured "was ordered off by the conductor or party in charge of the train, and it is incumbent on her to satisfy the jury of this fact." Southern R. Co. *v.* Coursey, 41 S. E. 1013, 115 Ga. 602.

65. What amounts to an instruction.—Barry *v.* Boston, etc., R. Co., 172 Mass. 109, 51 N. E. 518.

66. Act of passenger such as prudent person would not attempt.—In an action against a railroad company for injuries, the defendant requested the court to charge that if plaintiff undertook to board the train while in motion, and was injured, she was guilty of negligence, and the court added: "Unless she was directed by some employee of defendant in charge of the train, and her obedience to such instruction would not lead her into apparent danger such as a prudent person would not assume." Held, that such instruction, without the modification, was more favorable than the defendant was entitled to. Pence *v.* Wabash R. Co., 90 N. W. 59, 116 Iowa 279.

although deceased was negligent in getting on the engine and remaining there.[67]

§ 2964. Acts in Emergencies.—Predicating Lack of Coolness on Sudden Danger.—In an action for injuries to a passenger attempting to board a passenger train, an instruction that "one brought into sudden danger by the wrong of another is not expected to act with coolness and deliberation as moved a reasonable man under ordinary circumstances" was erroneous for attempting to predicate, as a matter of law, lack of coolness and deliberation upon merely "sudden danger," however slight that danger might have been.[68]

Jumping from Car to Avoid Danger.—In a passenger's action for injuries received in jumping from a train or car to avoid a collision[69] or derailment,[70] the defendant is entitled to an instruction that, if plaintiff so acted under circumstances that would not have justified such an act by a prudent, careful man, and that if such act caused the injury, he could not recover,[71] and the plaintiff is entitled to a charge that if he acted as a man of ordinary prudence in a like situation would have acted then, he was not guilty of contributory negligence, for the question of contributory negligence is not to be determined by the result of his attempt to escape but by whether his attempt was the act of a reasonably prudent man.[72] An instruction in such case which uses the word "danger" instead of apparent danger" in describing the circumstances created by the defendant's servants, is not objectionable.[73] But it must be accurate in stating the law[74] applicable to the evidence[75] and not misleading.[76]

67. Riding on engine.—Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

68. Predicating lack of coolness on sudden danger.—Alabama, etc., R. Co. *v.* Bates, 149 Ala. 487, 43 So. 98.

69. Jumping from car to avoid danger.—Howell *v.* Lansing City Elect. R. Co., 136 Mich. 432, 99 N. W. 406.

70. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

71. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

72. In an action for death of a passenger, plaintiff's evidence tended to show that he was in the negro coach, near the door, getting a drink of water, when the first shock of the wreck was heard. Just before the train was wrecked, the evidence showed several jerks and jolts were felt. The deceased was a boiler maker, and worked in a railroad shop. He was found just outside the coach which had turned over after being derailed. Held, that an instruction that if the negligence of the defendant endangered the deceased, and in attempting to escape that danger he was injured, the question of his contributory negligence should not be determined by the result of the attempt to escape, but by whether his attempt to escape was the act of a reasonable man, was proper. St. Louis, etc., R. Co. *v.* Evans, 137 S. W. 568, 99 Ark. 69.

73. Use of word "danger" instead of "apparent danger."—Where, in an action for the death of a trolley car passenger jumping from a car onto a parallel track in front of an approaching car to avoid danger of a collision by another car running into the car on which he was riding, the court charged that it was not sufficient for plaintiff to prove that decedent might have been frightened and excited, but that he must prove that the circumstances created by defendant or its servants were such as to place a reasonable man under the immediate apprehension of "danger," a charge that if decedent was not in danger of being injured if he had remained seated, but that he jumped directly in front of an approaching car without stopping to take any care for his safety, the verdict must be for defendant, was not objectionable because of the use of the word "danger," instead of the words "apparent danger." Adamson *v.* Norfolk, etc., Tract. Co., 69 S. E. 1055, 111 Va. 556.

74. Must be accurate.—In an action for injuries to a street car passenger who leaped from the car after derailment, an instruction that if plaintiff, at the time he jumped, was acting under a reasonable apprehension, that is to say, the apprehension of a prudent man, that under the circumstances he might receive an injury, he would not be guilty of contributory negligence in jumping from the car, was inaccurate. Georgia R., etc., Co. *v.* Gilleland, 66 S. E. 944, 133 Ga. 621.

75. In an action against a street railway for injuries to a passenger who left the car just before the occurrence of a then imminent collision, where his evidence was that he was thrown therefrom while the car was going around a curve by its centrifugal force, which broke his hold, and there was no evidence that he jumped from the car, there was no occasion to submit to the jury the question of his jumping from the car. Howell *v.* Lansing City Elect. R. Co., 99 N. W. 406, 136 Mich. 432.

76. Where plaintiffs' decedent, a drover,

Coupling Made at Great Speed.—In an action for personal injuries sustained by a passenger by reason of a train about to be coupled onto a car in which he had taken passage being run against the car at too great a rate of speed, after instructing the jury that plaintiff was bound to use ordinary diligence to avoid being injured, it was not error, by an instruction commencing with the words, "if you think," to refer it to the jury whether or not, under the circumstances, he ought to have left the car or taken the seat nearest to where he stood when he discovered the danger.[77]

Street Car Starting While Passenger Boarding It.—An instruction, in an action for injury to a street railway passenger, after advising the jury that plaintiff could not recover if his own negligence contributed to the accident; that the fact that plaintiff did not let go of the car, but kept his hold on the rail, and ran alongside trying to get on after it had started, did not necessarily show that he was guilty of contributory negligence; that if by reason of the starting of the car an emergency arose, then, even though his action was ill judged, if under the facts he acted as a man of ordinary prudence in a like situation, and had used ordinary care in his original attempt to get on the car, he was not guilty of contributory negligence—correctly stated the law, and without confusion.[78]

§ 2965. Injury Avoidable by Care of Carrier.—Assuming That Position of Passenger Dangerous.—In an action for the death of a passenger from injuries received while riding on a car, an instruction that if the passenger voluntarily left his seat, and took up the position in which he was injured, and that he would not have been injured had he remained in his seat, no recovery can be had unless the person in charge of the car saw him in his position of danger in time to have prevented the injury, is properly refused, as it assumes that the position which the passenger took was dangerous as a matter of law, and that no recovery could be had, though the injury was caused by the negligent management of the train.[79]

Passenger Alighting from Moving Car.—In an action for injuries to a passenger on a street car, an instruction that if defendant's conductor knew of plaintiff's negligent conduct in alighting from a street car, and by the exercise of proper care could have avoided the consequences of such negligence, and failed so to do, and the conductor's failure was the immediate cause of the injury, defendant could not rely on plaintiff's contributory negligence as a defense, was erroneous, for failure to define plaintiff's "negligent conduct."[80] The charge in such case, in addition to defining plaintiff's negligent conduct, should not exclude the point whether, in the exercise of reasonable foresight, the conductor could have anticipated that plaintiff would be injured,[81] should not

died from injuries received in jumping from a moving freight train to avoid injury from the derailment of a train, an instruction, in an action for his death that the court sitting as a jury is entitled to infer the absence of fault on the part of the deceased from a general and known disposition of men to take care of themselves and keep out of the way of difficulty, was misleading, as not justified by the facts. Western Maryland R. Co. *v.* State, 53 Atl. 969, 95 Md. 637.

77. **Coupling made at great speed.**—Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

78. **Street car starting while passenger boarding it.**—Burger *v.* Omaha, etc., St. R. Co., 139 Iowa 645, 117 N. W. 35.

79. **Assuming that position of passenger dangerous.**—Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

80. **Passenger alighting from moving car.**—Little Rock Tract., etc., Co. *v.* Kimbro, 75 Ark. 211, 87 S. W. 121, rehearing denied in 87 S. W. 644.

81. In an action for injuries to a passenger, the court charged that though plaintiff was negligent, and the conductor knew of his negligent conduct, such negligence was not a defense, if the conductor's failure to avoid the consequences thereof was the immediate cause of the injury, and that if such injury was caused by plaintiff's imprudently attempting to alight from a moving car, or from his effort to alight in an unskillful or unsafe manner, the jury would find for defendant, unless they found that the conductor knew of plaintiff's negligence in so attempting to alight in time to have pre-

be calculated to mislead[82] and must conform to the evidence.[83] But an instruction that if plaintiff alighted from a moving street car without notice to the conductor, or without his knowledge, he did so at his peril, provided the conductor "could not, by the exercise of the highest degree of care and caution, avoid injury" to him; and that if the conductor, knowing that he was about to alight, "or by the exercise of extraordinary care * * * could have known it, started the car," etc., plaintiff could recover, is not erroneous, where the jury were also told that it was not incumbent on the conductor to anticipate such action on plaintiff's part.[84]

Passenger Riding on Running Board.—In an action against a street-railway company for the death of a passenger from injuries received while riding on a running board used to step on in getting on and off the car, an instruction that if the passenger voluntarily left his seat in the car to ride on the running board, and that he would not have been injured had he not been standing thereon, and if the position on the running board was an unsafe one for passengers, no recovery can be had, is properly refused, since it prohibits a recovery notwithstanding the carrier's falure to exercise the greatest care to carry him safely, though he had voluntarily assumed an unsafe position.[85]

Carrier's Closing Space Left for Passenger between Cars at Crossing.—Where the evidence is conflicting as to whether defendant exercised sufficient care to give warning before closing the space left for the passage of persons between cars at a crossing, it is proper to instruct to find for defendant if plaintiff would not have been injured except for his contributory negligence, unless when he came in peril defendant's employees could, by the exercise of ordinary care, have discovered his peril and prevented the injury.[86]

§ 2966. Presumptions and Burden of Proof.—Burden of Proof Contributory Negligence.—In an action by a passenger against a carrier to recover for injuries, it is not error to instruct that, if such passenger had made out a prima facie case, he was entitled to a verdict, unless the carrier established an affirmative defense by a preponderance of the evidence, where the whole of the instruction showed that the court was simply instructing that contributory negligence of the passenger was an affirmative defense.[87] An instruction that plaintiff must prove that under all the circumstances in the case he was in

vented the injury, and could by the use of ordinary care have prevented the injury, and failed to do so. Held error, as excluding the point whether, in the exercise of reasonable foresight, the conductor should have anticipated that plaintiff would be injured by alighting when the car was in motion. Little Rock Tract., etc., Co. *v.* Kimbro, 87 S. W. 121, 75 Ark. 211, rehearing denied in 87 S. W. 644.

82. Misleading instructions.—In an action against a street railroad for injuries to a passenger, plaintiff claimed that the car suddenly moved forward while he was alighting, and there was testimony that the car was moving at the time plaintiff alighted. The court charged that if the conductor knew of plaintiff's negligent conduct, and could, by the exercise of proper care, have prevented the injury caused thereby, and did not do so, the contributory negligence of plaintiff would be no bar to his recovery, notwithstanding the jury might find that the conductor did not and could not have had any reason to anticipate that an injury would probably be caused. Held, that the instruction was calculated to mislead, since, if the car was moving so slowly that the conductor, by reasonable foresight, could not have anticipated that plaintiff would be injured, it was not the conductor's duty to make an effort to avoid such consequence. Rehearing, 87 S. W. 121, denied in Little Rock Tract., etc., Co. *v.* Kimbro, 87 S. W. 644, 75 Ark. 211. See ante, "Misleading Instructions," § 2949.

83. Conformity to evidence.—See ante, "Applicability to Evidence," § 2929.

84. Brown *v.* Seattle City R. Co., 16 Wash. 465, 47 Pac. 890.

85. Passenger riding on running board.—Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

86. Carrier's closing space left for passage between cars at crossing.—Louisville, etc., R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

87. Burden of proof contributory negligence.—Henry *v.* Grant St. Elect. R. Co., 24 Wash. 246, 64 Pac. 137.

the exercise of due care is improper. But in Iowa [88] and Massachusetts [89] an instruction that the plaintiff must prove that he was in the exercise of due care is proper.

Burden Under Statute of Georgia.—In an action to recover damages for injuries sustained in alighting from a moving car, it was not error in the presiding judge to read to the jury § 2321 of the Civil Code, which provides that a railroad company shall be liable for damages to persons by the running of locomotives or cars, unless the company shows that its agents have exercised all ordinary and reasonable care—the presumption in all cases being against the company—when, in immediate connection therewith, the judge instructs that the duty of carriers to passengers is that of extraordinary diligence, and that the burden is on the carrier to show such diligence, when the injury has been made to appear.[90]

Construction as Imposing Burden on Plaintiff.—A charge in an action against a street railway company for negligence, setting out plaintiff's theory, and stating that the burden is on plaintiff as to the act of negligence "throughout the case," is not objectionable as requiring the plaintiff to prove herself free from contributory negligence, where no reference is made to that.[91]

Requiring Carrier to Prove Passenger Guilty of Gross Negligence.—It is error to instruct that, when the injury has been shown, the carrier, to escape liability, must prove that the passenger was guilty of gross negligence.[92]

Request Covered by Instruction Already Given.—See ante, "Repetition of Instructions," § 2951.

Obviating Objection by Subsequent Instruction.—See ante, "Objections Obviated by Other Instructions," § 2952.

§ 2967. Comparative Negligence Rule under Georgia Statute.—In a suit by a passenger against a railroad company to recover damages for a personal injury, where the pleadings and evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it is error for the court to omit an instruction to the jury embodying the principle expressed in the Civil Code, § 3830, that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recovery." [93] In such

88. In an action by a passenger for personal injuries, an instruction that if the plaintiff failed to use ordinary care, and such failure contributed to the injury, defendant was not liable, and that, as to the issue of plaintiff's contributory negligence, the burden of proof was on him to establish by a preponderance of the evidence that he was in the exercise of ordinary care and caution, was not misleading as to the burden with reference to contributory negligence. Hutcheis *v.* Cedar Rapids, etc., R. Co., 103 N. W. 779, 128 Iowa 279.

89. Plaintiff, while standing up between the seats of an open horse car, there being no unoccupied seats therein, was thrown down and injured, in consequence of the rapid driving of the car around a curve. Held, that an instruction that plaintiff must prove that, under all the circumstances in the case, she was in the use of due care, was proper and sufficient. Lapointe *v.* Middlesex R. Co., 144 Mass. 18, 10 N. E. 497.

90. Burden under statute of Georgia.—Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840.

91. Construction as imposing burden on plaintiff.—Peck *v.* St. Louis Trans. Co., 178 Mo. 617, 77 S. W. 736.

92. Requiring carrier to prove passenger guilty of gross negligence.—Lincoln St. R. Co. *v.* McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736.

93. Comparative negligence rule under Georgia statute.—Southern R. Co. *v.* Gore, 128 Ga. 627, 58 S. E. 180.

Where, in an action by a passenger for personal injuries, the court charged that, if plaintiffs and the agents of the company were both in fault, plaintiff could recover, but the damages should be diminished in proportion to the amount of default attributable to him, failure to include the qualification of Civ. Code 1895, § 3830, that, if plaintiff by ordinary care could have avoided the consequences of defendant's negligence, he could not recover, was error. Southern R. Co. *v.* Gore, 58 S. E. 180, 128 Ga. 627.

In an action by a passenger against a railway company to recover for injuries alleged to have been caused by the negligence of the defendant, it is not erroneous to charge that if the defendant used all reasonable care and diligence in taking care of the plaintiff, then it would not

action the fact that the court read to the jury as a whole Civ. Code 1895, § 2322, providing that no person shall recover damages where the injury to himself * * * caused by his own negligence, and that if both parties are to blame, plaintiff may recover the amount of the damages less the amount attributable to him, thus giving each principle contained therein, is not ground for new trial.[94] But it is error to charge the law of Code, § 2972, providing that if plaintiff, by ordinary care, could have avoided the consequences to himself, caused by defendant's negligence, he shall not recover, but that, in other cases, defendant is not relieved, though plaintiff may in some way have contributed to the injury sustained, in immediate connection with the latter part of § 3034, providing that, if complainant in an action against a railroad company, and the agents of the company, were both at fault, the former may recover, but that the damages shall be diminished by the jury in proportion to the amount of default attributable to him, without making the proper explanation as to the class of cases to which the latter section is applicable.[95] The error consisted in stating in immediate connection with each other, and without proper explanation, two distinct rules of law, and thus qualifying the former by the latter, which is not the purpose of the statute.[96]

Defining Ordinary Care or Requiring the Doing of Particular Thing.—The judge should not inform the jury that ordinary care on the part of a passenger requires him to do some particular thing, such as looking out for danger. Charges that "If the plaintiff could have avoided the consequences of its negligence by ordinary care in looking out for danger and avoiding it," and that "If there was a safe place on one side of the car, and he chose to alight on the other side, which was not safe, and that unsafe condition would have been apparent to him had he used ordinary care in looking out for danger, and by ordinary care he could have avoided injury, he could not recover," were not accurately expressed. The expressions "by ordinary care in looking out for danger and avoiding it," and "had he used ordinary care in looking out for danger," may have led the jury to understand that the court instructed them, as matter of law, that under the evidence ordinary care required the plaintiff to look out for danger.[97]

Plaintiff's Negligence Preponderating Cause.—Where the court, after reading from the Civil Code, § 2322, immediately added, "but in this connection I charge you that the plaintiff can in no event recover if he could by the exercise of ordinary care and diligence have prevented the injury," such instruction is not open to criticism as authorizing a recovery although the plaintiff's negligence may have been the preponderating cause of the injury.[98]

§ 2968. Verdict and Findings.—Right to Special Findings.—In a passenger's action for personal injuries, where the statute gives either party the right upon the trial to present questions of fact for the finding of the jury, it is error for the court to refuse a plain unambiguous question presenting the main issue in the case, as, for instance, whether plaintiff in fact alighted while

be liable, but if it did not use such care and diligence it would be liable. This is essentially true when the charge taken in connection with other instructions given to the jury fairly submits the rule which would acquit the defendant of liability, namely, its freedom from negligence in the transaction, the want of ordinary care on the part of the plaintiff by the exercise of which he could have avoided the consequences to himself and the rule as to the measure of damages in cases of contributory negligence. Central R. Co. *v.* Smith, 76 Ga. 209, 2 Am. St. Rep. 31.

94. Macon, etc., R. Co. *v.* Anderson, 121 Ga. 666, 49 S. E. 791.

95. Macon, etc., R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460.

96. Americus, etc., Railroad *v.* Luckie, 87 Ga. 6, 13 S. E. 105; Macon, etc., R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460.

97. Defining ordinary care or requiring particular thing.—Turner *v.* City Elect. R. Co., 134 Ga. 869, 68 S. E. 735.

98. Plaintiff's negligence preponderating cause.—Southern R. Co. *v.* Nichols, 135 Ga. 11, 68 S. E. 789. See, also, Southern R. Co. *v.* Sams, 136 Ga. 762, 71 S. E. 1106

the train was still in motion.[99] But where plaintiff sued to recover damages for injuries sustained by being thrown from the rear platform of defendant's car as she was about to alight by a premature start and sudden jerk of the car forward, the court properly refused to submit to the jury for special findings whether plaintiff before she alighted was cautioned by the conductor to wait until the car stopped or until the usual stopping place had been reached, as such question was not a controlling one.[1]

Form of Questions.—Where an issue was whether plaintiff was guilty of contributory negligence in standing on the platform of a car, a submission of a question to the jury, whether he was guilty of contributory negligence, is sufficient in form, though the court might have submitted the question whether he voluntarily stood on the platform, or whether by ordinary diligence he could have found room in the cars.[2]

Propriety of Finding of Exercise of Care.—Where a special verdict stated that plaintiff, who sued for injuries received as a passenger, exercised care and caution by remaining seated until thrown from his seat, that part of the verdict stating that he exercised care and caution was not wholly improper.[3]

Construction of Findings.—Where, in an action against a railroad company, it appeared from the special verdict that plaintiff entered a passenger car and seated himself on a seat provided for the use of passengers and paid his fare, and that near the middle of a curve the train was thrown from the track, whereby he was injured, it appeared that he was free from contributory negligence without taking into account that part of the verdict which stated that he was exercising such care, prudence, and caution as prudent persons would and do under like circumstances.[4]

Finding Inconsistent and Contradictory.—In a passenger's action for personal injuries, where the jury brings in a special verdict, which is inconsistent and contradictory on vital points, no judgment should be entered on it.[5]

99. Right to special findings.—In an action by a passenger against a railway company for personal injuries, it appeared that the train ran past its usual stopping place at the station to which plaintiff was going, and that the engineer backed the train as quickly as he could operate the engine. On hearing the name of the station called, plaintiff got up and proceeded to alight, when, as she testified, the train suddenly backed just as she was stepping off, throwing her to the ground, and breaking her hip. Defendant contended that plaintiff attempted to alight while the train was backing, and, in support of this contention, introduced the evidence of other passengers, who were in the car behind the one in which plaintiff was riding, that they got off at the front end of their car when the train first stopped, and walked towards the rear of the train a distance of twenty-five or thirty feet, when they were attracted by the fall of plaintiff, who had gotten out at the front end of her car, and turned and walked back about ten feet to where she had fallen. Held, that defendant was entitled to a special finding by the jury on the question of fact presented by this evidence. Sherwood *v.* Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773.

1. Dykstra *v.* Grand Rapids, etc., R. Co., 165 Mich. 13, 130 N. W. 320.

2. Form of question.—Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442.

3. Propriety of finding of exercise of care.—Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

4. Construction of findings.—Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

5. Finding inconsistent and contradictory.—A train on which plaintiff was a passenger was stopped before reaching wrecked tanks containing burning naphtha, and the passengers were conducted to the other side of the wreck, 250 feet from the tanks, to await another train. Plaintiff thereafter went within eighty-five feet of the tanks, and was injured by an explosion. A special verdict found that if he had remained at the place designated for the passengers, "he would not have been seriously injured," and that he "unnecessarily, and from motives of curiosity and pleasure," went nearer to the tank, and that his injuries were caused by so doing; but also found that defendant, in the exercise of ordinary prudence, should have known of plaintiff's position in time to warn him of the danger, "and should have anticipated that he would go nearer to the tank." It also found that plaintiff was "not guilty of any want of ordinary care that contributed to his injury," and that a prudent man, in the same position, would not have expected an explosion, but that defendant ought to have expected an explosion, and did not use reasonable care, and was

Right to Judgment Not Withstanding General Verdict for Plaintiff.—Where, in an action for negligence against a railroad company, the special findings of the jury showed that the road had not used ordinary care, but also showed that the plaintiff had failed to use such care, it was proper to enter a verdict for the road, although the jury had found for plaintiff.[6] But where plaintiff was injured by the premature starting of a street car while he was attempting to alight, and the jury specially found there was no evidence that plaintiff could have released his hold on the car and have avoided being dragged, the court could not presume, on a motion for judgment notwithstanding a general verdict in plaintiff's favor, that he could have released his hold by the exercise of ordinary care, and therefore was guilty of contributory negligence.[7]

guilty of negligence, which was the proximate cause of the injuries. Held, that the verdict was too inconsistent to support a judgment for either party. Conroy *v.* Chicago, etc., R. Co., 70 N. W. 486, 96 Wis. 243.

6. Right to judgment not withstanding general verdict for plaintiff.—Adams *v.* Louisville, etc., R. Co., 82 Ky. 603, 6 Ky. L. Rep. 686.

The jury found, specially, that plaintiff went on the train to assist in placing an invalid in one of the cars; that he did so at the request of the invalid's family; that plaintiff knew that the train was in motion when he attempted to leave it; that the train was then moving at the rate of four and a half miles per hour, and that the conductor knew that plaintiff was on the train when it started, and that he intended leaving it, but that he did not know plaintiff was on the steps of the car, or in the act of alighting at the time he did. Held, that there was no such conflict between the answers and a general verdict for plaintiff as would entitle defendant to judgment notwithstanding the general verdict. Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

7. Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

CHAPTER XXV.

Ejection of Passengers.

I. Rights and Liabilities of Carrier in General, §§ 2969-2973.
  A. In General, § 2969.
  B. Liability for Acts of Employees, §§ 2970-2972.
    a. In General, § 2970.
    b. Unauthorized Ejection, § 2971.
    c. Wrongful Acts During Ejection, § 2972.
  C. Proximate Cause of Injury, § 2973.
II. Grounds for Election, §§ 2974-3012.
  A. In General, § 2974.
  B. Persons Objectionable as Passengers and Disorderly Conduct, §§ 2975-2976.
    a. In General, § 2975.
    b. Disorderly Conduct—Drunkenness, § 2976.
  C. Disobedience of Carrier's Rules, §§ 2977-2978.
    a. In General, § 2977.
    b. Particular Rules, § 2978.
  D. Failure to Procure Ticket or Pay Fare, §§ 2979-3012.
    a. Rights and Liabilities of Carrier in General, §§ 2979-2986.
      (1) In General, § 2979.
      (2) Allowing Time to Procure Fare or Produce Ticket, § 2980.
      (3) Duty to Ascertain as to Purchase of Ticket, § 2981.
      (4) Where Ticket Lost, § 2982.
      (5) Failure of Carrier to Furnish Evidence of Right to Continue Journey, § 2983.
      (6) Refusal to Pay Excessive or Second Fare, § 2984.
      (7) Nonpayment of Fare of Child, § 2985.
      (8) Nonpayment of Past Fare, § 2986.
    b. Requiring Ticket As Condition Precedent to Right of Carriage, §§ 2987-2988.
      (1) In General, § 2987.
      (2) Carriage on Freight Trains, § 2988.
    c. Defective or Invalid Ticket, §§ 2989-3005.
      (1) In General, § 2989.
      (2) Failure to Comply with Conditions of Ticket, §§ 2990-2994.
        (a) In General, § 2990.
        (b) Conditions against Transfer, § 2991.
        (c) Conditions as to Detachment of Coupons, § 2992.
        (d) Conditions as to Identification, Signature and Stamping, § 2993.
        (e) Conditions as to Use of Mileage Book, § 2994.
      (3) Time Limit of Ticket Expired, § 2995.
      (4) Passenger on Wrong Train, or Route, or Carried Past Destination, §§ 2996-3001.
        (a) Passenger on Wrong Train, §§ 2996-2997.
          aa. In General, § 2996.
          bb. Train Not Stopping at Passenger's Destination, § 2997.
        (b) Passenger on Wrong Route, § 2998.
        (c) Passenger on Wrong Road, § 2999.
        (d) Passenger on Wrong Part of Road, § 3000.
        (e) Passenger Carried Past Destination, § 3001.
      (5) Effect of Mistake of Employee Issuing Ticket, § 3002.
      (6) Effect of Mistake of First Conductor, § 3003.
      (7) Effect of Collateral Agreement with Ticket Agent, § 3004.

(8) Conclusiveness of Ticket or Transfer as between Passenger and Conductor, § 3005.
d. Ejection through Mistake of Holder of Valid Ticket, § 3006.
e. Extra Fares or Charges, §§ 3007-3008.
(1) In General, § 3007.
(2) Failure to Procure Ticket, § 3008.
f. Tender or Payment of Fare to Avoid Ejection, §§ 3009-3012.
(1) Duty to Pay Fare to Avoid Ejection, § 3009.
(2) Effect of Tender of Fare, §§ 3010-3012.
(a) Before Ejection, § 3010.
(b) After Ejection Commenced, § 3011.
(c) Effect as Waiver of Rights under Ticket, § 3012.
III. What Constitutes Ejection, § 3013.
IV. Place of Ejection, §§ 3014-3015.
A. In General, § 3014.
B. Statutory Regulation, § 3015.
V. Manner of Ejection, §§ 3016-3018.
A. In General, § 3016.
B. Use of Force, § 3017.
C. Ejection from Moving Train or Car, § 3018.
VI. Right of Passenger to Resist Ejection, § 3019.
VII. Ejection of Passenger under Disability, §§ 3020-3021.
A. In General, § 3020.
B. Drunken Passenger, § 3021.
VIII. Repayment of Fare or Return of Ticket, § 3022.
IX. Readmission after Ejection, §§ 3023-3024.
A. Right to Readmission, § 3023.
B. Effect of Readmission, § 3024.
X. Companies and Persons Liable, §§ 3025-3027.
A. In General, § 3025.
B. Connecting and Co-Operating Carriers, § 3026.
C. Carrier's Employees, § 3027.

§§ 2969-2973. Rights and Liabilities of Carrier in General—§ 2969. In General.—The rightful ejection of a passenger [1] in a proper manner [2] and at a proper place,[3] does not render the carrier liable in damages.[4] But a carrier is liable for an unauthorized ejection,[5] notwithstanding its employees acted in

1. Rightful ejection.—As to grounds for ejection of passengers see post, "Grounds for Ejection," §§ 2974-3012.

2. Manner of ejection.—See post, "Manner of Ejection," §§ 3016-3018.

3. Place of ejection.—See post, "Place of Ejection," §§ 3014-3015.

4. Wenz *v.* Savannah, etc., R. Co., 108 Ga. 290, 33 S. E. 970; Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163.

5. Liability for unauthorized ejection.—New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209; Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Seaboard, etc., R. Co. *v.* O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A., N. S., 472; Regner *v.* Glens Falls, etc., R. Co., 74 Hun 202, 26 N. Y. S. 625, 56 N. Y. St. Rep. 300. See, generally, post, "Grounds for Ejection," §§ 2974-3012.

Ejection in kindly manner.—Where a passenger who had delivered his ticket to a conductor was subsequently ejected by the latter who took him by the arm, led him to the platform, and he thereupon got off, although this was done in a kindly manner and he did not resist so as to require violence, yet the company is liable. Georgia R. Co. *v.* Homer, 73 Ga. 251.

Instances of unauthorized ejection.—The ejection of one riding upon a traction car and asserting his right so to ride by virtue of a transfer is unlawful where such right exists by virtue of a valid ordinance, notwithstanding such ordinance at the time of such ejection is in dispute and is being made the subject of test litigation. Chicago Union Tract. Co. *v.* Brethauer, 125 Ill. App. 204, judgment affirmed in 79 N. E. 287, 223 Ill. 521.

While plaintiff's wife was traveling on defendant's train as a passenger with her four children, one of them, aged thirteen

good faith.[6] And to warrant a recovery for an illegal ejection, it is not necessary that the passenger should have suffered any physical injury.[7] The ejection of a passenger on an illegal ground is not rendered legal by the fact that a ground which would have warranted the ejection is afterwards discovered. Thus the fact that the carrier subsequently learned that baggage which had been checked by the passenger contained merchandise does not relieve it from liability for having unlawfully ejected him from its train on the ground that the limit of his ticket had expired.[8] As to the liability of the carrier for ejecting a passenger at an improper place[9] or in an improper manner,[10] and for negligence in ejecting a passenger under disability,[11] see elsewhere.

Statutes Requiring Separation of the Races.—To justify a street railroad company in causing the arrest and ejection from its cars of a passenger for a violation of a statute providing that street railways shall provide separate accommodations for the white and colored races by providing two or more cars, or by dividing the cars by a partition or adjustible screen, the company itself must have complied with the provisions of the law.[12] While trainmen have the right, under a statute requiring the separation of the races, to require a white passenger to leave a coach set apart for negro passengers, yet if he has gone into it to deliver packages to a colored passenger, and stays there only a few

was accidentally killed by a rifle ball, shot by a boy at the train as it was passing him. At the next station, the conductor removed the body of the boy from the train and delivered it to the coroner, and then compelled the wife and her remaining children to leave the train, according to orders from defendant's superintendent. Held that, while defendant was entitled to remove the body of the child, the ejection of plaintiff and her other children was without justification. Leek *v.* Northern Pac. R. Co., 65 Wash. 453, 118 Pac. 345.

6. Good faith of employees no defense.—*Georgia.*—Seaboard, etc., R. Co. *v.* O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A., N. S., 472; Georgia R. Co. *v.* Homer, 73 Ga. 251; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Kansas.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Louisiana.—Marx *v.* Louisiana Western R. Co., 112 La. 1085, 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635, 36 So. 862.

Mississippi.—Illinois Cent. R. Co. *v.* Gortikov, 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650, 45 So. 363, 90 Miss. 787, 14 L. R. A., N. S., 464; Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Neb. 350, 21 Am. Rep. 757.

New York.—Jacobs *v.* Third Ave. R. Co., 75 N. Y. S. 679, 71 App. Div. 199, 10 N. Y. Ann. Cas. 462, reversing 69 N. Y. S. 981, 34 Misc. Rep. 512.

Ohio.—Lake Shore, etc., R. Co. *v.* Mortal, 18 O. C. C. 562, 8 O. C. D. 134; Cincinnati, etc., Tract. Co. *v.* Rosnagle, 84 O. St. 310, 95 N. E. 884, 35 L. R. A., N. S., 1030, Ann. Cas. 1912C, 639.

Texas.—Texas, etc., R. Co. *v.* Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400; Gulf, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 34 S. W. 449.

Virginia.—Fanshaw *v.* Norfolk, etc., Tract. Co., 108 Va. 300, 61 S. E. 790. See post, "Ejection Through Mistake of Holder of Valid Ticket," § 3006.

If a passenger is wrongfully expelled from a carrier's vehicle, the fact that the servants acted under a misapprehension in supposing that he had been guilty of some misconduct will afford the carrier no excuse. Fanshaw *v.* Norfolk, etc., Tract. Co., 108 Va. 300, 61 S. E. 790.

7. Necessity for physical injury.—New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356; Carpenter *v.* Washington, etc., R. Co., 121 U. S. 474, 30 L. Ed. 1015, 7 S. Ct. 1002; Mabry *v.* City Elect. R. Co., 116 Ga. 624, 42 S. E. 1025. See post, "What Constitutes Ejection," § 3013.

8. Subsequent discovery of valid ground for ejection.—Georgia R. Co. *v.* Baldoni, 115 Ga. 1013, 42 S. E. 364.

9. Ejection at improper place.—See post, "Place of Ejection," §§ 3014-3015.

10. Ejection in improper manner.—See post, "Liability for Acts of Employees," §§ 2970-2972; "Manner of Ejection," §§ 3016-3018.

11. Ejection of passenger under disability.—See post, "Ejection of Passenger under Disability," §§ 3020-3021.

12. Statutes requiring separation of the races.—Miss. Laws, 1904, p. 140, c. 99; Waldauer *v.* Vicksburg R., etc., Co., 88 Miss. 200, 40 So. 751.

The posting of a sign in a street car indicating that a part of the car was to be used by white persons and another part by colored persons was not a sufficient compliance with the statute especially where the sign posted was not large enough to be seen in all parts of the car. Waldauer *v.* Vicksburg R., etc., Co., 88 Miss. 200, 40 So. 751.

minutes, and is in the act of leaving when the trainmen assault and eject him, the carrier is liable therefor.[13] Under such a statute, where a brakeman required a white woman to leave the white coach, not believeing, or not in the exercise of ordinary care having the right to believe, that she was a woman of color, or if he was insulting to her, the company was liable, but not otherwise.[14] Under a statute requiring railroad companies to keep separate waiting rooms in depots for passengers of the white and colored races, a railroad company is liable in damages for its refusal to permit a colored passenger to enter a waiting room provided for colored passengers.[15]

Contributory Act or Negligence.—In some instances a passenger who has been ejected may have been guilty of some contributory act or negligence affecting his right to recover against the carrier.[16] So, where, on a passenger's refusal to pay fare when demanded by the conductor, a fight ensued, which was brought on by the passenger or voluntarily entered into by him, during which he was thrown or fell from the car and received injuries causing his death, the carrier was not liable for the acts of the conductor.[17] But one in charge of an aged and infirm passenger on a crowded train is not guilty of negligence contributing to the wrongful ejection of such passenger because he enters another car for the purpose of securing a seat, as he has a right to presume that the carrier's employees will exercise that degree of care, for the safety of passengers, that the law requires of them.[18] Where a passenger, after being properly

13. St. Louis, etc., R. Co. *v.* Mynott, 83 Ark. 6, 102 S. W. 380.

14. Southern R. Co. *v.* Thurman, 121 Ky. 716, 28 Ky. L. Rep. 699, 979, 90 S. W. 240, 2 L. R. A., N. S., 1108.

15. Exclusion from waiting room.—Kirby's Dig., § 6634; St. Louis, etc., R. Co. *v.* Green, 99 Ark. 572, 139 S. W. 307.

Passenger not negligent.—A colored passenger refused permission to enter the colored waiting room was not negligent in refusing to enter the waiting room provided for whites at the suggestion of a third person, so as to prevent recovery for his exclusion from the colored waiting room. St. Louis, etc., R. Co. *v.* Green, 99 Ark. 572, 139 S. W. 307.

16. Contributory act or negligence.—See post, "In General," § 3014; "Proximate Cause of Injury," § 2973; "Manner of Ejection," §§ 3016-3018; "Drunken Passenger," § 3021.

Where damage result of passengers negligence.—In an action for ejecting plaintiff from a railroad train, it appeared that plaintiff was asleep when the station at which he should have changed cars was reached; that he had been admonished by the conductor not to go to sleep; that the station was properly announced, and the train stopped there; that, upon discovering he had been carried past the station, plaintiff asked the conductor to stop the train, which he refused to do until reaching a station thirteen miles beyond. Plaintiff was told to get off at this point, and, after waiting three hours after midnight for a train to carry him back, started to walk. Held, that any damage plaintiff received was the result of his own negligence, and not that of the railroad company. Houston, etc., R. Co. *v.* Cohn, 53 S. W. 698, 22 Tex. Civ. App. 11.

Passenger not guilty of contributory negligence.—In an action against a railroad company for personal injuries caused by wrongfully and violently ejecting plaintiff from a train, in which it appeared that plaintiff had asked for a ticket to his desired destination and been given one to the intermediate point at which he was ejected, negligence of plaintiff in not looking at his ticket when he purchased it, and in failing to purchase a ticket from the place where he was ejected to his destination, was too remote to constitute a defense. Southern R. Co. *v.* Bunnell, 36 So. 380, 138 Ala. 247.

Plaintiff was wrongfully ejected from defendant's train at a station where she was a stranger, and where there was no regular station house, on the ground that her ticket was not good on that train. She walked back, a distance of four miles, to the station where she had gotten on the train, and where she must have been to some extent known, and there took a train which she could have taken had she waited at the station where she was put off. She testified that she did not know she could take the train at the latter place. While walking, she was caught in a storm, and sickness resulted. Held, that plaintiff was not, as a matter of law, negligent in walking back instead of waiting, and the question was properly left to the jury. Malone *v.* Pittsburgh, etc., R. Co., 25 Atl. 638, 152 Pa. 390; Huchel *v.* Pittsburgh, etc., R. Co., 25 Atl. 639, 152 Pa. 394.

17. Garrett *v.* St. Louis Trans. Co., 118 S. W. 68, 219 Mo. 65, 16 Am. & Eng. Ann. Cas. 678.

18. St. Louis, etc., R. Co. *v.* McAnellia (Tex. Civ. App.), 110 S. W. 936.

ejected, was injured by his own wrongful conduct in running beside the moving train with the intention to get on again, the company owed him no legal obligation to stop the train for the purpose of ascertaining whether he had been injured.[19]

Liability as to Baggage of Ejected Passenger.—See post, "Passenger's Effects," chapter 29.

Ejection of Persons Other than Passengers.—See post, "Licensees, Trespassers, Intruders, etc.," chapter 26.

§§ 2970-2972. Liability for Acts of Employees—§ 2970. In General. —Knowledge of a station agent to be imputed to the company must effect some matter lying within the scope of the agent's authority, so the knowledge of such an agent that an intending passenger had passed some time in the station apparently in a stupor resulting from the use of liquor or drugs is not imputable to the company so as to render it liable for the ejection of such passenger a short distance from the station.[20]

Arrest of Passenger Subsequent to Ejection.—Where a conductor ejects a passenger from a street car, and, in reply to an inquiry by a policeman, states that the passenger is disorderly, and the latter is then unlawfully taken into custody by the policeman, and it is not shown that it was within the scope of the conductor's authority to cause the passenger's arrest, the carrier is not liable therefor.[21]

§ 2971. Unauthorized Ejection.—Ejection by Conductor.—As it is within the scope of the authority of a street car or railway conductor to determine who should be expelled from the carrier's conveyance, the carrier is liable where he ejects a passenger without having the right to do so.[22] And the right of a passenger ejected from a railroad train in violation of his rights to recover damages therefor can not be affected by any rule of the carrier pre-

19. Chesapeake, etc., R. Co. *v.* Saulsberry, 112 Ky. 915, 66 S. W. 1051, 23 Ky. L. Rep. 2341, 56 L. R. A. 580.

20. Knowledge of station agent.—Korn *v.* Chesapeake, etc., R. Co., 125 Fed. 897, 62 C. C. A. 417, 63 L. R. A. 872.

21. Arrest of passenger subsequent to ejection.—Cunningham *v.* Seattle Elect. R., etc., Co., 3 Wash. 471, 28 Pac. 745.

22. Unauthorized ejection by conductor.—*United States.*—Baltimore, etc., R. Co. *v.* Thornton, 110 C. C. A. 502, 188 Fed. 868.

Arkansas.—St. Louis, etc., R. Co. *v.* Waters, 105 Ark. 619, 152 S. W. 137.

California.—Turner *v.* North Beach, etc., R. Co., 34 Cal. 594. See Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

Colorado.—Denver Tramway Co. *v.* Reed, 4 Colo. App. 500, 36 Pac. 557.

Georgia.—Higgins *v.* Southern R. Co., 98 Ga. 751, 25 S. E. 837; Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842; South Carolina R. Co. *v.* Nix, 68 Ga. 572.

Illinois.—Chicago Union Tract. Co. *v.* McClevy, 126 Ill. App. 21.

Indiana.—Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

Kansas.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Massachusetts.—Moore *v.* Fitchburg R. Corp. (Mass.), 4 Gray 465, 64 Am. Dec. 83.

Michigan.—Great Western R. Co. *v.* Miller, 19 Mich. 305.

Missouri.—Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

New York.—Charbonneau *v.* Nassau Elect. R. Co., 108 N. Y. S. 105, 123 App. Div. 531.

Ohio.—Passenger R. Co. *v.* Young, 21 O. St. 518, 8 Am. Rep. 78.

Where a conductor, intending to act within his authority, from a mistake of facts, or an error of judgment on the facts, wrongfully ejects a passenger from a car, the company is liable. Higgins *v.* Watervliet, etc., R. Co., 46 N. Y. 23, 7 Am. Rep. 293.

Contra.—It will not be presumed that a conductor was acting within the scope of his authority in ejecting from the cars a passenger who tendered an unlimited ticket and had a right to be there. And a railroad company is not liable for the act of its conductor in ejecting a man from its train, his ticket giving him the right to ride, though the conductor claimed otherwise, there being no evidence to show that the company authorized or directed the act. Allegheny Valley R. Co. *v.* McLain, 91 Pa. 442. See Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

scribing the duties of its conductors.[23] The act of a conductor, obeying the direction of a passenger agent in ejecting a passenger because of irregularity in his ticket, is the act of the company.[24] Where a statute requires a conductor to remove any passenger not entitled to ride under the provisions of the so-called "Jim Crow" Act, the duty being imposed on the conductor, the company is not liable for damages in action by a passenger for wrongful expulsion.[25] But it is held that a railroad company is liable for the wrongful ejection of a passenger by a conductor, notwithstanding a statute authorizing a conductor to act as a peace officer in arresting drunken passengers.[26]

Ejection by Brakeman.—It may be laid down as a general rule, that a brakeman, in the absence of express orders, has no authority to eject a passenger from a train.[27] But where it is a brakeman's duty to put off persons not entitled to ride on the train, his acts in putting persons off the train, whether rightfully or wrongfully, are within the scope of his employment.[28] And a brakeman, whose duty it is to see that persons do not enter the cars without tickets, acts within the scope of his employment where he ejects a passenger for failure to have a ticket.[29] A brakeman in charge of railway cars for the purpose of securing the proper and orderly seating of passengers is acting within the scope of his employment in ejecting a passenger who disobeyed his directions.[30] It is held that a railroad company is liable where its brakeman ejects a passenger who is entitled to ride, notwithstanding he has no authority to do so,[31] but the contrary is also held.[32]

Where a driver of a street car unlawfully removes a passenger from a car under authority conferred by the company, it is liable to plaintiff for the damage sustained.[33]

An officer, called by a station agent merely to put persons out of the waiting room, would not be acting officially in complying, so as to exempt the company from responsibility for humiliation suffered therefrom.[34]

§ 2972. Wrongful Acts during Ejection.—It is generally held that a carrier is liable for the wrongful or negligent acts committed by its employees while ejecting a passenger from its conveyance;[35] though a few cases hold

23. Effect of carrier's rules.—Baltimore, etc., R. Co. *v.* Thornton, 110 C. C. A. 502, 188 Fed. 868.

24. Ann Arbor R. Co. *v.* Amos, 85 O. St. 300, 97 N. E. 978.

Where conductor, on presentation of original ticket and incorrect ticket, issued by intermediate line, telegraphs for instructions from the general passenger agent, the question is between the company and the passenger; and the company is bound to give proper instructions. Ann Arbor R. Co. *v.* Amos, 97 N. E. 978, 85 O. St. 300.

25. Statute requiring ejection.—Stratford *v.* Midland Valley R. Co., 36 Okla. 127, 128 Pac. 98; Okl. Comp. Laws, 1909, § 443.

26. Ark. Acts 1909, p. 99, § 33; St. Louis, etc., R. Co. *v.* Waters, 105 Ark. 619, 152 S. W. 137.

27. Ejection by brakeman.—Wabash R. Co. *v.* Savage, 110 Ind. 156, 9 N. E. 85; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

28. Southern R. Co. *v.* Wideman, 119 Ala. 565, 24 So. 764.

29. St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971.

30. Peck *v.* New York, etc., R. Co. (N. Y.), 8 Hun 286, affirmed in 70 N. Y. 587.

31. Lindsay *v.* Oregon, etc., R. Co., 13 Idaho 477, 90 Pac. 984, 12 L. R. A., N. S., 184.

32. International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

33. Ejection by street car driver.—Corbett *v.* Twenty-Third St. R. Co. (N. Y.), 42 Hun 587, 4 N. Y. St. Rep. 535.

34. Ejection by officer.—Texas Mid. R. Co. *v.* Geraldon, 54 Tex. Civ. App. 71, 117 S. W. 1004.

35. Wrongful or negligent acts during ejection.—*California.*—Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

Kansas.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Massachusetts.—Hull *v.* Boston, etc., Railroad, 210 Mass. 159, 96 N. E. 58, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147.

Michigan.—Great Western R. Co. *v.* Miller, 19 Mich. 305; Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517.

Missouri.—Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

New Jersey.—New York, etc., R. Co. *v.*

that the carrier is not liable where its employees acted wantonly or wilfully,[36] or used unnecessary violence in ejecting a passenger.[37] So a railway company is liable for injuries resulting from the negligence, violence, or carelessness of its conductor, in removing from the cars a passenger, though the conductor had a right to remove him.[38] And it is immaterial that the conductor acted wantonly or wilfully,[39] and in abuse of his author-

Haring, 47 N. J. L. 137, 54 Am. Rep. 123.

New York.—Hamilton *v.* Third Ave. R. Co., 13 Abb. Prac., N. S., 318, 44 How. Prac. 294, 35 N. Y. Super. Ct. 118. See post, "Manner of Ejection," §§ 3016-3018.

Wrongful assault upon passenger.—It is the duty of the conductor of a street car to eject persons who refuse to pay fare, and if, in his endeavor to carry out such duty, he makes a wrongful assault upon a person, such course is within the scope of his employment, though not authorized by his master, for which the master is liable. Lugner *v.* Milwaukee Elect. R., etc., Co., 131 N. W. 342, 146 Wis. 175.

Ejection by brakeman using unnecessary force.—A brakeman, who was in charge of railway cars for the purpose of securing the proper and orderly seating of passengers, forcibly ejected plaintiff, who disobeyed his direction. Held, that in so doing the brakeman must be deemed to have acted within the scope of his employment, and that the company were liable for excessive and unnecessary force used by him. Peck *v.* New York, etc., R. Co. (N. Y.), 8 Hun 286, affirmed in 70 N. Y. 587.

Negligent acts within legal contemplation of carrier.—It is the duty of a carrier to furnish careful, cautious, and prudent persons in operating trains for the transportation of passengers, and the carrier is liable for all damages resulting from the negligent acts of such employees in ejecting a passenger as were within the legal contemplation of the carrier at the time of contracting for transportation. St. Louis, etc., R. Co. *v.* McAnellia (Tex. Civ. App.), 110 S. W. 936.

The conductor of a freight train, under orders to carry no passengers, acts within the scope of his authority in ejecting one who has entered his caboose for carriage as a passenger, and the company is liable for the latter's injuries resulting from his ejection while the train was in motion, under such circumstances as rendered it imprudent and reckless to eject him. Stone *v.* Chicago, etc., R. Co., 88 Wis. 98, 59 N. W. 457. See Holmes *v.* Wakefield (Mass.), 12 Allen 580, 90 Am. Dec. 171.

The New Hampshire statute requiring conductors on railroads to remove from the cars passengers refusing to pay the established fares applies to all persons properly acting as conductors, without regard to the formal regularity of their appointment, or the source from whence they derive compensation for their services. Hillard *v.* Goold, 34 N. H. 230, 66 Am. Dec. 765.

36. Holding that carrier not liable where employees acted wantonly or wilfully.—See Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Where a conductor uses unnecessary force in ejecting a passenger supposed to be personating the owner of a mileage ticket, the fact that the company has issued instructions to its conductors that regulations regarding such tickets must be strickly enforced, without fear or favor, and that, "if they find mileage tickets have been transferred, they must lift such tickets, collect full fare, and report the transaction," does not render the company responsible for the wanton act of the conductor. Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 6 C. C. A. 597, citing Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 37 L. Ed. 97, 13 S. Ct. 261.

Plaintiff, who claimed to have paid, was ejected by a conductor for nonpayment of his fare, and, on alighting from the car, fell or was thrown against a passing team, and injured. In an action to recover for his injuries, held that it was error for the court to refuse defendant's request to charge that if the conductor acted willfully, and from personal motives assaulted the plaintiff, the company was not liable. Murphy *v.* Central Park, etc., R. Co., 48 N. Y. Super. Ct. 96.

For the malicious action of a street railroad conductor in ejecting a passenger from his car, the company is not liable, unless the company, authorized or ratified the act, or was guilty of misconduct in the employment or retention of the conductor. Wright *v.* Glens Falls, etc., St. Co., 48 N. Y. S. 1026, 24 App. Div. 617.

A boy riding on a car was wantonly struck by the driver, and thereby thrown off the car. The car wheel passed over him. Held, in a suit against the car owners, that they were not liable for the act of the driver in striking the boy, but they were liable for negligently driving over him. Pittsburg, etc., R. Co. *v.* Donahue, 70 Pa. 119.

37. Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

38. Negligence, violence or carelessness of conductor.—Pennsylvania R. Co. *v.* Vandiver, 42 Pa. 365, 82 Am. Dec. 520.

39. Conductor acting wantonly or wilfully.—Converse *v.* Railroad Co., 2 MacArthur (D. C.), 504.

A railroad company is liable for in-

ity,[40] or that he was expressly forbidden to do as he did.[41] The carrier is liable even though the ejection is performed by its employees oppressively or recklessly,[42] as where a passenger is ejected from a moving conveyance.[43] It is held that where a passenger is ejected in a wrongful manner by an employee, it is immaterial whether the employee acted within the scope of his employment,[44] as a carrier is responsible for the malicious and wanton acts of its servants in ejecting a passenger, whether done in the line of his service or not, if done during the course of the discharge of his duty to the master which relates to the passenger.[45] Where the injury to one ejected from a street car, by the driver thereof, for nonpayment of fare, resulted from the want of care on the part of the driver in not stopping the car, and not from the force and violence used in ejecting the passenger, the company will be liable, regardless of the authority or want of authority of the driver to collect fare.[46]

Persons Assisting Carrier's Employees.—If a passenger aided and abetted by the conductor, uses excessive force in removing another passenger from the train, the company is liable for the resulting injuries.[47] A police officer who, in response to the invitation of the regular agents of the company, assists in ejecting a passenger, becomes a special agent of the company for that purpose, and is subject to the same rule in regard to excessive violence.[48] But if the conduct of a passenger unlawfully persisting in riding in a railroad car is such as to constitute him a disorderly person, a policeman may arrest him by virtue

juries caused by the act of the driver of their car in wrongfully ejecting a passenger from the platform, even though the act of the driver be forcible, malicious, and willful, and not merely negligent. It is to be deemed a part of the employment of a driver of a city railroad car to put a person off the platform of the car who may be there without right, or contrary to the regulations of the company; and also that it is by the company confided to such driver to determine whether a person on the platform is there without right, or contrary to such regulations; and a forcible and malicious ejectment of a passenger from the car by the driver is an act in the course of his employment as a servant of the company. Meyer *v.* Second Ave. R. Co., 21 N. Y. Super. Ct. 305.

40. Acting in abuse of authority.—Travers *v.* Kansas Pac. R. Co., 63 Mo. 421.

In an action against a horse railroad company to recover for injuries received by plaintiff, a boy, who was thrown off a car by the conductor, who supposed plaintiff was intending to steal a ride, which was not the case, as plaintiff had his fare in hand at the time, the court instructed the jury that, if the conductor "acted neither maliciously, nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interests, believing, upon the appearance before him, and upon which he had to exercise his judgment, that his duty to defendant required him to act, then the defendant is responsible for the manner in which he acted, and for the consequences of his act, though he may have acted in excess of his authority." Held, correct. Schultz *v.* Third Ave. R. Co., 46 N. Y. Super. Ct. 211, reversed 89 N. Y. 242. See Hoffman *v.* New York, etc., R. Co., 46 N. Y. Super. Ct. 526, affirmed in 87 N. Y. 25, 41 Am. Rep. 337.

41. Disobeying order.—Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

Where a passenger was arrested at a station before reaching his destination, on the mistaken idea that he was the person who had assaulted the conductor at another town some time prior thereto, the company was liable for the ejection, though the conductor acted contrary to orders not to make any arrests. Gulf, etc., R. Co. *v.* Conder, 58 S. W. 58, 23 Tex. Civ. App. 488.

42. Ejection performed recklessly or oppressively.—Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517.

43. Ejecting from moving conveyance.—Cain *v.* Minneapolis, etc., R. Co., 39 Minn. 297, 39 N. W. 635; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286, reversing 20 N. Y. Super. Ct. 122. See post, "Ejection from Moving Train or Car," § 3018.

44. Necessity that act be within scope of employment.—St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971; Brunswick, etc., R. Co. *v.* Bostwick, 100 Ga. 96, 27 S. E. 725.

45. Tanger *v.* Southwest, etc., Elect. R. Co., 85 Mo. App. 28.

46. Healey *v.* City Passenger R. Co., 28 O. St. 23.

47. Persons assisting carrier's employees.—International, etc., R. Co. *v.* Miller, 9 Tex. Civ. App. 104, 28 S. W. 233.

48. Ejection by police officer.—Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590.

of his office, though originally called in as an agent of the company; and for violence incident to such arrest the company is not liable.[49]

Ratification of Wrongful Acts.—Where, in an action for malicious assault and ejecting of a passenger from a street car, it was shown that the conductor was prosecuted before a justice, and that the railroad defended him by its attorneys, and that its general manager was present at the trial, paid the conductor's fine, and that he was retained in the company's employ after the assault, it justified a finding that the company ratified the conductor's acts.[50]

§ 2973. Proximate Cause of Injury.—Where a passenger has been removed from a railroad train wrongfully, the company would be liable for the ordinary and natural results of the act, and therefore such as might have been reasonably expected, in view of the duty of the passenger to exercise ordinary care to so act afterwards as to prevent injury.[51] It is not necessary, to the liability of a common carrier for an injury resulting from an act of its servants, that they should be able to anticipate the particular injury which might result; but it can not be held liable for failing to provide against a possible injury which could not have been reasonably anticipated.[52] One wrongfully ejected from a train may recover compensation for injuries arising after the ejection and caused thereby.[53] Where the conductor of a train ejected a passenger so that he was run over and disabled by such train, and another train of the same road passing shortly afterwards extinguished what life was left, a right of action arose whether the actual death was caused by the first or second train.[54] But one who after being ejected, waited until more than half the succeeding day had expired before pursuing his journey by vehicle, and consequently was compelled to spend the night in the open air, could not recover for such exposure.[55] Where in an action for being ejected from a train

49. Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590.

Presumed to act in official capacity.—When a city police officer takes, by force, a disorderly person from the scene of disorder to the police station, he will be presumed to have done it by virtue of his official character, though before such disorderly conduct he was in law the agent of defendant; and for force used in making said arrest defendant is not liable. Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590.

50. Ratification of wrongful acts.—Denison, etc., R. Co. *v.* Randell, 29 Tex. Civ. App. 460, 69 S. W. 1013.

51. Ordinary and natural results of act.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347. See post, "Damages," chapter 28.

An old colored man whose hands were partially paralyzed, had taken passage on defendant's train from Franklin to Nashville, and for failing to produce his ticket or pay his fare on demand, was, about eight o'clock at night, put off at a station nine miles from Nashville, where there were a depot building and thirty or forty houses, many of them occupied by persons of his own race and color, and thereupon, although the night was cold, with snow on the ground, and snowing and sleeting, undertook to walk to Nashville, and did so. It was held, that the injuries caused by the walk, if any, would not be the proximate result of the removal from the cars, unless, after reasonable effort at the station, he failed to find shelter or conveyance, nor then, if, in the opinion of the jury, his failure was due to his negligence in not having with him money to pay for the accommodations demanded, rather than a proximate result of the removal. Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347.

Where a street car conductor wrongfully ordered from the car a boy who was a passenger, kicking at him as he jumped off, and the boy ran around the rear of the car, whereupon the conductor thrust his head and shoulders out of the rear window, and the boy, thinking that the conductor was attempting to grab him, was so frightened that he jumped into the side of a car on the other track and was injured, the conductor's appearance at the window was simply the concluding act of his endeavor to prevent the boy from riding on the car, his conduct being one continuous wrongful action, rendering the carrier liable for the injuries, though he, in fact, made no motion to grab the boy from the rear window. Lugner *v.* Milwaukee Elect. R., etc., Co., 131 N. W. 342, 146 Wis. 175.

52. Keeshan *v.* Elgin, etc., Tract. Co., 82 N. E. 360, 229 Ill. 533, affirming judgment 132 Ill. App. 416.

53. Injuries after ejection.—Georgia, etc., R. Co. *v.* Bigelow, 68 Ga. 219.

54. South Carolina R. Co. *v.* Nix, 68 Ga. 572.

55. Chicago, etc., R. Co. *v.* Spirk, 70 N. W. 926, 51 Neb. 167.

at a point other than a usual stopping place, it appeared that a passenger, having gone beyond his destination, was put off at a point past the succeeding station, and that he not only walked back to the first station, but back to his destination, it was held that, as the last walk was not necessitated by his being ejected from the train at a point other than the usual stopping point, injuries resulting therefrom were not a proximate result of the ejection.[56] Where after a passenger was wrongfully ejected he could not reach his destination on foot without having to wade a creek, except by traveling over the railroad company's track, the fact that he did walk along the track and cross a trestle over the creek in question does not make him a trespasser, so as to relieve the company from liability for damages for the anxiety caused by walking thereon.[57] The wrong committed by a ticket agent in giving a ticket to an intermediate station only to a passenger buying a ticket to his destination, the agent knowing that yellow fever was prevalent near the former place, and the danger and inconvenience of going about there, is the proximate cause of the passenger's suffering on account thereof, where he was put off at such place, and did not have money to buy a ticket to his destination.[58]

Ejection of Passenger under Disability.—See post, "Ejection of Passenger under Disability," §§ 3020-3021.

§§ 2974-3012. Grounds for Ejection—§ 2974. In General.—Refusal to Sign Release of Liability.—The expulsion of a passenger from a mixed train because of refusal to sign a release of liability for injuries which may be received is wrongful.[59]

Violation of Statute Requiring Separation of the Races.—See ante, "In General," § 2969. And see generally, ante, "Separation of White and Colored Passengers," §§ 2501-2506.

If a passenger places himself in such a position of danger that the carrier is unwilling to assume the duty of carrying him therein, the carrier has the right to require the passenger to leave the car.[60]

§§ 2975-2976. Persons Objectionable as Passengers and Disorderly Conduct—§ 2975. In General.—Insane Passengers.—While a carrier may refuse to carry one who is insane, yet if it receives him, it is bound to fulfill its contract, if the passenger conducts himself properly during the trip.[61] But when an unattended passenger becomes insane on a train, it is the carrier's duty to remove him, if required for the comfort and safety of other passengers.[62]

Passenger with Smallpox.—Where a passenger on a train breaks out with eruptions, and the best medical advice that is obtained is unable to disclose whether they proceed from smallpox, and where, from any prior conduct of such passenger, or any statement he had made, there is a well-grounded belief that smallpox is developing, the officers of the train are justified in ejecting him.[63]

Passenger of Bad Character.—While a carrier may refuse to carry one whose character is bad, yet if it receives him, it is bound to fulfill its contract, if the passenger conducts himself properly during the trip.[64]

56. St. Louis, etc., R. Co. *v.* Williams, 100 Ark. 356, 140 S. W. 141.

57. Southern R. Co. *v.* Lynn, 128 Ala. 297, 29 So. 573.

58. Agent giving wrong ticket.—Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25.

59. Refusal to sign release of liability.—Schwartz *v.* Missouri, etc., R. Co., 109 Pac. 767, 83 Kan. 30.

60. Passenger getting in position of danger.—Parks *v.* St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70, 101 Am. St. Rep. 425.

61. Insane passenger.—Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

62. St. Louis, etc., R. Co. *v.* Woodruff, 89 Ark. 9, 115 S. W. 953.

63. Passenger with smallpox.—Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

64. Passenger of bad character.—Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

Passenger Guilty of Gambling.—A statute providing for the ejection of passengers guilty of obtaining or attempting to obtain money or property from any person by any game or device, etc., is reasonable and valid.[65]

§ 2976. Disorderly Conduct—Drunkenness.—The carrier may eject a passenger guilty of disorderly conduct[66] or where he uses obscene, profane, or

65. Passenger gambling.—Kentucky Statute, § 806 (Russell's St., § 5350); Commonwealth *v.* Marcum, 135 Ky. 1, 122 S. W. 215, 24 L. R. A., N. S., 1194.

66. Disorderly conduct.—*United States.*—New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109; Murphy *v.* Western, etc., Railroad, 23 Fed. 637.

Alabama.—Code, 1896, § 3457. Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

Georgia.—Code 1882, § 4586 (a); Seaboard, etc., R. Co. *v.* O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A., N. S., 472; Hillman *v.* Georgia R., etc., Co., 126 Ga. 814, 56 S. E. 68; Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334.

Indiana.—Indianapolis Tract., etc., Co. *v.* Lockman, 49 Ind. App. 143, 96 N. E. 970; Baltimore, etc., R. Co. *v.* McDonald, 68 Ind. 316.

Under Act March 10, 1875, § 2 (1 Rev. St. 1876, p. 710), a passenger who gets on a train drunk and intoxicated and advises other passengers not to pay their fare is guilty of disorderly conduct. Baltimore, etc., R. Co. *v.* McDonald, 68 Ind. 316.

Kentucky.—Ky. St. § 806 (Russell's St., § 5350); Commonwealth *v.* Marcum, 135 Ky. 1, 122 S. W. 215, 24 L. R. A., N. S., 1194; Chesapeake, etc., R. Co. *v.* Saulsberry, 23 Ky. L. Rep. 2341, 112 Ky. 915, 66 S. W. 1051, 56 L. R. A. 580; Chesapeake, etc., R. Co. *v.* Robinett, 32 Ky. L. Rep. 1077, 107 S. W. 763.

The statute would not authorize a conductor to put off a sick passenger vomiting or otherwise doing things a well behaved passenger in good health would not do, but only applies to persons who voluntarily, or while under the influence of liquor, act in a boisterous, indecent, and disgusting manner, to the annoyance of other passengers. Chesapeake, etc., R. Co. *v.* Crank, 108 S. W. 276, 32 Ky. L. Rep. 1202.

A conductor has no right under such statute to remove an offensive passenger from the car and require him to stand on the unprotected platform of a moving train, and the company is liable to a passenger required to leave a car and take such position, and injured whilst exercising ordinary care. Chesapeake, etc., R. Co. *v.* Crank, 108 S. W. 276, 32 Ky. L. Rep. 1202.

Massachusetts.—Thayer *v.* Old Colony St. R. Co., 101 N. E. 368, 214 Mass. 234, 44 L. R. A., N. S., 1125; O'Laughlin *v.* Boston, etc., Railroad, 164 Mass. 139, 41 N. E. 121.

Mississippi.—Code 1892, § 3563; Gallegly *v.* Kansas, etc., R. Co., 83 Miss. 171, 35 So. 420.

Missouri.—Leonard *v.* St. Louis Trans. Co., 115 Mo. App. 349, 91 S. W. 452.

New York.—People *v.* Caryl (N. Y.), 3 Parker Cr. R. 326; Putnam *v.* Broadway, etc., R. Co., 36 N. Y. Super. Ct. 195, affirmed in 55 N. Y. 108, 14 Am. Rep. 190.

North Carolina.—Berry *v.* Carolina, etc., Railway, 155 N. C. 287, 71 S. E. 322.

Ohio.—§ 3434, Rev. St.; B. & O. R. Co. *v.* Reed, 12 O. C. C., N. S., 177, 21-31 O. C. D. 521; Railway Co. *v.* Vallely, 32 O. St. 345, 30 Am. Rep. 601.

Pennsylvania.—West Chester, etc., R. Co. *v.* Miles, 55 Pa. 209, 93 Am. Dec. 744.

Texas.—Atchison, etc., R. Co. *v.* Wood (Tex. Civ. App.), 77 S. W. 964; Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

Instances of disorderly conduct justifying ejection.—Plaintiff, a railway contractor, having a pass over his own road, boarded defendant's train, and tendered money for his fare to the condutor along with his pass, expecting that the courtesy of a free ride might be extended to him. The conductor did not have the change, and it was returned afterwards by the brakeman, but not his pass. When the conductor came back through the car, plaintiff asked for his pass, and the conductor told him that he had not had it; and, after insisting that the conductor did have it, plaintiff became very abusive, and called the conductor a damned liar. At length the conductor replied in kind, and a fight ensued; and, after they were separated, plaintiff went to his satchel and got a pistol, and threatened to kill the conductor, and continued using profane and vulgar language. The door into the ladies' coach was open, and he could be heard there. At the next station the conductor had plaintiff arrested and taken off the train. Held, that the conductor's conduct was justifiable, under Code 1892, § 3563. Gallegly *v.* Kansas, etc., R. Co., 35 So. 420, 83 Miss. 171.

Where a waiter in a dining car is discharged en route, he may ride in a coach upon payment of his fare to the end of his run, but he has no right to insist upon riding in the dining car after the car has been closed to passengers generally at a station; and, if he defiantly persists in doing so after he has received sufficient notice to change his clothing, creates a disturbance, and delays the train, he may be put off the car with such

vulgar language.[67] This power is given to the carrier as incidental to its duty to exercise a high degree of care in providing for the comfort and convenience of its passengers.[68] In such a case, the passenger, by his own misconduct, has broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof.[69] The right of a carrier to expel a passenger when his conduct is such as to endanger the safety of other passengers is undoubted.[70] And misconduct, justifying ejection, need not be so grossly disorderly as to endanger the peace and safety of other passengers.[71] The right of ejection may be exercised when the misconduct is such as to seriously interfere with their comfort.[72] And it is held that the carrier is not bound to wait

force as is necessary by the police at the direction of the company's employees, and if he persists in his disorder on the platform in the presence of the police, and the police arrest him upon a charge of disorderly conduct, the company will not be liable for his ejection from the car. Perry *v.* Pennsylvania R. Co., 41 Pa. Super. Ct. 591.

Where a passenger in a street car laden with passengers of both sexes, on being requested by the conductor to stop using oaths in his conversation, denied using the same, and on being contradicted, called the conductor a "damned liar," he was rightfully removed from the car for a breach of the peace, and could not recover for his ejection. Robinson *v.* Rockland St. R. Co., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530.

Where a passenger on a street railway car, without reasonable provocation, willfully and in anger calls the conductor a liar, in the presence and hearing of other passengers, he is guilty of disorderly conduct, which will forfeit his rights as a passenger. Eads *v.* Metropolitan R. Co., 43 Mo. App. 536.

A passenger, occupying more than one seat in a railroad train, contrary to the rules of the company, and who resists any attempt of the trainmen to confine him to a single seat by displaying a pistol, may be removed from the train, whether other passengers were inconvenienced or not. Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009.

A conductor of a railroad train has a right to eject a passenger who enters the cars intoxicated, and armed with a pistol, and whose language and conduct are disorderly and threatening. Gulf, etc., R. Co. *v.* Adams, 3 Texas App. Civ. Cas., § 422.

Language and conduct held not to warrant ejectment.—Plaintiff, a passenger on a street car, on being asked for his fare, handed the conductor a transfer folded. The conductor returned it with a demand that plaintiff unfold it, which plaintiff refused to do. Thereupon the conductor demanded a nickel, and the second time demanded that plaintiff unfold the transfer, when plaintiff replied, "Damned if I am going to unfold it; unfold it yourself," whereupon the conductor seized plaintiff, threw him on the floor against a seat, and ejected him from the car. Held, that plaintiff's language was neither profane nor obscene, and that his conduct was no justification for his ejection. El Paso Elect. R. Co. *v.* Alderete, 81 S. W. 1246, 36 Tex. Civ. App. 142.

That a passenger in a street car leaves his seat to protest with the conductor against what he considers unnecessary roughness in handling an intoxicated person does not constitute a waiver of his rights as a passenger, freeing the company from liability for the conductor's action in ejecting him. Weber *v.* Brooklyn, etc., R. Co., 62 N. Y. S. 1, 47 App. Div. 306.

67. Improper language. — *Alabama.*—Code 1896, § 3457; Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

Georgia.—Code 1882, § 4586 (a); Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334; Hillman *v.* Georgia R., etc., Co., 126 Ga. 814, 56 S. E. 68.

Kentucky.—St. 1903, § 806 (Russell's St. § 5350); Louisville, etc., R. Co. *v.* Setser, 138 Ky. 476, 128 S. W. 341; Chesapeake, etc., R. Co. *v.* Crank, 32 Ky. L. Rep. 1202, 108 S. W. 276; Stringfield *v.* Louisville R. Co., 32 Ky. L. Rep. 578, 105 S. W. 1190.

Ohio.—Section 3434, Rev. St. Ohio; B. & O. R. Co. *v.* Reed, 12 O. C. C., N. S., 177, 21-31 O. C. D. 521. See cases in preceding note.

68. Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

69. New Orleans, etc., R. Co. *v.* Jopes, 142 U. S. 18, 35 L. Ed. 919, 12 S. Ct. 109.

If a disorderly passenger defies the conductor, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train, and if after expulsion he still uses grossly obscene, profane, and insulting language, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict. Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334.

70. Fanshaw *v.* Norfolk, etc., Tract. Co., 108 Va. 300, 61 S. E. 790.

71. People *v.* Caryl (N. Y.), 3 Parker Cr. R. 326.

72. Fanshaw *v.* Norfolk, etc., Tract. Co., 108 Va. 300, 61 S. E. 790. See, Chesapeake, etc., R. Co. *v.* Crank, 32 Ky. L. Rep. 1202, 108 S. W. 276, construing Ky. St. 1903, § 806.

until some overt act of violence, profanity, or other misconduct has been committed, but may exercise his authority to expel the offender when his conduct or condition is such as to render it reasonably certain that he will occasion discomfort or annoyance to other passengers.[73] It is held that the carrier has no right to eject a passenger because of his use of vulgar and indecent language, unless he uses such language in a tone sufficiently loud to annoy and disturb the other passengers.[74] But under a statute providing that passengers may be ejected when using such language it is immaterial to the right to eject a passenger for using obscene language that his conduct was in fact offensive to other passengers.[75]

Drunken Passenger.—The mere fact that a passenger may have drunk to excess will not justify his expulsion by the carrier if he appears to be peaceably inclined, and is not interfering with any one.[76] But a passenger who is so intoxicated as to be offensive to other passengers, or who gives reasonable cause to believe that he will become so, may be ejected.[77] So, a conductor may eject a passenger who is intoxicated, and has vomited in the car.[78] Where an unattended passenger on a railroad train is suffering from delirium tremens so as to annoy the other passengers, the company may remove him, and it is not liable if it turns him over to the overseer of the poor of a town having sufficient accommodations for caring for him.[79] One who boards a train after the conductor has rightfully refused to carry him because of his intoxication may be ejected, though he has a ticket.[80] In some states there are statutes authorizing the ejection and arrest of intoxicated passengers.[81]

Carrier's Duty.—It is held that it is not only the right but also the duty of a carrier to remove a passenger if necessary to preserve peace and order,[82] or

73. Vinton *v.* Middlesex R. Co. (Mass.), 11 Allen 304, 87 Am. Dec. 714; Thayer *v.* Old Colony St. R. Co., 214 Mass. 234, 101 N. E. 368, 44 L. R. A., N. S., 1125; Hudson *v.* Lynn, etc., R. Co., 178 Mass. 64, 59 N. E. 647; Berry *v.* Carolina, etc., Railway, 155 N. C. 287, 71 S. E. 322; Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485.

74. Chicago City R. Co. *v.* Pelletier, 134 Ill. 120, 24 N. E. 770.

75. Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

76. Drunken passenger.—Galveston, etc., R. Co. *v.* Long, 13 Tex. Civ. App. 664, 36 S. W. 485. See Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

77. Murphy *v.* Union R. Co., 118 Mass. 228. See Hudson *v.* Lynn, etc., R. Co., 178 Mass. 64, 59 N. E. 647; Edgerly *v.* Union St. R. Co., 36 Atl. 558, 67 N. H. 312.

The conductor of a street car has a right to expel therefrom a person honestly supposed to be drunk, and whose condition or conduct is such as to afford reasonable ground for believing that if he is permitted to remain he will be guilty of some misconduct or indecency. If the passenger is sick, good faith at least requires that he shall inform the conductor of the fact. Lemont *v.* Washington, etc., R. Co., 1 Mackey (12 D. C.) 180, 47 Am. Rep. 238.

That a drunken passenger was in such condition that he was improperly allowed to board the train as a passenger did not deprive the conductor of the right to eject him, when he entered the ladies' car, and by violence and indecent language alarmed the passengers, and, when locked out of the car, pulled the bell-rope, stopping the train, and threatened the conductor with an open knife. Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232, 10 S. W. 655, 10 Ky. L. Rep. 798, 21 Am. St. Rep. 332, 3 L. R. A. 80.

78. Converse *v.* Railroad Co., 2 MacArthur (D. C.) 504; Chesapeake, etc., R. Co. *v.* Crank, 32 Ky. L. Rep. 1202, 108 S. W. 276, construing Ky. St. 1903, § 806.

79. Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543.

80. Chesapeake, etc., R. Co. *v.* Selsor, 134 S. W. 143, 142 Ky. 163, 33 L. R. A., N. S., 165.

81. *Arkansas.*—Under Acts 1909, p. 99, § 3, authorizing railway conductors to act as peace officers in arresting drunken passengers, a conductor may arrest a passenger if he has reasonable ground for believing him intoxicated, though the passenger was not intoxicated. St. Louis, etc., R. Co. *v.* Waters, 105 Ark. 619, 152 S. W. 137.

Iowa.—A carrier is not liable for ejection of intoxicated passenger at a station, in view of Acts of Thirty-Third Gen. Assem., c. 141, § 2, where no unnecessary force was used, and the conductor did not know the passenger was in a helpless condition. Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

82. Carrier's duty.—Scioto Valley Tract. Co. *v.* Craybill, 8 O. C. C., N. S., 469, 19-29 O. C. D. 95.

Under Ky. St., § 806 (Russell's St., § 5350), it is the duty of the conductor to

where his presence is dangerous to other passengers,[83] or occasions them serious annoyance and discomfort,[84] or his condition is such as to induce the belief that his conduct will become offensive or annoying to other passengers.[85] The duty of carriers of passengers to remove disorderly persons is an incident to their proprietorship of the car or vehicle of the business they were conducting, and the responsibility they assume and take in such business for the safety and comfort of their passengers.[86]

Use of Profane Language While Being Ejected.—Where, after a passenger on a railroad train has surrendered his ticket, the conductor asks him a second time for his fare, and, on his assertion that he has already given up his ticket, and refusal to pay again, stops the train, and proceeds to eject him, and such passenger then for the first time uses profane language, the company can not, by reason of such language, escape liability for wrongfully ejecting him.[87]

Ejection from Station.—A railroad ticket agent who has refused to sell a ticket to an intending passenger, who appears to be drunk, has a right to expel the passenger from the office within a reasonable time, on his refusing to leave, using no unnecessary force.[88]

§§ 2977-2978. Disobedience of Carrier's Rules—§ 2977. In General.—In accordance with the right of common carriers of passengers to make and enforce reasonable rules and regulations necessary for the conduct of their business of transportation, they have also the right to eject passengers from their conveyances for noncompliance with such rules, provided such right is exercised under proper circumstances and in the proper manner.[89] The carrier

eject a passenger who shall behave in a boisterous or riotious manner. In such a case, the conductor is not required to permit the person to continue on the train upon the promise of another passenger to see that he will hurt nobody. Louisville, etc., R. Co. *v.* Setser, 138 Ky. 476, 128 S. W. 341.

83. Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Railway Co. *v.* Valleley, 32 O. St. 345, 30 Am. Rep. 601.

84. Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543.

85. Grimsley *v.* Atlantic, etc., R. Co., 1 Ga. App. 557, 57 S. E. 943.

86. Putman *v.* Broadway, etc., R. Co., 36 N. Y. Super. Ct. 195, affirmed in 55 N. Y. 108, 14 Am. Rep. 190.

87. Use of profane language while being ejected.—Louisville, etc., R. Co. *v.* Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436.

88. Ejection from station.—McKernan *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 354.

89. Disobedience of carrier's rules.—*Alabama.*—Birmingham, etc., Co. *v.* Stallings, 154 Ala. 527, 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319, 45 So. 650.

Arkansas.—Bradford *v.* St. Louis, etc., R. Co., 93 Ark. 244, 124 S. W. 516.

California.—Nye *v.* Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. 530.

Connecticut.—Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

Florida.—South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

Georgia.—Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209.

Illinois.—Ft. Clark St. Railroad *v.* Ebaugh, 49 Ill. App. 582; Toledo, etc., R. Co. *v.* Williams, 77 Ill. 354.

Iowa.—Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532.

Kentucky.—Stringfield *v.* Louisville R. Co., 32 Ky. L. Rep. 578, 105 S. W. 1190.

Massachusetts.—Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

Minnesota.—Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

Missouri.—McQuerry *v.* Metropolitan St. R. Co., 117 Mo. App. 255, 92 S. W. 912.

New York.—Elder *v.* International R. Co., 122 N. Y. S. 880, 68 Misc. Rep. 22, affirmed in 128 N. Y. S. 1122; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

North Carolina.—Ammons *v.* Southern R. Co., 138 N. C. 555, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340, 51 S. E. 127.

Ohio.—Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580; Lake Shore, etc., R. Co. *v.* Orndorff, 55 O. St. 589, 45 N. E. 447, 38 L. R. A. 140, 60 Am. St. Rep. 716; Railroad Co. *v.* Skillman, 39 O. St. 444.

Oklahoma.—St. Louis, etc., R. Co. *v.* Johnson, 25 Okla. 833, 108 Pac. 378; Decker *v.* Atchison, etc., R. Co., 3 Okla. 553, 41 Pac. 610.

Pennsylvania.—McMillan *v.* Federal, etc., R. Co., 172 Pa. 523, 33 Atl. 560.

Texas.—Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009; Texas,

judges at his peril the application of a rule to a given case, and is liable for the ejection of a passenger not liable to be ejected thereunder.[90] And when a passenger, without fault on his part, is ejected by a railway company from its premises for a supposed violation of its rules, the company is liable for the injury occasioned, without regard to whether it exercised care or not.[91] Thus, where a rule of a street car company forbade its conductors from allowing intoxicated persons to ride on its cars, the company was held liable for ejecting a person afflicted with St. Vitus' dance, which produced involuntary motions resembling those of an intoxicated person, and led the conductor to believe that the passenger was intoxicated.[92]

Effect of Custom.—That a street railway has customarily permitted passengers to ride in the vestibule of cars does not preclude a conductor from requiring a passenger either to go inside the car or to get off.[93]

§ 2978. Particular Rules.—In General.—Rules of a street car company forbidding passengers to stand upon the platform,[94] smoking in a car,[95] or talk-

etc., R. Co. *v.* Pearl, 3 Texas App. Civ. Cas., § 4.

Wisconsin.—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

Notice of violation of rule—Trespasser.—If, after express notice to a passenger of his violation of a reasonable rule of the carrier, he does not forthwith conform thereto, his rights as a passenger ceases, and he becomes a trespasser, and may be ejected, but until such notice is given the relation of carrier and passenger continues. Renaud *v.* New York, etc., R. Co., 210 Mass. 553, 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 97 N. E. 98, 38 L. R. A., N. S., 689.

Under the common law, when a passenger wantonly violates any reasonable rule of a railroad, the obligation to transport him ceases, and he may be ejected from the train at any convenient and safe point that may be selected by the officer in charge of the train. South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

Illustrations.—Where a railway company prescribed a rule that no trains should enter the Cherokee Outlet within six hours of noon on the day the outlet was to open to settlement, and that trains should be stationed at the edge of the land thirty minutes before the hour of opening, and should not be entered by passengers before that time, one who was ejected from the train for failing to comply with the rule could not recover damages for the ejection. Decker *v.* Atchison, etc., R. Co., 3 Okla. 553, 41 Pac. 610.

Under Kirby's Dig. §§ 6622, 6632, requiring railroad companies to provide equal but separate and sufficient accommodation for the white and colored races, a company may make reasonable regulations as to the time and manner of desigating the respective compartments of the races; and where there were more colored passengers than the end of the smoker set apart for them would accomodate, the conductor could order the white passengers to take seats in a Pullman coach, in the rear, and, if a white passenger in the smoker refused to change his seat, could use such force as was necessary to eject him from the smoker and compel him to go to the coach designated for white passengers. Bradford *v.* St. Louis, etc., R. Co., 93 Ark. 244, 124 S. W. 516.

Where three persons entitled to ride in a stock car to care for horses being transported therein permitted three others who had no right in the car to ride therein, and any one of the three entitled to transportation for any purpose closed and fastened the doors of the car and knowingly refused to open it at the request of the conductor or employees of the carrier when they sought to ascertain who were inside the car, to identify the passes, and inspect the transportation contracts of those holding them, the passenger so doing thereby forfeited his rights as a passenger so far as was necessary to carry out the regulations of the company, though there was no conspiracy between the three passengers and the trespassers to procure free transportation for the latter. Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

90. Regner *v.* Glens Falls, etc., R. Co., 74 Hun 202, 26 N. Y. S. 625, 56 N. Y. St. Rep. 300.

91. St. Louis, etc., R. Co. *v.* Osborn, 67 Ark. 399, 55 S. W. 142.

92. St. Louis, etc., R. Co. *v.* Osborn, 67 Ark. 399, 55 S. W. 142; Regner *v.* Glens Falls, etc., R. Co., 74 Hun 202, 26 N. Y. S. 625, 56 N. Y. St. Rep. 300.

93. Effect of custom.—Liversidge *v.* Berkshire St. R. Co., 210 Mass. 234, 96 N. E. 665, 36 L. R. A., N. S., 993.

94. Standing on platform.—*Arkansas.*—Dobbins *v.* Little Rock R., etc., Co., 79 Ark. 85, 95 S. W. 794 (standing room in car).

Illinois.—Ft. Clark St. Railroad *v.*

95. Smoking in car.—McQuerry *v.* Metropolitan St. R. Co., 117 Mo. App. 255, 92 S. W. 912.

ing to the driver of the car,[96] are reasonable, and a passenger may be ejected for noncompliance. When a passenger refuses to remove his dog from a passenger car, in compliance with a regulation of the railroad company, the conductor is authorized to remove both.[97] A passenger, occupying more than one seat in a railroad train, contrary to the rules of the company, and who resists any attempt of the trainmen to confine him to a single seat by displaying a pistol, may be removed from the train, whether other possengers were inconvenienced or not.[98]

Manner of Entering Conveyance or Station.—It is held that a passenger may not be ejected though he violated the carrier's rule as to the manner of entering the conveyance,[99] or station,[1] unless he has been notified of the existence of the rule.[2]

Entering Ladies' Car or Waiting Room.—A regulation of a railroad company, setting apart one car of each passenger train for women and the men accompanying them, is reasonable, and one violating such regulation may be ejected.[3] And the same rule applies to a regulation that no gentleman without

Eubaugh, 49 Ill. App. 582.

New York.—Montgomery *v.* Buffalo R. Co., 48 N. Y. S. 849, 24 App. Div. 454, affirmed in 58 N. E. 770, 165 N. Y. 139 (passenger nauseated).

Pennsylvania.—McMillan *v.* Federal, etc., R. Co., 172 Pa. 523, 33 Atl. 560, in which case as a reason for refusing the passenger said he was not going far enough to justify him in going inside, but how far he was going he refused to say.

Washington.—See Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S., 991.

96. Talking to driver of car.—Commonwealth *v.* Mansfield (Pa.), 29 Leg. Int. 124.

97. Carrying dog in passenger car.—Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532; Hull *v.* Boston, etc., Railroad, 210 Mass. 159, 96 N. E. 58, 36 L. R. A., N. S., 406, Ann. Cas. 1912C, 1147. See Butler *v.* Steinway R. Co., 87 Hun 10, 33 N. Y. S. 845.

98. Occupying more than one seat.—Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009.

99. Manner of entering conveyance.—Where a person has purchased a ticket, but has violated a rule of the company by going through the wrong door at the station, the company is liable in damages if its employees eject him from the train, and force him back to the station. Huerstel *v.* New York, etc., R. Co. (N. Y.), 1 City Ct. R. 134.

Plaintiff, having paid his fare, boarded defendant's elevated railway train by leaping on the rear platform, in violation of a rule of the company. His valise having been tossed to the platform of the next station, he recovered it, and returned into the train whence defendant's servants attempted to eject him. Held, no matter what the irregularity of plaintiff was in boarding the train, his presence there was rightful, and defendant was liable for his injuries resulting from the attempted ejection. Smith *v.* Manhattan R. Co., 18 N. Y. S. 759, 45 N. Y. St. Rep. 865.

1. Manner of entering station.—In an action by a passenger to recover damages from a railroad company for his ejectment from a station, it appeared that by an accident for which neither party was responsible he had, at an intermediate station, been carried, on a dining car, several hundred feet away from his own car, to a point outside the station, and that he thereupon walked back and entered the station. After he had proceeded some hundred feet within it, he was expelled therefrom by a station policeman, acting under the assumed authority of a rule forbidding passengers to enter the station where he had entered, and which had been adopted to prevent danger to passengers in crossing the tracks. In consequence of this act he lost his train. Held, that the interference of the officer came too late, and constituted, not a proper enforcement of the rule, but an unlawful attempt to impose a penaly for its breach. Penfield *v.* Cleveland, etc., R. Co., 50 N. Y. S. 79, 26 App. Div. 413.

2. Compton *v.* Van Volkenburgh, 34 N. J. L. 134.

3. Entering ladies' car.—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495. See ante, "Separation of Male and Female Passengers," § 2500.

If there be no sitting room in the cars for men excluded by the regulation from the car for women, and there be room to seat them in the latter car, it is the duty of those having charge of the train either to admit them to such car, or to make room for them in the ordinary cars by admitting others to the women's car. Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

If a male passenger peaceably enters a ladies' car without being forbidden by the conductor, this may be regarded as a license to enter, and he can not rightfully be removed by force without of-

a lady shall be allowed to enter and remain in the ladies' waiting room of a depot.[4]

Attempting to Ride on Freight Train.—Where it is a published rule of a railroad company that passengers are forbidden to ride on "through" freight trains, the fact that passengers had often before been allowed to ride on such trains will not deprive the company of its right to begin the enforcement of the rule whenever it pleases; and, in the absence of any appearance of the train's being held out for the carriage of passengers, the conductor of the train may eject from it any one who attempts to ride as passenger.[5] Where freight trains are used to carry passengers, in violation of a rule of the company printed on its trainmen's timetables, but not otherwise published, a person who, knowing the custom, but not the rule, enters a caboose to take passage, can not, on being informed of the rule after the train has started, be ejected, if he offer to pay fare.[6]

Prescribing Dress of Passengers.—Railroad companies have no right to prescribe the dress of any passenger, so a rule adopted by a railroad company, which prohibits passengers on their trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers running in connection with the company, is not reasonable, and hence does not authorize the ejection of one violating it.[7]

Conducting Business.—A passenger may be ejected from the carrier's conveyance or depot where he is conducting a business therein against the remonstrances of the carrier.[8]

Requiring Ticket before Entering Train.—See post, "Requiring Ticket as Condition Precedent to Right of Carriage," §§ 2987-2988.

Surrender of Ticket or Check.—A passenger in the cars, who refuses to comply with reasonable regulations of the company in regard to the delivering up of his check, may be lawfully ejected from the train, no unnecessary force being used for that purpose, notwithstanding that he has paid his fare.[9] But the purchaser of a round-trip railway ticket, one-half of which is intended as a return ticket, can ride from terminal station to the station at which the trip begins, though he refuses to surrender the first half on demand made by the

fering him a seat elsewhere; but if barred or forbidden to enter he must not attempt to enter by force. Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

4. **Entering ladies' waiting room.**—Toledo, etc., R. Co. *v.* Williams, 77 Ill. 354, wherein it appeared that plaintiff went into the ladies' waiting room to wait for a train, and shortly afterwards entered a closet marked "Ladies Private Room," for the purpose, as he claimed of getting a drink of water. Being ordered out by a servant of defendant, and refusing to go, plaintiff was seized by the collar, and pushed out upon the platform, without injury to his person or clothing. Held, that he had no cause of action.

5. **Attempting to ride on freight train.**—Hobbs *v.* Texas, etc., R. Co., 49 Ark. 357, 5 S. W. 586.

6. Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491.

7. **Prescribing dress of passengers.**—South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

8. **Conducting business.**—A steamboat passenger pursuing against the remonstrance of the carrier the business of an express agent, on board of such steamboat may be ejected from the boat. Barney *v.* D. R. Martin, Fed. Cas. No. 1,030, 11 Blatchf. 233.

Soliciting in depot.—If an innkeeper, who has frequently entered a railroad depot, and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with the bona fide intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he had entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but presses forward toward the cars, and the superintendent and his assistants thereupon forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery. Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

9. **Surrender of check.**—Havens *v.* Hartford, etc., R. Co., 28 Conn. 69.

conductor in accordance with a rule of the company, unknown to the passenger or to the public generally, requiring conductors to take up the whole of such tickets when tendered as fare from the return station or collect full fare, and, if ejected from the train, may recover damages.[10]

Exhibition of Ticket.—A regulation established by a railroad company requiring passengers to exhibit their tickets when requested to do so by the conductor, or, in case of refusal, to be removed from the cars, is a reasonable and lawful rule, and when a passenger refuses to comply with its terms, it is immaterial whether the conductor had before seen his ticket, or knew that he had purchased one, or not.[11] A servant of a railroad company may use reasonable force to prevent a passenger from going into a car without showing his ticket, at the servant's request, and according to a rule of the company.[12] But it is held that where a railroad passenger had no opportunity to exhibit his ticket before the train started but while mounting the steps of a car offered to show his ticket when he got in the car, he was improperly ejected.[13]

Payment of Fare.—The rule of a street car company requiring passengers to pay their fare on entering the car is reasonable and one refusing to comply therewith may be ejected.[14] Where a passenger on a street car refuses to comply with the conductor's request to place his fare in the box provided by the company for such purpose, the conductor may eject him from the car.[15]

Remaining in Certain Part of Car during Collection of Tickets.—A regulation that a conductor should not permit passengers to go past him into the part of the train where he had completed the collection of tickets and fares, until the entire collection was completed, unless such passengers presented tickets or fares, or satisfied the conductor that they had paid, is a reasonable rule, of which passengers are bound to take notice; and the conductor is justified in ejecting one refusing to comply therewith.[16]

Rules as to Transportaton of Employees.—Rules of a street car company, providing that employees, while riding free on open cars, must not ride on the front seat, and that employees in uniform may ride free, to the number of five, on a car, provided that if more than that number insist on riding the conductors shall collect fare, applied only to employees riding free, and did not justify an assault on an employee riding in uniform, but paying fare, in ejecting him from the front seat on his refusal to vacate the same.[17]

10. Chicago, etc., R. Co. *v.* Holdridge, 118 Ind. 281, 20 N. E. 837.

11. Exhibition of ticket.—Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

Plaintiff had a ticket which entitled him to travel on defendant's railroad. He proceeded to board the train, and was requested by the brakeman to show his ticket. He declined to show his ticket, but exhibited money to the brakeman, boarded the train, and took a seat in a car. Before the train started, the brakeman again requested him to show his ticket, and again he refused to do so, and again exhibiting money, saying that the money was good for his fare. The brakeman then proceeded to eject plaintiff from the train, but while in the act of ejecting him he exhibited his ticket, and was at once released. At the time he boarded the train he knew of the rule adopted by the company requiring passengers to show tickets before entering the cars. Held, the rule being a reasonable one, and being known to plaintiff, it was his duty to obey it; and the company, on his refusal, having a right to eject him, without unnecessary force or violence, if, under these circumstances, he sustained injuries, he is not entitled to recover for them, notwithstanding he exhibited money sufficient to pay his fare. International, etc., R. Co. *v.* Goldstein, 2 Texas App. Civ. Cas., § 274.

12. Illinois Cent. R. Co. *v.* Louthan, 80 Ill. App. 579.

13. Cathey *v.* St. Louis, etc., R. Co., 149 Mo. App. 134, 130 S. W. 130.

14. Payment of fare on entering car.—Nye *v.* Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. 530.

15. Placing fare in box.—Elder *v.* International R. Co., 122 N. Y. S. 880, 68 Misc. Rep. 22, affirmed in 128 N. Y. S. 1122; Commonwealth *v.* McGinn (Pa.), 29 Leg. Int. 124; Lackman *v.* Union, etc., R. Co. (Pa.), 1 Wkly. Notes Cas. 446.

16. Remaining in certain part of car during collection of tickets.—Faber *v.* Chicago, etc., R. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789.

17. Rules as to transportation of employees.—Rowe *v.* Brooklyn Heights R. Co., 81 N. Y. S. 106, 80 App. Div. 477.

Where a street railway inspector, in ejecting an employee from a seat in a

§§ 2979-3012. Failure to Procure Ticket or Pay Fare—§§ 2979-2986. Rights and Liabilities of Carrier in General—§ 2979. In General.—Carriers of passengers are not liable for ejecting from their vehicles or conveyance persons failing to pay fare or presenting, when demanded, a ticket or other evidence of their right to carriage,[18] provided such ejection is made

car, acted under a mistaken impression that such employee was not entitled to ride in such seat, under a rule of the company, his act could not be justified on the ground that he had authority to make rules, which the employee was bound to obey. Rowe *v.* Brooklyn Heights R. Co., 81 N. Y. S. 106, 80 App. Div. 477.

18. Failure to procure ticket or pay fare.—*United States.*—Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann. Cas. 939.

Alabama.—Louisville, etc., R. Co. *v.* Johnson, 92 Ala. 204, 9 So. 269, 25 Am. St. Rep. 35.

California.—Cox *v.* Los Angeles Terminal R. Co., 109 Cal. 100, 41 Pac. 794.

Connecticut.—Norton *v.* Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

Georgia.—Allison *v.* Georgia R., etc., Co., 132 Ga. 834, 65 S. E. 85; Harp *v.* Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. Rep. 212; Pressley *v.* State, 118 Ga. 315, 45 S. E. 395.

Illinois.—Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Peoria, etc., Terminal Railway *v.* Hoerr, 120 Ill. App. 65.

Indiana.—Indianapolis Tract., etc., Co. *v.* Lockman, 49 Ind. App. 143, 96 N. E. 970. It was so provided by Act May 11, 1852, § 28 (1 Rev. St. 1876, p. 709); Toledo, etc., R. Co. *v.* Wright, 68 Ind. 586, 34 Am. Rep. 277.

Iowa.—Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

Kentucky.—McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611; Chesapeake, etc., R. Co. *v.* Robinett, 32 Ky. L. Rep. 1077, 107 S. W. 763; Anderson *v.* Louisville, etc., R. Co., 134 Ky. 343, 120 S. W. 298, 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220, 20 Am. & Eng. Ann. Cas. 920; Cincinnati, etc., R. Co. *v.* Barkley, 13 Ky. L. Rep. 331; Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433.

Maine.—State *v.* Goold, 53 Me. 279.

Massachusetts.—Crowley *v.* Fitchburg, etc., R. Co., 185 Mass. 279, 70 N. E. 56.

Pub. St. c. 112, § 197, relating to passengers on street railways, and providing, "whosoever does not on demand first pay such toll or fare shall not be entitled to be transported for any distance, and may be ejected from a street railway car," governs wherever the railway is located. Hudson *v.* Lynn, etc., R. Co., 59 N. E. 647, 178 Mass. 64.

Michigan.—Mahoney *v.* Detroit City Railway, 93 Mich. 612, 53 N. W. 793, 32 Am. St. Rep. 528, 18 L. R. A. 335.

Missouri.—Shular *v.* St. Louis, etc., R. Co., 92 Mo. 339, 2 S. W. 310; Tarrant *v.* St. Louis, etc., R. Co., 237 Mo. 655, 141 S. W. 600; Bolles *v.* Kansas, etc., R. Co., 134 Mo. App. 696, 115 S. W. 459.

New Jersey.—State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

New York.—Northern R. Co. *v.* Page (N. Y.), 22 Barb. 130; Johnson *v.* New York, etc., R. Co. (N. Y.), 14 Wkly. Dig. 495; Hoelljes *v.* Interurban St. R. Co., 87 N. Y. S. 133, 43 Misc. Rep. 350.

Ohio.—Pennsylvania Co. *v.* Hine, 41 O. St. 276; Shelton *v.* Lake Shore, etc., R. Co., 29 O. St. 214, affirming 1 W. L. Bull. 190, 7 O. Dec. Reprint 161; Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 357; Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580; Railroad Co. *v.* Skillman, 39 O. St. 444.

Tennessee.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347.

Texas.—Breen *v.* Texas, etc., R. Co., 50 Tex. 43; Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347; Texas, etc., R. Co. *v.* Smith, 38 Tex. Civ. App. 4, 84 S. W. 852; Ft. Worth, etc., R. Co. *v.* Gribble, 46 Tex. Civ. App. 78, 102 S. W. 157. It was so provided by Art. 4892, Paschal's Dig. Texas, etc., R. Co. *v.* Casey, 52 Tex. 112.

Virginia.—Virginia, etc., R. Co. *v.* Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A., N. S., 899.

Washington.—Braymer *v.* Seattle, etc., R. Co., 35 Wash. 346, 77 Pac. 495; Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S., 991.

West Virginia.—McKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913; Price *v.* Chesapeake, etc., R. Co., 46 W. Va. 538, 33 S. E. 255.

A baggage check is no token of a passenger's right to transportation. Bolles *v.* Kansas, etc., R. Co., 134 Mo. App. 696, 115 S. W. 459; Texas, etc., R. Co. *v.* Smith, 38 Tex. Civ. App. 4, 84 S. W. 852.

Memorandum check of another conductor as exempting from payment of fare.—The right of companies to eject passengers refusing to pay fare applied to a case where the passenger tendered a check given him by the conductor of another train, by which he had been accidentally left behind at a stopping place, said check being intended only as a memorandum for the individual use of the conductor of the first train. Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

Previous wrongful prevention from

completing trip as exempting from payment of fare.—In Breen *v.* Texas, etc., R. Co., 50 Tex. 43, it was held that if appellant was wrongfully prevented from completing his trip, after entering appellee's cars, on May 6th, 1874, he was entitled to recover the damage he thereby sustained; but that fact did not relieve him from the necessity of paying fare to the conductor of the train on which he got the next day, or presenting satisfactory evidence of his right to ride thereon.

If a passenger sell a nontransferable ticket, and is unable to exhibit it within a reasonable time after request, and refuse to pay fare for the balance of the trip, and is required, without abuse or unnecessary force, to leave the train, he can not recover. Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401.

Insane passenger.—A father purchased a railroad ticket for himself and a lunatic son, and left the lunatic in the car while he went for refreshments. The lunatic changed his seat, and before his father found him, the conductor, having no knowledge or suspicion that he was a lunatic, or that a ticket had been purchased for him, expelled him from the car, because he had no ticket, and he was subsequently run over by another train and killed. Held, that there could be no recovery by the lunatic's personal representative. Willetts *v.* Buffalo, etc., R. Co. (N. Y.), 14 Barb. 585.

Passenger carried past destination.—Plaintiff was a passenger on the car of the defendant, but by the failure of the conductor to call the streets he was carried past his destination. He rode around the loop for the purpose of riding back to his destination. While he was riding on the car on his return trip, the conductor requested him to pay his fare or get off the car. He refused to do either, and in forcibly resisting the attempt of the trainmen to eject him he was injured. Held, that the plaintiff had no right, at the time he was ejected, to ride on the car without paying the fare, and, upon his refusal to pay or get off, it was the right and duty of the trainmen to put him off, provided they used only such reasonable force as was necessary. Willard *v.* St. Paul City R. Co., 116 Minn. 183, 133 N. W. 465.

Illustrations.—California Civ. Code, § 488, requires every conductor to wear on his cap, or other conspicuous place, a badge indicating his office, and provides that no conductor without such badge is authorized to demand or receive fare from a passenger. Held, that where a passenger who refuses to pay fare recognizes the conductor as such, and does not refuse to pay fare because of the absence of such badge, or object to its absence, and the conductor puts him off the train, the company is not liable because such conductor wore no badge. Cox *v.* Los Angeles Terminal R. Co., 109 Cal. 100, 41 Pac. 794.

A conductor on a railroad train, in order to avoid trouble with an intoxicated man, accepted only a portion of the regular fare, but demanded the balance when the passenger began to boast as to how he had beaten the conductor, and to advise others not to pay; and, upon refusal to pay, put him off at a station house, after returning to him the proper proportion of his fare for the untraveled distance. Held, that said passenger had no cause of action, as the action of the conductor was in accordance with 1 Rev. St. 1876, p. 709, § 28. Baltimore, etc., R. Co. *v.* McDonald, 68 Ind. 316.

A railway passenger without a ticket, who hands a $10 bill to pay his fare of $6.20 to the conductor, who, in making change, returns him $5 too much, and who, upon the conductor's subsequently demanding a correction of the mistake, refuses to examine his change to ascertain the correctness of the conductor's claim of mistake, can not recover damages for his expulsion from the train, where, upon his having ridden as far as the payment made by him entitles him to ride, he is directed by the conductor to leave the train, which he does. McCarthy *v.* Chicago, etc., R. Co., 41 Iowa 432.

The trains of the C. & O. railroad run for some distance over the tracks of the L. & N. under a traffic arrangement between the two companies, by the terms of which the C. & O. trains are not allowed to carry passengers from F. to B., as a local L. & N. train closely following the C. & O. carries passengers between these points. Consequently the C. & O. sells no tickets between these points, and conductors are not allowed to accept cash fares for transportation between them. Plaintiff boarded the C. & O. train at F. without getting a ticket, or making any inquiries as to whether it stopped at B. The conductor refused to accept the regular fare to B., and demanded fare to the first station beyond B. at which it stopped. This the plaintiff refused to pay. Held, that the conductor properly ejected plaintiff, as the railroad had the right to run its train as a through one, and, under its agreement, was bound to so run it, and plaintiff, on refusing to pay the fare demanded, became a trespasser. Flood *v.* Chesapeake, etc., R. Co., 80 S. W. 184, 25 Ky. L. Rep. 2135.

Two passengers got on a train without tickets, knowing that they would have to pay fare at the rate of four cents a mile. One of them gave the conductor $1 to pay both fares. The latter understood him to say that he wanted to pay three fares, and told them that three fares came to $1.65. They did not try to correct his mistake, and did not tender $1.10, which was the fare for the two at four cents a mile. He told them they must pay, or get off, and they said they would

at a suitable time [19] and place,[20] and in a proper manner.[21] A railway company can expel a passenger from a car in which are provided accommodations for which he has not paid.[22] It is held that where a passenger on a street car is entitled by his contract to be carried to a certain point, and the railway company breaks the contract by turning the car back at a point short of the destination, the passenger's right of action is complete; and, if he elects to remain on the car for its return journey, he must pay the fare, and may include the amount in his damages, but can not remain on the car without payment of fare.[23]

Refusal to Pay unless Provided with Seat.—Though the contract of a carrier is not only to furnish the passenger with transportation but with a seat and the passenger need not surrender his ticket until he is furnished with a seat, he can not ride free because not furnished with a seat and if he chooses to accept transportation without a seat he must on demand pay his fare. And if he is ejected for failure to pay the fare he can not recover therefor but only for breach of contract.[24]

Refusal to Pay unless Given Baggage Check.—Under a statute requiring a railroad to affix a check to every parcel of baggage and deliver a duplicate thereof to the passenger and making it liable to a penalty for refusal to do so, and declaring that it shall collect no fare from such passenger, where a railroad has no night agent at a station to receive and check baggage, but stops its train and takes on a passenger and his baggage, and those in charge of the train refuse to deliver a baggage check to the passenger, and eject him from the train on his declining to pay his fare or deliver up his ticket until he received the check, the railroad is liable for his ejection.[25]

Refusal to Pay unless Given Transfer.—Where the rule of a street car company provided that the conductor should issue transfer tickets when fares were paid and a passenger offered to pay his fare only upon condition that the conductor would simultaneously give him transfer, and after some altercation the conductor ejected him, using no more force than was reasonably necessary, it was held that the company was not liable for the ejection.[26]

get off. He stopped the train, and they walked back a half mile to the depot from which they had started. Held, that a judgment against the company was wholly without evidence to support it. Eddy *v.* Elliot, 4 Texas App. Civ. Cas., § 173, 15 S. W. 41.

19. Ejection at suitable time.—State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

20. Ejection at suitable place.—See post, "Place of Ejection," §§ 3014-3015.

21. Ejection in proper manner.—See post, "Manner of Ejection," §§ 3016-3018.

22. Failure to pay for accommodations.—Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740; Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 115 Pac. 401, 36 L. R. A., N. S., 1139.

23. Wright *v.* Orange, etc., R. Co., 77 N. J. L. 774, 73 Atl. 517, 23 L. R. A., N. S., 571.

24. Refusal to pay unless provided with seat.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Leigh, 45 Ark. 368, 55 Am. Rep. 558.

Indiana.—Pittsburg, etc., R. Co. *v.* Van Houten, 48 Ind. 90.

Minnesota.—See Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610.

Tennessee.—Memphis, etc., R. Co. *v.* Benson, 85 Tenn. (1 Pickle) 627, 4 S. W. 5, 4 Am. St. Rep. 776, citing Davis *v.* Kansas, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457.

The fact that all the seats in a particular car are already occupied by passengers excuses a conductor from complying with a request to give another passenger a seat in that particular car; and if such passenger refuses to pay fare until assigned a seat in that car, he may be put off the car for nonpayment; and this, although the only other passenger car on the train is a smoking car, in which the complaining passenger avers he could not ride without injury to health. Pittsburg, etc., R. Co. *v.* Van Houten, 48 Ind. 90; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. (1 Pickle) 627, 4 S. W. 5, 4 Am. St. Rep. 776.

25. Refusal to pay unless given baggage check.—Rev. St. 1887, § 2674, Tarr *v.* Oregon, etc., R. Co., 14 Idaho 192, 93 Pac. 957.

26. Refusal to pay unless given transfer.—Louisville R. Co. *v.* Hutti, 141 Ky. 511, 133 S. W. 200, 33 L. R. A., N. S., 867.

Conductor Not Required to Accept Articles as Pledge for Fare.—A railroad conductor is not required to accept jewelry as a pledge for a passenger's fare, where a rule of the rood requires a ticket or fare in money.[27]

Disobedience of Rules Relating to Payment of Fare and Exhibition or Surrender of Ticket.—See ante, "Particular Rules," § 2978.

Ejectment of Person Trying to Avoid Payment of Fare before Demand Therefor.—Where the conductor before demanding fare of a person riding on the platform of a train to avoid paying his fare ejects him from the train, the carrier will be liable for any injuries he may sustain.[28]

Contributory Negligence.—The act of a person in permitting his wife to take passage on a train without a ticket and without money to pay her fare, knowing that her attempt to so ride would result in her ejection, is such contributory negligence on his part as to preclude him from recovering damages caused by the ejection, irrespective of whether he, who accompanied her, had the money to pay her fare, when the same was demanded by the conductor, or not.[29]

Medium of Payment.—A railroad company is not justified in ejecting a passenger already admitted into its cars, and who has commenced his journey, because, upon demand of his fare, he offers only legal-tender notes in payment. In such case the contract is already made and in process of performance, and the kind of money to be paid is no longer an open question.[30] A genuine silver coin worn smooth,[31] bruised or cracked,[32] or one somewhat rare and different in appearance from other coins of like denomination and of later dates,[33] is legal tender for car fare and a passenger ejected for failure to make payment otherwise may recover, even though the conductor honestly believed that the coins were not good ones.

Amount of Tender.—The tender of a ten dollar bill for the payment of a five cent fare is unreasonable, and it is the duty of a passenger to get off the car upon request of the conductor, and if he refuses the conductor may eject him and not be liable for such ejection.[34] And it has been held that the tender of a five dollar bill for a five cent fare is not a reasonable tender.[35]

§ 2980. Allowing Time to Procure Fare or Produce Ticket.—Passengers are entitled to a reasonable time before ejection within which to produce

27. Conductor not required to accept articles as pledge for fare.—Texas, etc., R. Co. *v.* Smith, 38 Tex. Civ. App. 4, 84 S. W. 852.

28. Ejection of person trying to avoid payment of fare before demand therefor.—Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

29. Contributory negligence.—Galveston, etc., R. Co. *v.* Scott, 79 S. W. 642, 34 Tex. Civ. App. 501.

30. Medium of payment.—Tarbell *v.* Central Pac. R. Co., 34 Cal. 616. See Lewis *v.* New York Cent. R. Co. (N. Y.), 49 Barb. 330.

31. Worn coin.—Chicago Union Tract. Co. *v.* McClevy, 126 Ill. App. 21; Ruth *v.* St. Louis Trans. Co., 98 Mo. App. 1, 71 S. W. 1055; Jersey City, etc., R. Co. *v.* Morgan, 52 N. J. L. 60, 18 Atl. 904; Cincinnati, etc., Tract. Co. *v.* Rosnagle, 84 O. St. 310, 95 N. E. 884, 35 L. R. A., N. S., 1030, Ann. Cas. 1912C, 639.

32. Bruised or cracked coin.—Cincinnati, etc., Tract. Co. *v.* Rosnagle, 84 O. St. 310, 95 N. E. 884, 35 L. R. A., N. S., 1030, Ann. Cas. 1912C, 639.

33. Rare coin.—Atlanta Consol. St. R. Co. *v.* Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

34. Amount of tender.—Judge *v.* Columbus R., etc., Co., 17 O. D. N. P. 146. See Knoxville Tract. Co. *v.* Wilkerson, 117 Tenn. 482, 99 S. W. 992, 10 Am. & Eng. Ann. Cas. 641, 9 L. R. A., N. S., 579.

35. Barker *v.* Central Park, etc., R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626; Muldowney *v.* Pittsburg, etc., Tract. Co., 8 Pa. Super. Ct. 335.

Contra.—Barrett *v.* Market St. R. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 636, 15 Am. St. Rep. 61.

Where the company had a rule, prescribing two dollars as the maximum amount for which change would be made, the tender of a five dollar bill is not a good tender for three five cent fares. Burge *v.* Georgia R., etc., Co., 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42. See Funderburg *v.* Augusta, etc., R. Co., 81 S. C. 141, 61 S. E. 1075, 21 L. R. A., N. S., 868.

a ticket or to comply with the conductor's demands for fare;[36] and the latter has no right to conclude that any apparent unwillingness is an absolute and willful refusal to accede to them.[37] So where a passenger upon being approached by the conductor for his ticket, states that he has purchased a ticket and has it with him, but has misplaced it, it is the conductor's duty to give him a reasonable time to find it, before ejecting him for refusal to present his ticket or pay fare.[38] But where a passenger does not request additional time to search for his ticket which he has mislaid, the conductor may expel him at once, without giving him additional time.[39] A reasonable time should be given a passenger to obtain money with which to pay the fare from some other person on the train, even in another car.[40] What constitutes a reasonable time depends upon the facts and circumstances of each particular case, and is a question for the jury to determine.[41]

§ 2981. Duty to Ascertain as to Purchase of Ticket.—It is held that it is the duty of the agents of a railroad company to ascertain whether a passen-

36. Allowing time to procure fare or produce ticket.—*United States.*—Missouri, etc., R. Co. *v.* Smith, 81 C. C. A. 598, 152 Fed. 608, 10 Am. & Eng. Ann. Cas. 939.

Connecticut.—Maples *v.* New York, etc., R. Co., 38 Conn. 557, 9 Am. Rep. 434.

Georgia.—Western, etc., R. Co. *v.* Ledbetter, 99 Ga. 318, 25 S. E. 663.

Illinois.—Chicago, etc., R. Co. *v.* Willard, 31 Ill. App. 435.

Indiana.—Baltimore, etc., R. Co. *v.* Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166.

Kentucky.—Anderson *v.* Louisville, etc., R. Co., 134 Ky. 343, 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220, 20 Am. & Eng. Ann. Cas. 920, 120 S. W. 298.

Michigan.—Ferguson *v.* Michigan Cent. R. Co., 98 Mich. 533, 57 N. W. 801.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New York.—Hayes *v.* New York, etc., R. Co. (N. Y.), 34 Hun 627.

North Carolina.—Clark *v.* Wilmington, etc., R. Co., 91 N. C. 506, 49 Am. Rep. 647.

Ohio.—Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. 23; Cincinnati, etc., R. Co. *v.* Skillman, 39 O. St. 444.

Tennessee.—Louisville, etc., R. Co. *v.* Garrett, 76 Tenn. (8 Lea) 438, 41 Am. Rep. 640.

Texas.—International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Gulf, etc., R. Co. *v.* Bunn, 41 Tex. Civ. App. 503, 95 S. W. 640; St. Louis, etc., R. Co. *v.* Fussell (Tex. Civ. App.), 97 S. W. 332.

Awakened while being ejected.—In Ferguson *v.* Michigan Cent. R. Co., 98 Mich. 533, 57 N. W. 801, plaintiff claimed to have been wrongfully ejected from defendant's train by the conductor while in possession of a ticket entitling him to transportation. The evidence tended to show that plaintiff had been for some years subject to deep sleeps of chronic drowsiness, from which it was difficult to arouse him; that he purchased a ticket from M. to J. and return; that on his return trip, in the night, he fell asleep soon after leaving J.; that when he became conscious, he found he was being ejected from the car by the conductor; that, before reaching the door of the car, he informed the conductor that he had a ticket to M., but was not given an opportunity to present it. It was held that the conductor should have given him a reasonable opportunity to produce his ticket before ejecting him.

37. Texas, etc., R. Co. *v.* Bond, 62 Tex. 442, 50 Am. Rep. 532.

38. Anderson *v.* Louisville, etc., R. Co., 134 Ky. 343, 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220, 20 Am. & Eng. Ann. Cas. 920, 120 S. W. 298; International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

39. Louisville, etc., R. Co. *v.* Mason, 4 Ala. App. 353, 58 So. 963.

40. Clark *v.* Wilmington, etc., R. Co., 91 N. C. 506, 49 Am. Rep. 647; Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. App. 503, 95 S. W. 640.

A passenger who failed to procure a ticket before entering a railroad train, by reason of the absence of the ticket agent from the station, tendered the usual fare to the conductor, who demanded ten cents extra fare, and, some delay occurring before the passenger could borrow that amount from a fellow passenger, though he finally succeeded in doing so, the conductor rang the bell, stopped the train, and forcibly ejected him. Held, that he was entitled to recover damages from the railroad company for such ejection. Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308, distinguishing Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458; Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

41. What constitutes reasonable time.—Seaboard, etc., R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706; Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. 23; International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

ger has purchased a ticket before ejecting him from the train, and their negligence in this respect can not be pleaded or urged as a defense, or considered in mitigation of damages.[42] If it afterwards turns out that the passenger had a ticket, then, no matter how much the carrier's agent was mistaken, or how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong.[43]

Duty to Search Passenger's Pockets for Ticket.—The conductor of a railroad train can not be required to search the pockets of a passenger for his ticket, and if he consents to search a particular pocket at the request of the passenger, he is not bound to search further.[44] If, however, the conductor does, at the request of a passenger, undertake to search for the passenger's ticket, he should do so properly and in good faith, but only to the extent of the request, and if, acting in good faith and with ordinary diligence, he fail to find the ticket, neither he nor the company would be liable for the consequence of the failure.[45]

§ 2982. Where Ticket Lost.—It is held that the purchaser of a ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, may be ejected;[46] and the same rule has been held to apply where a ticket was left behind by accident.[47] There is no distinction, so far as it affects the

42. Duty to ascertain as to purchase of ticket.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

43. Mistake as to possession of ticket.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

44. Duty to search passenger's pockets for ticket.—Louisville, etc., R. Co. *v.* Fleming, 18 Am. & Eng. R. Cas. 347, 82 Tenn. (14 Lea) 128.

45. Degree of care required in searching for ticket.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347.

46. Where ticket lost.—*Connecticut.*—Downs *v.* New York, etc., R. Co., 36 Conn. 287, 4 Am. Rep. 77.

Georgia.—Harp *v.* Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. Rep. 212.

Ohio.—Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580; Wilt *v.* Wabash, etc., R. Co., 21 O. C. C. 579, 11 O. C. D. 589.

Pennsylvania.—See Cresson *v.* Philadelphia, etc., R. Co. (Pa.), 11 Phila. 597.

Tennessee.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347.

Reason of rule.—As a ticket of a railroad company generally entitles the bearer to transportation, they can be used by the finder, so that two could ride for one fare, if the carrier were required to carry a passenger who had lost his ticket. Harp *v.* Southern R. Co., 47 S. E. 206, 119 Ga. 927, 100 Am. St. Rep. 212.

Illustration.—Plaintiff purchased a ticket of defendant's agent, who gave plaintiff an envelope, on which was written the number of the ticket and the number of plaintiff's credential book. Plaintiff put the envelope in his pocket, and after going on the train discovered that there was no ticket in the envelope. He immediately informed the agent, but no other ticket was given him and he returned to the train, and, on refusing to pay his fare, was ejected from the car. He knew it was the duty of the conductor to eject persons without tickets who refused to pay fare, and he was ejected without unnecessary force. Held, that, if the agent did not give plaintiff a ticket, defendant was liable only for the amount of the fare, but, if plaintiff lost the ticket, defendant was not liable in any amount. Gulf, etc., R. Co. *v.* McCormick, 100 S. W. 202, 45 Tex. Civ. App. 425.

Conductor's check.—Plaintiff bought a ticket over defendant's railroad with checks attached, the conductor detached and retained one of the checks, and gave him instead a conductor's check. Before plaintiff arrived at the point where the conductor's check took him, another conductor took the train and demanded his fare or the production of the check. Plaintiff had lost the conductor's check, and so informed the conductor, and refused to pay his fare, whereupon the conductor ejected him from the cars. Held, that he was lawfully ejected. Jerome *v.* Smith, 48 Vt. 230, 21 Am. Rep. 125.

Evidence as to checking of baggage not conclusive as to existence of ticket.—Where a passenger having a ticket from G. to D. lost her ticket at F., an intermediate point, the fact that her trunk had been checked a G. to D. was not such evidence to the conductor of the train from F. to D. that she had had a ticket as to render it unlawful for him to put her off for failure to produce her ticket or fare. Texas, etc., R. Co. *v.* Smith, 84 S. W. 852, 38 Tex. Civ. App. 4.

47. Ticket left behind by accident.—In Nutter *v.* Southern Railway, 25 Ky. L. Rep. 1700, 78 S. W. 470, it appeared that

relative rights of the parties, whether a ticket be lost or mislaid before or after going on the train. The exhibition of his ticket by the passenger to the employee in attendance for the purpose, upon entering on the train, will give the passenger no other or different rights than if he had not exhibited it.[48]

§ 2983. Failure of Carrier to Furnish Evidence of Right to Continue Journey.—In some cases it is held that a conductor may lawfully remove a passenger from his train, who fails to produce a ticket or pay fare, although such failure is due to the wrongful taking up of the ticket by the conductor of another train, on which the passenger had performed part of the journey;[49] in such case, the right of action of the passenger would be for the wrongful taking up of the ticket.[50] And this rule has been applied where a street car conductor failed to give a transfer to a passenger.[51] Similarly it is held that a passenger who has purchased transportation between two places, and received a contract entitling him to a return ticket on demand at the place of destination, which was refused when demanded, can not recover, on attempting to return without a ticket, for being ejected from the company's train, as he can only recover for breach of contract to furnish the return ticket.[52] But many cases hold that where a passenger gives the conductor his ticket, receiving, however, no check from the conductor in return, and before reaching his destination

before plaintiff boarded defendant's train she handed her ticket to her companion for safe keeping, and the latter, being unable to secure a seat in the car with plaintiff, left it to go to another car, and was left at the station, with plaintiff's ticket in her possession, and when plaintiff's fare was demanded, she, having neither ticket or money, was ejected. It was held that such ejection was justifiable.

48. Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128, 18 Am. & Eng. R. Cas. 347.

49. Where ticket wrongfully taken up.—Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455, approved in Townsend *v.* New York, etc., R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Shelton *v.* Lake Shore, etc., R. Co., 29 O. St. 214, affirming 1 W. L. Bull. 190, 7 O. Dec. Reprint 161. See Lovings *v.* Norfolk, etc., R. Co., 47 W. Va. 582, 35 S. E. 962; Baggett *v.* Baltimore, etc., R. Co., 3 App. D. C. 522.

Ejected by same conductor.—In Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499, an action by a passenger to recover damages for being ejected from a train, plaintiff insisted that he had purchased a ticket to a certain station, which the conductor took up before reaching it, while the conductor claimed that the ticket called for passage only to the station where plaintiff was ejected. The trial court instructed, as a matter of law, that it was the duty of the conductor, in taking up the ticket, to give back a check, or punch the ticket and allow plaintiff to hold it until all intermediate stations were passed. It was held that the law imposes no such duty; and if it did, the neglect to do so could work no injury, as plaintiff was entitled, notwithstanding, to be carried to the station to which he paid fare; and that by not demanding a check on surrendering the ticket the point could not arise.

50. Shelton *v.* Lake Shore, etc., R. Co., 29 O. St. 214. See Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

51. Failure to give transfer.—Defendant's street car, in which plaintiff was riding, did not go to the end of the line, plaintiff's destination. The conductor informed him when the car stopped that he could get off, and take the next car. Plaintiff had paid his fare in the first car, but had no transfer, or any evidence, except his own statement, that he was entitled to ride on the second car without paying. On his refusal to pay the fare demanded, he was ejected, and brought an action for damages. Held, that he could not recover, even if he had a contract with defendant for a ride to the end of the line, because the conductor was not bound to accept his statement that he had such a contract, but it was plaintiff's duty to pay his fare, and seek redress for violation of the contract. Mahoney *v.* Detroit City Railway, 93 Mich. 612, 53 N. W. 793, 32 Am. St. Rep. 528, 18 L. R. A. 335.

The rules of a street railway company required that a passenger, on transferring from one line to another, should produce a transfer, or pay his fare on the second line. Plaintiff, on leaving a car in order to transfer to another line, was not given a transfer by the conductor of the car he was leaving, but such conductor shouted to the other conductor that plaintiff had paid his fare, and that he should be passed. Plaintiff refused to pay a fare on the car to which he transferred, and was ejected by the conductor. Held, that the conductor had no right to disregard the rule, and had a right to eject plaintiff. Crowley *v.* Fitchburg, etc., R. Co., 70 N. E. 56, 185 Mass. 279. See Bradshaw *v.* South Boston R. Co., 16 Am. & Eng. R. Cas. 386, 135 Mass. 407, 46 Am. Rep. 481.

52. Wilt *v.* Wabash, etc., R. Co., 21 O. C. C. 579, 11 O. C. D. 589.

there is a change of conductors, and the new conductor expells him for want of a ticket or check, the carrier is liable to the passenger in damages for the ejection.[53] And this holding has been applied to street car transfers.[54] It is also held that if the second conductor is satisfied that the passenger has surrendered his ticket to the first conductor upon the evidence exhibited by the passenger, he has no legal right to expel the passenger because he does not pay fare or produce the ticket, although the rule of the company may require the expulsion under such circumstances.[55] And where a passenger pays his fare to the first conductor, who neglects to give him a ticket, the rule that a passenger must show a ticket or pay his fare will not authorize his ejection by the second conductor, if he has actual knowledge of the payment of the fare to the first conductor.[56] Where a street railway company established, by practice, a right in its passengers to change, without a transfer ticket, from one car to another, in completing their journey, it could not change the practice without notice to the passengers, so that it was liable for ejecting a passenger who changed from one car to another without obtaining a transfer.[57]

Mistake of First Conductor in Detaching Wrong Part of Ticket.—See post, "Effect of Mistake of First Conductor," § 3003.

§ 2984. Refusal to Pay Excessive or Second Fare.—Refusal to Pay Excessive Fare.—Where the conductor demands of a passenger a higher rate of fare than he is entitled to demand under the rules of the company, and ejects the passenger for his refusal to comply, the company is liable.[58] Where a passenger tenders the conductor the lawful amount of fare, he is under no duty to pay additional fare unlawfully demanded, or to get off the train at an intermediate station and buy a ticket in order to reduce the damages that might result from his ejection from the train.[59]

53. Holding that carrier liable for ejection.—*United States.*—Scofield *v.* Pennsylvania Co., 50 C. C. A. 553, 112 Fed. 855, 56 L. R. A. 224.

California.—Sloane *v.* Southern Cal. R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Georgia.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Indiana.—Pittsburgh, etc., R. Co. *v.* Hennigh, 39 Ind. 509.

South Carolina.—Palmer *v.* Charlotte, etc., R. Co., 3 S. C. 580, 16 Am. Rep. 750.

The measure of care required of a carrier to see that a passenger, after his ticket is taken up, is provided with evidence of his right to continue his journey is extreme care and diligence. Sloane *v.* Southern Cal. R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Presumption against carrier.—In case of the ejection from a train of a passenger who had previously delivered up his ticket, the presumption is against the company. Georgia R. Co. *v.* Homer, 73 Ga. 251.

Passenger not guilty of contributory negligence.—Where a railroad company agrees to transport a passenger between specified points, with the right to stop off at an intermediate point, and the ticket coupon covering the distance between such points is taken up by the company's conductor, over the passenger's objection, before reaching the intermediate point, and the right to stop off denied, the passenger on resuming his journey from the point of stop-over is not guilty of contributory negligence, as a matter of law, in attempting to ride without a ticket on a later train, from which he was expelled. Scofield *v.* Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224.

54. Failure to give transfers.—Plaintiff, a passenger on defendant's street car line, paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the company. He took the next car on such line, and the conductor took up his transfer check. Without notice to plaintiff, this car was shortly taken off. The conductor having disappeared, plaintiff was informed by the driver of that car that he should take the next passing car. He did so, but was put off by the conductor because he had no transfer check, and refused to pay fare again. Held, that plaintiff showed, prima facie, a right to recover. Appleby *v.* St. Paul City R. Co., 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308.

55. East Tennessee, etc., R. Co. *v.* King, 88 Ga. 443, 14 S. E. 708.

56. Homiston *v.* Long Island R. Co., 3 Misc. Rep. 342, 22 N. Y. S. 738, 52 N. Y. St. Rep. 1.

57. Consolidated Tract. Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685.

58. Refusal to pay excessive fare.—Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

59. Gulf, etc., R. Co. *v.* Dyer, 43 Tex. Civ. App. 93, 95 S. W. 12.

Refusal to Pay Second Fare.—It is held that it is the duty of a passenger of whom a second fare is demanded under an honest mistake made by the conductor to rectify the mistake, and show the conductor his right to ride without the payment of additional fare when it is within his power and with reasonable effort to do so. He can not accede to the demand of the conductor that he pay additional fare or leave the train, and afterwards sue the carrier for wrongful expulsion when he could easily have convinced the conductor of his right to continue his journey.[60] But it is held that a railroad company is liable for ejecting a passenger who is rightfully on a train and has paid his fare,[61] though the ejection is the result of the honest belief of the conductor that he has not paid, and the passenger makes no effort to show that he has paid, and is immediately taken back onto the train.[62] A passenger who has surrendered his ticket, and who is called on to pay a second time need not, to avoid ejection from the train, go among his friends on the train to endeavor to borrow money to pay the fare.[63] Where the driver of a street car, in changing a fifty-cent piece for a passenger, gave him a package of nickels, marked "fifty cents," but which contained only forty-five cents, and refused to make good the mistake, referring him to the office, the street railway company was liable for ejecting the passenger upon his refusal to pay his fare of five cents.[64] Private instructions by a street railway company to its drivers to go through the cars when crowded, and collect the fares, will not relieve it from liability for the ejection of a passenger, ignorant of such instructions, who, in obedience to a notice posted in the car

60. Refusal to pay second fare.—Southern R. Co. *v.* Christian, 2 Tenn. App. Cas. 231.

Illustrations.—A passenger who has had mileage taken from his book by the conductor for his entire trip, but who, at an intermediate station, changes his seat, can not recover for being ejected on his refusal to pay when fare was afterwards demanded; he having simply said he had paid his fare, and, on being asked where to, told the conductor that he ought to know; that it was his business to know (language which on a former occasion the conductor had used to him), and having, when the conductor, for the first time recognizing him, asked him to get on again, refused to do so, with the statement that he would fix him. White *v.* Grand Rapids, etc., R. Co., 107 Mich. 681, 65 N. W. 521.

Where a passenger receives a check from the conductor on the surrender of his ticket and goes into another car, and, on his fare being demanded, fails to produce the check, and claims that none was given him, and, on his refusal to return to the other car for identification, is ejected from the train, he can not recover damages for such ejection. Lucas *v.* Michigan Cent. R. Co., 56 N. W. 1039, 98 Mich. 1, 39 Am. St. Rep. 517.

61. Gulf, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 34 S. W. 449

Plaintiff was ejected from defendant's train for refusal to pay a second fare. There was evidence that the conductor, when plaintiff stated to him that he had already paid his fare, without requesting any explanation, accused him of lying, and demanded his ticket; that plaintiff, to whom, on payment of his cash fare, a rebate check had been given, stated that he had no ticket, whereupon, on his refusal to pay a second fare, he was ejected. The conductor did not inquire as to the manner in which the fare had been paid, and plaintiff testified that his failure to show his rebate check was because he had forgotten it. Held, that plaintiff's failure to produce the rebate check did not, as a matter of law, prevent a recovery by him. Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890.

A passenger who paid his full cash fare on the train, but was not given a cash fare receipt, is not bound to tender a second fare, or otherwise be limited to nominal damages for ejection; the conductor, who made a mistake by giving him a hat check to a station before that to which he paid, having refused to listen to his explanation, which, when he was finally permitted to give it, after ejection, set him right, and secured permission for him to continue his journey; and the conductor having had in his possession a copy of the receipt, which, with a little care and examination, would have explained and made clear the whole difficulty. Burnham *v.* Detroit, etc., R. Co., 168 Mich. 55, 133 N. W. 952, Ann. Cas. 1913B, 1204.

62. Gulf, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 34 S. W. 449.

63. Light *v.* Detroit, etc., R. Co., 165 Mich. 433, 130 N. W. 1124, 34 L. R. A., N. S., 282.

64. Refusal to rectify mistake.—Curtis *v.* Louisville City R. Co., 94 Ky. 573, 23 S. W. 363, 21 L. R. A. 649, 15 Ky. L. Rep. 351.

prohibiting the driver from collecting fares, had deposited his fare in a box placed there for that purpose by the company, of which fact the driver had full knowledge when he demanded the fare a second time.[65]

§ 2985. Nonpayment of Fare of Child.—A passenger on a railroad car, being responsible for the fare of a child under his charge, may be ejected for refusal to pay such fare, though he has paid his own fare;[66] and it makes no difference that the passenger is himself a minor.[67] A child entitled to ride on half fare, who is riding upon a railroad train, may be ejected from the train for nonpayment of its fare, notwithstanding that it is accompanied by its parent, who has paid her own fare, but refuses to pay that of the child.[68]

§ 2986. Nonpayment of Past Fare.—One who has been transported upon a train without producing a valid ticket or tendering the proper fare may be ejected for refusal to pay fare for the distance already ridden though he has a valid ticket from the place of ejection or offers to pay fare from such place.[69] But, of course, this rule does not apply to a passenger presenting in the first in-

65. Perry *v.* Pittsburgh Union Pass. R. Co., 153 Pa. 236, 25 Atl. 772.

66. Nonpayment of fare of child.—*Maryland.*—Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

Minnesota.—Braun *v.* Northern Pac. R. Co., 79 Minn. 404, 82 N. W. 675, 984, 49 L. R. A. 319, 79 Am. St. Rep. 497. (Parent in charge of child).

Ohio.—Lake Shore, etc., R. Co. *v.* Orndorff, 45 N. E. 447, 55 O. St. 589, 38 L. R. A. 140, 60 Am. St. Rep. 716.

Tennessee.—Warfield *v.* Railroad, 104 Tenn. (20 Pickle) 74, 55 S. W. 304, 78 Am. St. Rep. 911.

Texas.— Ft. Worth, etc., R. Co. *v.* Gribble, 102 S. W. 157, 46 Tex. Civ. App. 78.

67. Warfield *v.* Railroad, 104 Tenn. (20 Pickle) 74, 55 S. W. 304, 78 Am. St. Rep. 911.

68. Beckwith *v.* Cheshire R. Co., 143 Mass. 68, 8 N. E. 875. See Pittsburgh, etc., R. Co. *v.* Dewin, 86 Ill. 296.

Under Mass. Pub. St., c. 112, § 197, enacting that a person who fraudulently attempts to evade the payment of a fare established by a railroad corporation shall be punished, and that "no person shall be removed from a car of a steam railroad corporation except as provided in" chapter 103, § 18 (that is, by a railroad police officer, who must remove him to, and confine him in, the baggage car or other suitable car, and place him in charge of an officer at some station), "nor from a train except at a regular passenger station," a child of the age at which the rules of a railroad corporation require the payment of a fare, and traveling in the custody of his parent, upon refusal to pay such fare, may be removed from the train at a regular passenger station, without being arrested. Beckwith *v.* Cheshire R. Co., 143 Mass. 68, 8 N. E. 875.

69. Nonpayment of past fare though fare paid from place of ejection.—Manning *v.* Louisville, etc., R. Co., 95 Ala. 392, 11 So. 8, 16 L. R. A. 55, 36 Am. St. Rep. 225; Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458. See Chicago, etc., R. Co. *v.* Adams, 60 Ill. App. 571.

Illustrations.—Plaintiff procured a ticket entitling him to transportation on defendant's road from W. to B., but upon entering the car refused to surrender his ticket until he was provided with a seat, and was thereupon ordered to leave the train when it should arrive at F. Having procured a seat at F., he tendered his fare from that point to B., but refused to surrender his ticket. The conductor refused to accept the amount offered, and ejected plaintiff from the train. Held, in an action for damages brought upon the original contract for transportation made at W., that plaintiff was not entitled to carriage from F. to B. without surrendering his ticket or tendering his fare from W. The case might be otherwise if plaintiff alleged a new contract entered into at F. Davis *v.* Kansas, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457.

Where a passenger boarded a train at X., with a ticket for Z., which had expired, and on refusing to pay the required fare was ejected by the conductor at Y., he could not, immediately after his ejection, board the train again at Y., and obtain passage to Z. on the payment of fare from Y. to Z., but the conductor was authorized, on his refusal to pay the full fare from X. to Z., to eject him a second time. Gulf, etc., R. Co. *v.* Riney, 41 Tex. Civ. App. 398, 92 S. W. 54.

A passenger who has forfeited a ticket providing for a continuous passage, but who has been carried almost to his destination before the mistake is discovered, may be ejected for refusal to pay fare not only for the remaining distance, but for that which has already been traveled since the forfeiture of the ticket. Manning *v.* Louisville, etc., R. Co., 95 Ala. 392, 11 So. 8, 16 L. R. A. 55, 36 Am. St. Rep. 225.

stance a ticket entitling him to transportation.[70] And it has been held that if one thought his ticket entitled him to ride to his destination, and refused to pay his fare for that reason, he might recover for the carrier's fault in refusing to accept him as a passenger at the place of ejection upon presenting a valid ticket unless he paid past fare since, the carrier having terminated his journey at that point, it was bound to accept him as a passenger there; but if such person knew, or ought to have known, that his ticket was worthless, or if he refused to pay fare because he thought he would not be put off until the train reached the place of ejection, he could not recover.[71]

§§ 2987-2988. Requiring Ticket as Condition Precedent to Right of Carriage—§ 2987. In General.—A rule of a carrier that persons contemplating taking passage upon a train must buy a ticket is a reasonable one,[72] and may be enforced by ejecting from the train a passenger without a ticket,[73] regardless of a tender by him of the fare in money.[74] But such rule must be enforced in a reasonable manner, and where a person sought to comply with the rule but could not do so because of the absence of the carrier's agent, the conductor could not eject him from the train after he had been notified of the inability to procure a ticket.[75] A rule of a railroad company requiring passengers on accommodation trains to procure tickets does not justify the ejection of a passenger who was ignorant of the rule, who had been often permitted by the train hands to ride on the payment of a cash fare to them, and who could not have secured a ticket in time to board the train, by reason of the ticket agent's failure to seasonably open the office.[76]

§ 2988. Carriage on Freight Trains.—A railroad company may require passengers to procure tickets before riding on freight trains, and may expel from the cars such as neglect to comply with the regulation.[77] But to entitle a railroad company to enforce a published rule requiring passengers to obtain tickets as a condition precedent to the right to ride on one of its freight trains, the company must afford passengers reasonable facilities for purchasing tickets, and for that purpose must keep its ticket office open for a reasonable time before the departure of the train.[78] And where a carrier had been in the habit of

70. Where ticket valid.—Plaintiff purchased a ticket entitling him to transportation from B. to H., on defendant's railroad, without any limitation as to time or train. He stopped over at A., and resumed his journey by the next train. The conductor of the second train told him his ticket was punched to H., and he must pay the fare from A. to H., or be put off the train at M., the next station. Plaintiff remonstrated, but on arriving at M. purchased a ticket from that place to H., which the conductor refused unless plaintiff paid the fare from A. to M.; and, on plaintiff refusing to do this, he was put off the train. Held, that defendant was liable in damages. Ward *v.* New York, etc., R. Co., 56 Hun 268, 9 N. Y. S. 377, 30 N. Y. St. Rep. 604.

71. Whittemore *v.* Boston, etc., Railroad, 76 N. H. 388, 83 Atl. 125.

72. Requiring ticket as condition precedent to right of carriage.—Harkless *v.* Chicago, etc., R. Co., 151 Mo. App. 463, 132 S. W. 29.

73. Ammons *v.* Southern R. Co., 138 N. C. 555, 51 S. E. 127, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S. 340; International, etc., R. Co. *v.* Goldstein, 2 Texas App. Civ. Cas., § 274.

74. Ammons *v.* Southern R. Co., 138 N. C. 555, 51 S. E. 127, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340.

75. Harkless *v.* Chicago, etc., R. Co., 151 Mo. App. 463, 132 S. W. 29.

76. Eddy *v.* Rowell (Tex. Civ. App.), 26 S. W. 875.

77. Carriage on freight trains.—*Illinois.*—Illinois Cent. R. Co. *v.* Nelson, 59 Ill. 110; Toledo, etc., R. Co. *v.* Patterson, 63 Ill. 304.

Indiana.—St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Missouri.—Jones *v.* Wabash, etc., R. Co., 17 Mo. App. 158.

Nebraska.—Burlington, etc., R. Co. *v.* Rose, 11 Neb. 117, 8 N. W. 433.

Pennsylvania.—Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. 373.

Tennessee.—Lane *v.* East Tennessee, etc., R. Co., 73 Tenn. (5 Lea) 124.

78. Reasonable opportunity to obtain ticket.—*Alabama.*—Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771.

Indiana.—St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

Kansas.—Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937; Brown

receiving money on its freight trains from passengers, a passenger is entitled to notice of a regulation changing such custom, and requiring tickets to be purchased, before he can be lawfully ejected for noncompliance.[79] Where a regulation providing that passengers would not be carried on defendant's freight trains unless they first provided themselves with tickets was posted conspicuously in the waiting room of a station for a month prior to and at the time when defendant took passage on such a train, the notice was sufficient to bind plaintiff, though he had no actual knowledge thereof, and he could be expelled at any suitable place for failure to obtain a ticket, though he offered to pay his fare.[80] When the conductor and brakeman of a freight train announce to the passengers in the caboose that they must all procure tickets before taking passage, and ample time is given to procure tickets before the train leaves, this is sufficient notice of the rule of the company requiring passengers on freight trains to procure tickets, and a person failing to comply may be ejected.[81]

Requiring Certain Kind of Ticket.—Where due notice thereof is given, and the necessary means for complying therewith is provided, a railroad company has the right to adopt a regulation prohibiting the conductors of its freight trains from carrying passengers thereon who shall not have previously procured a specified kind of ticket; and if a passenger, having notice of, and neglecting to comply with, such regulation, is ejected from such train by the conductor thereof, by the use of no more force than is necessary, he can not maintain an action therefor.[82]

Requiring Permit.—A rule that no conductor in charge of a freight train shall allow any person to travel as a passenger on his train without a permit from a particular agent is within the power of a railroad company to prescribe, and one attempting to ride on a freight train without a permit may be ejected.[83] But the company can not eject a passenger on such train who has no permit, where no reasonable opportunity to procure the permit at the station at which he took the train was offered,[84] or where he requests a permit when he purchases

v. Kansas, etc., R. Co.. 38 Kan. 634, 16 Pac. 942.

Missouri.—Cross *v.* Kansas, etc., R. Co., 56 Mo. App. 664.

Where a railroad company advertised to carry on its freight trains passengers who would purchase a freight train ticket, and plaintiff waited at the ticket office until the train was about to start, but saw no one, although he made no effort to obtain a ticket, held, that he could not recover from the company upon being put off the train, as they were not bound to carry passengers save upon strict compliance with their regulations. Indianapolis, etc., R. Co. *v.* Kennedy, 77 Ind. 507.

Texas statute.—Under Rev. St., art. 4238, declaring the intersection of two railroads to be a depot where the companies must receive passengers, and article 4226, requiring passengers to be carried to and from such junctions on payment of the legal fares, and Sayles' Civ. St., art. 4258b, § 9, requiring ticket offices to be open half an hour prior to the departure of trains, and authorizing a charge of only three cents a mile by the conductor if the offices are not so open, a company is liable for the ejection of a passenger from a freight train, who gets on at a junction where there is no ticket office, notwithstanding its rule that passengers without tickets can not ride on such trains. Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

79. Notice of regulation.—Lane *v.* East Tennessee, etc., R. Co., 73 Tenn. (5 Lea) 124. See Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. 373.

80. Burlington, etc., R. Co. *v.* Rose, 11 Neb. 177, 8 N. W. 433. See Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. 373, wherein it was held that putting up notices of the regulation at the station houses was not sufficient.

81. Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

82. Requiring certain kind of ticket.—Falkner *v.* Ohio, etc., R. Co., 55 Ind. 369.

83. Requiring permit.—Thomas *v.* Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463. See Louisvlile, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

A passenger ticket expressed to be "good going on any train" does not give the passenger a right to ride on a through freight without a permit, and, on his attempting to do so, the conductor may lawfully eject him. Thomas *v.* Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463.

84. Reasonable opportunity to obtain permit.—Reed *v.* Great Northern R. Co., 76 Minn. 163, 78 N. W. 974.

his ticket, and is told by the agent that the conductor will give him one,[85] or when the passenger relies on the promise of the agent to procure and deliver such permit to the conductor.[86] It is held that a passenger who knew it was essential, under the rules of the railroad, that he must get the permit before he got on the train, and that the ticket agent had no authority to say he could get it of the conductor, can not, because of such representation of the agent, recover for his ejection by the conductor.[87] But it is also held that where the agent promised to procure a permit and to give it to the conductor, but neglected to do so, the rule prohibiting passengers from riding without permits, and plaintiff's knowledge of the rule, were no defense.[88] Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of a permit, the company is not liable because its conductor has violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced.[89] Where a person in good faith enters a freight train as a passenger, and in possession of a ticket good on the train when accompanied by a permit, the fact that he is informed by the brakeman prior to demand by the conductor for his ticket and permit that the rules require a permit in connection with the ticket does not make it the duty of the passenger to leave the train at a station at which a stop was made after receiving the information, and before the conductor's demand.[90]

Failure of Agent to Give Ticket in Addition to Permit .—If a passenger paid his fare to the agent and secured a permit for transportation by a freight train, and believed in good faith that it was the evidence of his right to transportation, and was ejected from the train because of the agent's mistake in failing to give him a ticket in addition to the permit, and the passenger was not at fault in failing to discover the mistake before entering the car, he may recover for his ejection.[91]

§§ 2989-3005. Defective or Invalid Ticket—§ 2989. In General.—A passenger who has no valid ticket,[92] or transfer,[93] and who fails to pay his

85. Houston, etc., R. Co. *v.* White (Tex. Civ. App.), 61 S. W. 436; Houston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 61 S. W. 440.

86. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

87. Houston, etc., R. Co. *v.* Stell, 28 Tex. Civ. App. 280, 3 R. R. R. 722, 26 Am. & Eng. R. Cas., N. S., 722, 67 S. W. 537

88. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

89. Houston, etc., R. Co. *v.* White (Tex. Civ. App.), 61 S. W. 436; Houston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 61 S. W. 440.

90. Houston, etc., R. Co. *v.* Berry (Tex. Civ. App.), 84 S. W. 258.

91. Failure to give ticket in addition to permit.—Olson *v.* Northern Pac. R. Co. 96 Pac. 150, 49 Wash. 626, 18 L. R. A., N. S., 209.

92. Defective or invalid ticket.—*United States.*—Hall *v.* Memphis, etc., R. Co., 9 Fed. 585.

Illinois.—Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59; Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96.

New York.—Berkelhamer *v.* Joline (App. Term), 113 N. Y. S. 921.

Ohio.—Pennsylvania Co. *v.* Hine, 41 O. St. 276; Haskins *v.* Lake Shore, etc., R Co., 4 Wkly. L. Bull. 951, 7 O. Dec. 679.

Texas.—Texas, etc., R. Co. *v.* McDonald, 2 Texas App. Civ. Cas., § 163.

A railroad company has the right to eject from the cars a passenger who, when asked for his fare, tenders, without explanation, a ticket which is void by reason of having a hole punched through it. Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96.

Where the holder of a mileage ticket, after having been warned by the conductor that the ticket was invalid and had been ordered taken up, and after having neglected opportunities to ascertain the validity of the ticket, presented the ticket again for payment of his fare, and was ejected from the train on refusing to pay otherwise, he could not recover. Moore *v.* Ohio River R. Co., 41 W. Va. 160, 23 S. E. 539.

A passenger offering a worthless sheet of paper, claiming it to be a pass, and who, on being informed that it was not a pass, refuses to pay fare, may be ejected. Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59.

93. Street car transfer.—Where a street railway company voluntarily permits passengers to transfer from one car to another on obtaining a transfer check, the person who fails to comply with the requirements as to such check and refuses to pay fare can not recover, when ex-

fare may be ejected. As to the liability of a carrier for ejecting a passenger whose ticket is defective through the fault of the carrier's servants, see elsewhere.[94] Where a passenger was not entitled to ride on a ticket presented for his fare, the fact that the conductor wrongfully took up the ticket did not justify the passenger in refusing to pay fare except on condition that the ticket be returned.[95]

Where Ticket Not Paid For.—For a passenger to give a counterfeit bill for his ticket, though he does so unknowingly and innocently, is no payment, creates no obligation on the company to carry him, and entitles the conductor, if the passenger will not rectify the error, to put him off as a passenger refusing to pay fare.[96]

Authority of Agent.—Where a ticket is issued by one who at most occupies to the carrier the relation of special agent, the passenger purchases the ticket at his own peril and can not recover for being ejected where he presented an improper ticket issued by such agent and refused to pay fare.[97] It is held that where a railroad company has authority or apparent authority to issue tickets over a connecting line, one purchasing from its agent a ticket over such connecting line is entitled to ride thereon in the absence of knowledge on his part that such agent was without authority to sell the ticket.[98] Although a Pennsylvania statute makes it illegal for one other than the authorized agent of a railroad

pelled from the car, where his failure to have a valid transfer check was not due to the fault of some employee of the company. Hornesby *v.* Georgia R., etc., Co., 48 S. E. 339, 120 Ga. 913.

Where a street railway under a contract with a city requiring it to carry passengers over two sections of its line for one fare has passed a rule requiring the passenger to show an undetached coupon ticket as a voucher of his right to continue beyond a given point, the passenger who does not comply with such rule can not recover for his election. De Lucas *v.* New Orleans, etc., R. Co., 38 La. Ann. 930.

Rule requiring hour to be punched.—Defendant interurban street car company contracted with a local company, for mutual transfer privileges within the city limits, subject to the regulations contained in the transfers. Defendant's rules forbade the acceptance of a transfer unless the hour was properly punched thereon, and a transfer slip received by a passenger from the local company stated thereon that it was void fifteen minutes after the hour punched on it, and that the passenger should see that the line and the time were correctly punched; but no time was punched on a transfer by the conductor of the local line, though it had been in fact received within fifteen minutes from the time it was presented to defendant. Held that, the rule requiring the hour to be punched on the transfer being a reasonable one, the passenger could not recover damages from defendant company as for assault for being ejected. Weber *v.* Rochester, etc., R. Co., 129 N. Y. S. 304, 145 App. Div. 84.

94. Ticket defective through fault of carrier.—See post, "Effect of Mistake of Employee Issuing Ticket," § 3002; "Effect of Mistake of First Conductor," § 3003.

95. Rahilly *v.* St. Paul, etc., R. Co., 66 Minn. 153, 68 N. W. 853.

96. Where ticket not paid for.—Memphis, etc., R. Co. *v.* Chastine, 54 Miss. 503.

97. Ticket bought of unauthorized agent.—A. purchased a ticket over the H. Railroad from the general ticket agent of another company, who, by the custom existing among railroads, had the right to sell tickets of a prescribed form, but not tickets such as he sold to A., who on presenting his ticket, and refusing to pay fare, was ejected from the cars. Held, that the railroad company was not liable for damages. Houston, etc., R. Co. *v.* Ford, 53 Tex. 364.

98. Absence of knowledge of lack of authority.—The T. Ry. Co., whose line ran from F. to E., was authorized by defendant company, whose line ran from E. to M., to sell tickets from F., through E., to M., at a less rate than defendant's regular fare from E. to M. Plaintiff, a citizen of E., applied to the agent of the T. Ry. Co. at E. for tickets from F., through E., to M., and asked him if he could not telegraph to F. for them. Soon after he bought two tickets from the agent, who had not telegraphed for them, but had made them up in his office in E. They indicated a journey from F. to M., and were stamped "Exchanged," indicating that they were given at E. in exchange for others that were surrendered by the holder at E. Held, that it could not be legally presumed from the stamp that the purchaser knew that the agent was without authority to sell the tickets, or that he was perpetrating a fraud on defendant by issuing the same, so as to justify the purchaser's expulsion from the train. Mexican Cent. R. Co. *v.* Goodman (Tex. Civ. App.), 55 S. W. 372.

company to sell tickets, one who buys a ticket of an unauthorized agent in New York, where such a sale is lawful, is entitled to be brought into Pennsylvania over the road of the company issuing the ticket, and is entitled to damages for ejection from the cars.[99]

Mutilated Ticket.—A valid ticket, though mutilated, must be received by the conductor unless its condition is due to fault of the passenger, and the conductor is reasonably satisfied that it is invalid.[1] But where the holder of a condemnation ticket, so mutilated that all the fares were canceled before they had been used, without applying to the officials of the railroad company for relief attempted to take passage on the ticket, and when it was rejected by the subordinate whose duty it was to cancel tickets he protested, and obstructed the passageways, whereupon he was removed by a policeman, the company was not liable in damages as for an assault.[2]

Where Passenger Stops Over.—As an ordinary railway ticket only entitles the holder to a continuous passage, he is not entitled to stop over without the consent of the company and where he does so he may be ejected from the next train for nonpayment of fare.[3] It is held that where a train agent informs a passenger that he may leave the train at a station, and continue his journey upon the same ticket, the company is bound, and can not deny the authority of

99. Sleeper *v.* Pennsylvania R. Co., 100 Pa. 259, 45 Am. Rep. 380.

1. **Valid though mutilated ticket.**—Houston, etc., R. Co. *v.* Crone (Tex. Civ. App.), 37 S. W. 1074.

2. Henly *v.* Delaware, etc., R. Co., 59 N. Y. S. 857, 28 Misc. Rep. 499, affirming 57 N. Y. S. 396, 27 Misc. Rep. 811.

3. **Where passenger stops over.**—Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458, holding that evidence that the passenger had sometimes been permitted to stop over at intervening stations, and ride upon the same ticket without stop-over checks, as he wished to do when ejected, and that sometimes he had not, is inadmissible. See, generally, ante, "Stipulation as to Continuous Passage," § 2219.

Travelers having a special contract of passage which did not allow them to stop over can not, having stopped over, complain that they were ejected from another train on which they took passage and refused to pay full fare, for Rev. Codes, § 5350, provides for the ejection of persons declining to pay their fare. Sanden *v.* Northern Pac. R. Co., 115 Pac. 408, 43 Mont. 209, 34 L. R. A., N. S., 711.

Failure to comply with carrier's rules.—A passenger bought, without objection, a ticket which, on its face, entitled him to one trip from New York to Rochester within five days from date. Rules of the company allowed him to stop over, on complying with certain conditions of surrendering the ticket and obtaining a conductor's check; but these rules he did not know, and he stopped over without complying with them. On resuming his journey, the conductor required him to pay fare, and, on his refusal, put him off for nonpayment. Held, that he could not recover damages. Dunphy *v.* Erie R. Co., 42 N. Y. Super. Ct. 128.

Stop-over not indorsed on ticket.—The regulations of a railroad company required conductors on each division, when starting with a train, to examine tickets, tear off the corner thereof indicating the division, indorse stop-overs, and collect fare from passengers from whose tickets the division marks had been torn and which were not indorsed with stop-overs. In an action by a passenger who, after a stop-over, which was not indorsed on his ticket, was ejected for refusing to pay fare, held, that the regulation was not unreasonable and void. Beebe *v.* Ayres (N. Y.), 28 Barb. 275.

The regulations of a railroad company required that a passenger's ticket should be indorsed by the conductor if he desired to stop over at a way station and resume his journey on another train. A passenger on a through train, desiring to stop over at L., an intermediate station, applied to the conductor of the train on which he was traveling to have his ticket so indorsed, and was told by him that it was not necessary. The passenger stopped over at L., and resumed his journey on another train, and, without applying to the conductor of that train to have his ticket indorsed, again stopped over at A. On attempting to resume his journey from A. on another train, the conductor refused to recognize his ticket, because it was not indorsed in accordance with the company's regulations, and ejected him for nonpayment of his fare. Held, that the privilege granted him by the conductor of the train on which he first embarked, of stopping over at a way station without having his ticket indorsed as required by the company's regulations, was exhausted by his stopping over at L., and that, when he again embarked, he became subject to all the company's regulations, and that he could not again stop over at a way station without having his ticket indorsed. Denny *v.* New York, etc., R. Co. (N. Y.), 5 Daly 50.

the agent.[4] But a conductor has no such authority where the function to modify the terms of a ticket is vested exclusively in the train agent.[5] In an action by a passenger for attempted ejection of him from a train, the defense that the ticket presented by the passenger was invalid, because good for only one continuous passage, is not inconsistent with the claim by defendant's conductor at the time of the attempted ejection that the ticket was "out of date."[6]

Contributory Negligence of Passenger.—The fact that one conductor allowed a passenger, who was subsequently ejected by another conductor, to ride on a defective ticket, does not affect the proper standard of due care on the part of the passenger in trying to cure the defect.[7] A passenger buying a round-trip ticket, who did not observe the mistake of the conductor, who retained the return part of the ticket, was not guilty of contributory negligence because of his failure to observe the mistake and could sue for being ejected from the train on the return trip on the refusal of the conductor to accept his ticket.[8]

Estoppel of Carrier to Deny Validity of Pass after Journey Commenced.—A railroad company, giving a free pass to a laborer agreeing to work for it at the end of his journey, is estopped to deny the validity of the pass after the laborer has entered the train to go on the journey, without any knowledge that the pass has been revoked; and hence, when he presents such a pass under such circumstances, the company has no right to expel him.[9]

Failure to Comply with Berth Regulations.—Where a ticket does not entitle one to ride on a certain train unless he has a berth, he may be ejected from such train where he has failed to secure a berth.[10]

4. Tarbell *v.* Northern Cent. R. Co. (N. Y.), 24 Hun 51.

5. Plaintiff rode in the cars, having a ticket that did not give him the right to a discontinuous passage. He stopped at an intermediate point, and entered another train, and claimed the right to continue his journey on such ticket, under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train agents had the power to modify the force of such tickets. Held, that such expulsion was justifiable, although, at the trial, the plaintiff testified that it was, in point of fact, a train agent, and not a conductor, that had given him the privilege claimed. Petrie *v.* Pennsylvania R. Co., 42 N. J. L. 449.

6. Louisville, etc., R. Co. *v.* Klyman, 67 S. W. 472, 108 Tenn. 304, 56 L. R. A. 769, 91 Am. St. Rep. 755.

7. Contributory negligence of passenger.—Poulin *v.* Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

At the city ticket office of a railroad company a passenger paid the price of a ticket from Detroit to Quebec and return, but, by mistake of the agent, was given a ticket, both parts of which were stamped for passage from Detroit to Quebec. He discovered the mistake when about to take the train, and thereupon consulted a person temporarily in charge of the station office during the absence of the agent. This person said he had no authority to correct the mistake, but thought the matter would be all right. The passenger went to Quebec, and spent several weeks, but on the way home was ejected from the train. Held, that he was bound to know that the conductor had a right to refuse the ticket, and therefore, in boarding the train, was guilty of negligence barring a recovery in tort, and rendering his damages merely nominal if his action is on contract. Brown, J., dissenting on the ground that, under all the circumstances of the case, the question of contributory negligence was one for the jury. Poulin *v.* Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800, distinguishing Eddy *v.* Wallace, 49 Fed. 801, 1 C. C. A. 435; Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 412, 50 N. W. 386, 14 L. R. A. 223.

8. Louisville, etc., R. Co. *v.* Fish (Ky.), 127 S. W. 519.

9. Estoppel of carrier to deny validity of pass after journey commenced.—St. Louis, etc., R. Co. *v.* Tucker, 3 Texas App. Civ. Cas., § 322.

10. Failure to comply with berth regulations.—Defendant operated a special train known as "The Owl," which ran on a special schedule, with a limited number of sleepers, with no accommodations for passengers except those having berths. Plaintiff applied for a ticket on this train, and was informed that such ticket would not be good unless he had a berth. Plaintiff bought a ticket which recited that it was good only on train "No. — The Owl," but contained no reference to the berth requirements. He applied for a berth, and was informed that they had all been sold, and on his attempting to board the train he was also informed that his ticket was not good on that train unless he had a berth. He boarded the train without a berth, and the conductor refused to permit him to ride, informing him that he would have to get off at P., and could

Effect of Provision in Ticket Not Binding on Purchaser.—One who purchases a ticket good for passage on freight trains, which provides that the purchaser agrees that the company shall not be liable for damage to his person or baggage, is not, by reason of the fact that his agreement is not binding on him, precluded from recovering from the railroad company for his wrongful exclusion from a freight train, on the theory that such privilege can be revoked at any time on notice.[11]

§§ 2990-2994. Failure to Comply with Conditions of Ticket—§ 2990. In General.—A carrier may lawfully eject a passenger who has, through his own fault, failed to comply with the conditions of his ticket and who refuses to pay his fare.[12] And, in an action for ejection for failure to comply with the conditions of his ticket, a passenger can not claim that the provisions of the ticket releasing the carrier from liability for negligence are illegal, as that question can only be raised in an acton to recover damages for negligence.[13]

Provision as to Signing Ticket.—Where a railroad ticket provided that it should be signed by the purchaser, who should also, when requested, sign his name for identification, and that the agent selling it had no authority to alter or waive any of its terms, one who purchased such ticket at a reduced rate in consideration of a compliance with its terms, of which he was made acquainted, is thereby bound, notwithstanding an alleged waiver by said agent of his signing; and, when ejected from a train because of his refusal to sign the ticket or pay full fare, he can not recover, except for the use of excessive force in ejecting him.[14] But a carrier is bound to accept a ticket providing that it must be signed by the person using it, though tendered by a wife whose husband signed it in his own name, where the company's agent told the husband that he could sign it.[15] And it is held that where the provision as to signing has been waived, the passenger can not be ejected.[16]

there take the next regular train, which would not arrive at his destination until several hours later than "The Owl." This plaintiff refused to do. Held, that the ticket did not entitle plaintiff to ride on "The Owl" except on his compliance with the berth regulations, and he was therefore not entitled to recover for his ejection. Ames *v.* Southern Pac. Co., 75 Pac. 310, 141 Cal. 728, 99 Am. St. Rep. 98.

11. Effect of provision in ticket not binding on purchaser.—Central, etc., R. Co. *v.* Almand, 43 S. E. 67, 116 Ga. 780.

12. Failure to comply with conditions.—Gulf, etc., R. Co. *v.* Kuenhle, 4 Texas App. Civ. Cas., § 249, 16 S. W. 177; Reed *v.* Texas, etc., R. Co. (Tex. Civ. App.), 50 S. W. 432; Ketcheson *v.* Southern Pac. Co., 19 Tex. Civ. App. 288, 46 S. W. 907, affirmed in 93 Tex. 712, no op. Baltimore, etc., R. Co. *v.* Kent, 1 O. C. C. 81, 1 O. C. D. 49.

A passenger who purchased an excursion ticket, which provided that it was exchangeable at destination for a return ticket, "good for the day and date designated on the face of such exchange ticket," can not recover for ejection from a train on which he attempted to return on a ticket not dated on the day of return, notwithstanding that advertisements of the excursion stated "tickets good to return any day on any regular train for five days," as the advertisements did not control the contract provisions of the ticket. Howard *v.* Chicago, etc., R. Co., 61 Miss. 194.

13. Baltimore, etc., R. Co. *v.* Kent, 1 O. C. C. 81, 1 O. C. D. 49.

14. Provision as to signing ticket.—Ketcheson *v.* Southern Pac. Co., 46 S. W. 907, 19 Tex. Civ. App. 288.

15. Mexican Cent. R. Co. *v.* Goodman (Tex. Civ. App.), 43 S. W. 580.

16. Waiver of provision as to signing.—Plaintiff purchased a first-class, round trip, nontransferable ticket, which contained on its face a requirement that he must sign it in ink, and a proviso that if presented for passage by other than the original purchaser, the same was void; also a line for his signature with a line for the signature of the agent as witness. Without being signed, said ticket was honored for plaintiff's going passage. On his return he was ejected from the train because said ticket was not signed. There was no evidence showing plaintiff had refused to sign the same. Held, even if essential to the validity of the ticket, plaintiff's signature was waived by the company, and his ejection was wrongful. Chicago, etc., R. Co. *v.* Newburn, 110 Pac. 1065, 27 Okla. 9, 30 L. R. A., N. S., 432.

Entering Car at Wrong Point.—A street car company can not be held liable for ejecting from a car, without unnecessary force or violence, a passenger who has entered the car at a different point than that named on his transfer ticket, and who has refused to pay the usual fare.[17]

Condition That Journey Begin at Designated Place.—The condition of a ticket for a certain train that the journey should begin at the place designated thereon should have a reasonable application, and where the passenger fails to comply therewith through the fault of the company's servants, it is liable for ejecting him on his refusal to pay fare.[18]

§ 2991. Conditions against Transfer.—One attempting to ride upon a ticket containing a provision restricting its use to the original purchaser may be ejected where such provision has been violated and he refuses to pay fare.[19] This rule applies where the original purchaser is traveling on such a ticket after he has permitted another to use it.[20] A carrier, sued for ejection of a passenger, was not precluded from relying on a forfeiture of his ticket for misuse, because the conductor at the time of the ejection erroneously refused to accept the ticket because it had expired.[21] It is held that where one bought for his wife a nontransferable ticket, which, with his knowledge, was made out to "Mr." instead of "Mrs.," the conductor had a right to refuse to receive it for the wife's fare, though both asserted it was bought for her, and she offered to sign it according to its conditions.[22] But it is held that if the conductor knows that a woman passenger is the owner of a nontransferable ticket made out to "Mr.," he is not entitled to eject her because of the clerical error in the title.[23] The fact that a son over 21 years of age has sold a nontransferable ticket while using it on a trip does not justify ordering his father, who is accompanying him, to leave the train, or ejecting the father.[24]

§ 2992. Conditions as to Detachment of Coupons.—A passenger traveling on a commutation ticket which provides that coupons shall be void if detached by any other person than the conductor violates the contract by detaching the coupons himself, and if he insist upon making payment of his fare with coupons which he has himself detached, he may be ejected.[25] But is is held

17. **Entering car at wrong point.**—Percy *v.* Metropolitan St. R. Co., 58 Mo. App. 75; Shortsleeves *v.* Capital Tract. Co., 28 App. D. C. 365, 8 L. R. A., N. S., 287.

18. **Condition that journey begin at designated place.**—Plaintiff and his father held two tickets, purchased at a reduced price, good for a continuous passage on train fifty-nine from W. to R. Plaintiff's father presented the tickets to the doorkeeper at W., and asked what train they called for. The doorkeeper, pointing to a train, said, "That is the train," and ordered him to pass on. The father then went back for his overcoat and plaintiff, and when he returned he again presented the tickets. He was directed to the same train as before, which plaintiff and his father then entered. After the train had started the conductor looked at the tickets; told plaintiff and his father that they were not on train fifty-nine; that they would have to get off at H., the next station, and wait for train fifty-nine. When train fifty-nine reached H., plaintiff and his father, who were asleep in the waiting room, were awakened by the station agent, and entered the train, but they were ejected by the conductor. Held, that plaintiff was entitled to recover for the ejection. Elliott *v.* New York, etc., R. Co., 53 Hun 78, 6 N. Y. S. 363, 24 N. Y. St. Rep. 835.

19. **Condition against transfer.**—Davis *v.* South Carolina, etc., R. Co., 107 Ga. 420, 33 S. E. 437; Post *v.* Chicago, etc., R. Co., 14 Neb. 110, 15 N. W. 225, 45 Am. Rep. 100.

20. **Original purchaser.**—Freidenrich *v.* Baltimore, etc., R. Co., 53 Md. 201; Baltimore, etc., R. Co. *v.* Evans, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

21. Baltimore, etc., R. Co. *v.* Evans, 169 Ind. 410, 82 N. E. 773, 14 L. R. A., N. S., 368.

22. Chicago, etc., R. Co. *v.* Bannerman, 15 Ill. App. 100.

23. Parish *v.* Ulster, etc., R. Co., 192 N. Y. 353, 85 N. E. 153, reversing 98 N. Y. S. 1109, 113 App. Div. 894.

24. Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401.

25. **Condition as to detachment of coupons.**—Louisville, etc., R. Co. *v.* Harris, 77 Tenn. (9 Lea) 180, 42 Am. Rep. 668; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Plaintiff's wife purchased a coupon book from defendant, good for twenty

that after having waived a provision in a commutation ticket requiring the coupons to be detached by the conductor, a carrier can not, without notifying the passenger of a revocation of such waiver, eject him for failure to present the whole ticket.[26] And it has been held that a carrier is liable for ejecting a passenger insisting on using on return passage a round trip ticket containing the words "not good for passage" on the going part, and the words "if detached" on the returning part, where both parts which have become accidentally separated are presented to the conductor at the same time.[27]

§ 2993. Conditions as to Identification, Signature and Stamping.—Where a round trip ticket, conditioned that it shall not be good for the return trip unless the holder identifies himself as the original purchaser before a certain designated agent by whom it must be signed and stamped, is presented for passage showing a noncompliance with such condition, the conductor may, in default of fare, eject the passenger,[28] though he may offer proof of identification to the conductor.[29] The passenger can not recover unless he shows that he furnished the designated agent proper proof of his identity.[30] Where one did not

rides between specified stations. It was stipulated on the coupons that they would not be good unless detached by the conductor. Plaintiff tore out of the book a coupon, leaving the book with his wife, and presented the coupon to the conductor, who rang up a fare, and then demanded that the book be shown him. Plaintiff said he could not show it. After the demand was repeated several times, the conductor said he would have to put plaintiff off if the book was not shown, to which plaintiff replied, "You can put me off the car, I suppose, but I can not show you the book," and, when asked to walk off, said he would have to be put off. The conductor then took hold of plaintiff and put him off. The conductor did not demand a cash fare, nor did plaintiff tender any payment, except such coupon. Held, that plaintiff was not entitled to recover damages for such expulsion. United R., etc., Co. *v.* Hardesty, 51 Atl. 406, 94 Md. 661, 57 L. R. A. 275.

26. Waiver of stipulation.—Thompson *v.* Truesdale, 61 Minn. 129, 63 N. W. 259, 52 Am. St. Rep. 579.

27. Wightman *v.* Chicago, etc., R. Co., 73 Wis. 169, 40 N. W. 689, 9 Am. St. Rep. 778, 2 L. R. A. 185.

28. Condition as to identification signature and stamping. — *Alabama.* — McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68; Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

Georgia.—Mosses *v.* East Tennessee, etc., Railroad, 73 Ga. 356; Central, etc., R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874.

Michigan.—Edwards *v.* Lake Shore, etc., R. Co., 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527.

Tennessee.—Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154.

Texas.—Abram *v.* Gulf, etc., R. Co., 83 Tex. 61, 18 S. W. 321; Russell *v.* Missouri, etc., R. Co., 12 Tex. Civ. App. 627, 35 S. W. 724, affirmed in 93 Tex. 737, no op; Houston, etc., R. Co. *v.* Arey, 18 Tex. Civ. App. 457, 44 S. W. 894.

Absence of person authorized to stamp ticket.—A passenger was sold an excursion ticket by the agent of a railroad company, which, by its terms, was required to be stamped for return passage by the secretary of a camp meeting association. The camp meeting had closed, and the secretary had gone away. The passenger tendered the unstamped ticket for return passage, and, on the refusal of the conductor to accept it, refused to pay fare. Held, that he was rightfully ejected, and could not recover therefor in tort. Western Maryland R. Co. *v.* Stocksdale, 83 Md. 245, 34 Atl. 880.

29. Abram *v.* Gulf, etc., R. Co., 83 Tex. 61, 18 S. W. 321; Central, etc., R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874.

30. Morse *v.* Southern R. Co., 29 S. E. 865, 102 Ga. 302; Southern R. Co. *v.* McKenzie, 29 S. E. 869, 102 Ga. 313.

Right of agent to refuse to validate ticket.—Where a passenger purchased a return ticket providing that the original purchaser should sign it, and, before return, present it to a certain agent of the road, who would validate it, on the passenger's identifying himself by the signature on the back thereof, and that, if presented by any other than the original purchaser, it should be void, he agreeing to write his name, whenever requested, to avoid imposition, and such passenger signed his christian initial and middle name without his surname, and the agent, knowing him personally, refused to validate the ticket on such signature, it is proper to instruct, in an action for ejection from a train, that the agent had a right to refuse to validate a ticket so signed. Sinnott *v.* Louisville, etc., R. Co., 56 S. W. 836, 104 Tenn. 233.

Where a purchaser of a round trip excursion ticket, had "printed" his name to the contract thereon, instead of writing it, and, when ready to return, offered to

attempt to have his ticket stamped, and declined to pay any further fare, the fact that defendant's conductor did not inform him of the amount of fare required before ejecting him from the train is immaterial.[31] But it is held if the agent improperly refuses or fails to sign or stamp a return ticket, and its holder is without fault in this respect, he is as much entitled to ride on the ticket as if it were duly signed or stamped, and a conductor failing to heed the explanations of the passenger in regard to the absence of the agent's signature or stamp, does so at the pecuniary peril of the carrier.[32] And it is held that where the holder

"print" his name, but the agent did not consider it a sufficient identification, and he was ejected from the train on his return trip, for which he sued, it was error to instruct that, if he signed said ticket in the presence of the validating officer, it was immaterial as to the nature and character of the signature. Central, etc., R. Co. *v.* Cannon, 32 S. E. 874, 106 Ga. 828.

31. Boylan *v.* Hot Springs R. Co., 132 U. S. 146, 10 S. Ct. 50, 33 L. Ed. 290.

32. Refusal or failure of agent to stamp ticket.—*United States.*— Morrison *v.* John L. Stephens, 17 Fed. Cas. No. 9, 847, Hoff. Op. 473; Northern Pac. R. Co. *v.* Pauson, 17 C. C. A. 287, 70 Fed. 585, 30 L. R. A. 730.

Georgia.—Harp *v.* Southern R. Co., 119 Ga. 927, 47 S. E. 206, 100 Am. St. Rep. 212; Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; Central, etc., R. Co. *v.* Cannon, 106 Ga. 828, 32 S. E. 874.

Indiana.—Pittsburgh, etc., R. Co. *v.* Street, 26 Ind. App. 224, 59 N. E. 404.

Louisiana.—Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166.

Missouri.—Dillon *v.* Lindell R. Co., 64 Mo. App. 418.

Nebraska.—Gregory *v.* Burlington, etc., R. Co., 10 Neb. 250, 4 N. W. 1025.

New York.—Nelson *v.* Long Island R. Co. (N. Y.), 7 Hun 140.

Ohio.—Corry *v.* Cincinnati, etc., R. Co., 3 O. Dec. 82.

Texas.—Ft. Worth, etc., R. Co. *v.* Jones, 38 Tex. Civ. App. 129, 85 S. W. 37; Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951; Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501; Mexican Cent. R. Co. *v.* Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778; Missouri Pac. R. Co. *v.* Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; San Antonio, etc., R. Co. *v.* Newman, 17 Tex. Civ. App. 606, 43 S. W. 915.

Passenger's knowledge of invalidity.—A passenger may recover for his wrongful expulsion from the train, even though he boarded the train knowing that his ticket might not be accepted for passage by reason of the refusal of the carrier's agent to validate it in the manner required by its terms, where he has done all that the contract requires of him and the failure is due to the neglect of another agent of the company. Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

Effect of representations of selling agent.—Plaintiff, though asking defendant carrier's ticket agent at C. for a round-trip to A., accepted a special round-trip ticket to S., a few miles beyond A., because it was cheaper, and because, when he stated that he did not want it if he had to go to S., the agent told him he would not have to do so, but that the agent at A., as was his custom and duty, would on its presentation to him send it to the agent at S., and have it stamped and returned by him. Held that, notwithstanding stipulations in the ticket would have to be validated for return trip, he had a right to rely on the representations of the selling agent; and that it was the duty of the agent at A. to have it validated, as it had been represented that he would; and that, he having refused to forward it for validation on the ground that it had ceased to be the practice for him to do so, it was the conductor's duty to heed plaintiff's explanation, consisting of such facts, why he presented it for return passage unvalidated in accordance with its terms; so that this not having been done, but he having been ejected for refusal to pay fare, he was entitled to damages. Corley *v.* Southern Railway, 71 S. E. 1035, 89 S. C. 432.

Ticket presented to be stamped returned folded up with sleeping car ticket —Absence of stamp discovered too late.—In Northern Pac. R. Co. *v.* Pauson, 17 C. C. A. 287, 70 Fed. 585, 30 L. R. A. 730, it appeared that plaintiff purchased from the defendant railway company a round-trip ticket from P. to S. and return, one of the printed conditions of which was that the return coupon would not be accepted for transportation unless the passenger was identified by the agent at S., before returning and the coupon stamped by such agent. Plaintiff properly signed the ticket and presented it to the proper agent, at the same time asking for a sleeping car ticket. The agent took the ticket to the rear of his office, and returning with it, handed it to plaintiff, folded up with the sleeping car ticket. Plaintiff put the ticket, so folded, in his pocket, and did not discover until he was on the train on the way home that the agent had not stamped the ticket, for which cause plaintiff was ejected from the train by the conductor upon his refusal to pay fare. It was held that plaintiff had done all he was required to do,

of an unstamped ticket, providing that it must be stamped to be available for return passage, has, before entering the cars, exhibited it to the conductor, and been told that it was all right, he can not afterwards be ejected.[33]

Identification to Conductor.—Where a passenger tendered a ticket containing a provision that he would sign his name and otherwise identify himself to the conductor as the original purchaser, and his identification was sufficient to satisfy a reasonable man, his ejection was wrongful.[34] And it has been held that in such case where the conductor refused the passenger's offer to identify himself by signing the ticket, he had no right to require him to "otherwise identify" himself, and the carrier was liable for his expulsion from the train for refusal to pay fare.[35]

§ 2994. Conditions as to Use of Mileage Book.—A passenger purchasing a mileage book, who refuses on the demand of the conductor to present the book when presenting the issued exchange ticket, may be ejected.[36] It is held that a passenger owning an exchange mileage ticket which requires the holder to procure an exchange ticket in order to entitle him to transportation is excused for nonperformance of the condition where he is without fault and fails to secure the exchange ticket through fault of the carrier.[37] But it is also held that

and was justified in believing that the agent had stamped his ticket, and, therefore, he was a legal passenger upon the train, and the railroad was liable for his ejection.

Failure of agent of connecting line to stamp ticket.—Where a railroad company sold a return ticket to a point on a connecting line, under conditions printed thereon providing that the company acted only as agent of the connecting carrier, and was not liable beyond its own line; that no agent of any line could modify its conditions; that the ticket was good for return only after the holder had been identified by the agent of the connecting line at the destination point, and the ticket officially executed by such agent in the manner provided therein,—the company issuing the ticket was liable for the expulsion of the purchaser from one of its trains on his return trip because the ticket had not been duly executed by the connecting line at the destination point, where the passenger presented the ticket to such agent, and he returned it without stamping it, telling the purchaser that it was all right. Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501.

33. Louisville, etc., R. Co. *v.* Blair, 104 Tenn. 212, 55 S. W. 154.

34. Identification to conductor.—Marlow *v.* Southern Pac. Co. (Cal.), 90 Pac. 928.

35. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

36. Condition as to use of mileage book.—Mason *v.* Seaboard Air Line Railway, 159 N. C. 183, 75 S. E. 25.

37. Fault of carrier.—Where a mileage book contract required the holder to exchange mileage coupons for a ticket before boarding the train, and plaintiff so presented his book and demanded a ticket within a reasonable time, but the carrier's agent refused to issue a ticket to destination, alleging lack of time, and gave him a ticket to a junction point only, plaintiff on arriving at the junction point and being unable, for want of time, there to exchange his mileage coupons for a ticket to continue his journey, was entitled to ride on the mileage book, so that the conductor's refusal to accept the mileage coupons for transportation, and ejection of plaintiff for his refusal to pay fare except with such coupons, was actionable injury. Dorsett *v.* Atlantic, etc., R. Co., 72 S. E. 491, 156 N. C. 439.

Supply of tickets exhausted—Effect of statement of agent.—Where a ticket agent informed the holder of an interchangeable mileage ticket requiring him to procure exchange transportation tickets at stations that he could not furnish such tickets because his supply was exhausted, but that the passenger could ride on his mileage, such statement was binding on the carrier, and it was liable for damages caused by his ejection by its conductor on the latter's refusal to accept the mileage for transportation. Pittsburgh, etc., R. Co. *v.* Street, 59 N. E. 404, 26 Ind. App. 224.

Same—Promise of agent to explain to conductor.—Plaintiff held a mileage ticket, good on defendant's railroad, which provided that it must be presented at the ticket office at the starting point, where the agent would issue a mileage exchange ticket for the desired trip in exchange for coupons from the book. It also provided that conductors might issue such exchange tickets, where the holder took the train at a station where there was no ticket office, or where such office was closed. Plaintiff presented his book to the agent at a station, and desired an exchange ticket, but the agent was not supplied with such tickets, and promised to explain such fact to the con-

where a passenger owning an exchange mileage ticket presented it on the train without the necessary exchange ticket called for by the contract, he can not recover for ejection from the train, though he could not secure the exchange ticket, owing to negligent attendance of the ticket agent,[38] or his refusal to issue the exchange ticket.[39] A passenger, knowing that his mileage book is not, under the express terms of the contract, good for passage between points in the state, is bound by the terms thereof, and he can not recover for his expulsion from a train for his failure to pay fare after refusal to accept his mileage, where the ejection is unattended by any circumstances of insult.[40] Where a person holding a mileage book, which is not good for passage on trains except from nonagency stations unless it is first exchanged for a ticket, boards a train at a nonagency station, intending to travel to a point upon the railroad company's line, but, instead of asking the conductor to accept the coupons from the book to that point, asks him to take them only to an intermediate place, which is an agency station, and on arriving at that station attempts to continue his journey without exchanging his coupons for a ticket, notwithstanding the agency is open, and tenders the mileage book for the remainder of his passage, the conductor of the train, on behalf of the company, has the right to refuse to accept the mileage book for passage, and to eject the passenger unless he pays fare.[41] The word "obtainable," in a contract providing that scrip exchangeable for tickets will not be honored for passage on trains except from stations where tickets are not obtainable, means that scrip can not be used for fare on trains, except from stations where tickets are not kept on sale or for exchange for scrip.[42]

§ 2995. Time Limit of Ticket Expired.—If a passenger's ticket, containing a valid stipulation limiting the time within which it may be used, has expired, the carrier may refuse it and eject the passenger on refusal to pay fare.[43]

ductor. Plaintiff got on board, and presented his book to the conductor, who refused to give him an exchange ticket, and on plaintiff's refusal to pay fare ejected him at the next station. The ticket office there was closed, and plaintiff called the conductor's attention to such fact, and desired to again enter the train, but was refused. Held, that such action was a breach of the contract on the part of defendant, which rendered it liable in damages for plaintiff's wrongful ejection. Pennsylvania Co. *v.* Lenhart, 120 Fed. 61, 56 C. C. A. 467.

38. Negligent attendance of agent.—Robb *v.* Pittsburg, etc., R. Co., 14 Pa. Super. Ct. 282.

39. Refusal of agent to issue ticket.—A mileage book issued by defendant provided that plaintiff was entitled to transportation in exchange tickets over certain lines, subject to all conditions of the contract, which further provided that the book would not be honored on trains; but must be presented at the ticket office and exchanged for a continuous passage ticket. Defendant's ticket agent, on refusing to issue the exchange ticket, told plaintiff that, if the latter could fix it with the conductor of the train, it would be all right. The conductor refused to accept the book, or less than the full cash fare, and on plaintiff's failure to pay the same he was ejected from the train. Held that, as plaintiff knew that the mileage book would not be honored, he could not recover for the ejection. Schmidt *v.* Cleveland, etc., R. Co., 74 S. W. 674, 25 Ky. L. Rep. 11.

40. St. Louis, etc., R. Co. *v.* Brown, 93 Ark. 35, 123 S. W. 763.

41. Perry *v.* Atlantic, R. Co., 9 Ga. App. 260, 70 S. E. 1122.

42. Kozminsky *v.* Oregon, etc., R. Co., 36 Utah 454, 104 Pac. 570, 24 L. R. A., N. S., 758.

A contract provided that script issued by a railroad company, exchangeable for tickets, would not be honored on trains except from stations where tickets were not obtainable. Plaintiff, a passenger, got off a train at a station, and attempted to exchange his scrip for a ticket to another station while the train was waiting, but was unable to do so before the train left. Held, that he could not assert that the ticket was not obtainable by him at the station, so as to authorize him to tender the scrip to the conductor for his passage. Kozminsky *v.* Oregon, etc., R. Co., 104 Pac. 570, 36 Utah 454, 24 L. R. A., N. S., 758.

43. Time limit of ticket expired.—*Alabama.*—McGhee *v.* Drisdale, 111 Ala. 597, 20 So. 391.

Georgia.—Central, etc., R. Co. *v.* Ricks, 109 Ga. 339, 34 S. E. 570; Boyd *v.* Spencer, 103 Ga. 828, 30 S. E. 841, 68 Am. St. Rep. 146; Lewis *v.* Western, etc., R. Co., 93 Ga. 225, 18 S. E. 650; Southern R. Co. *v.* Howard, 111 Ga. 842, 36 S. E. 213; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209.

Iowa.—Trezona *v.* Chicago, etc., R.

And this rule applies to street car transfers.[44] It is held that the carrier is not liable for ejecting the holder of an expired ticket, even though he has shown it to the agent by whom it was sold and was admitted to the platform.[45] Under

Co., 107 Iowa 22, 77 N. W. 486, 43 L. R. A. 136.

Kansas.—Arnold *v.* Atchison, etc., R. Co., 81 Kan. 400, 105 Pac. 541.

Kentucky.—Southern R. Co. *v.* Hawkins, 121 Ky. 415, 28 Ky. L. Rep. 364, 89 S. W. 258. See Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71.

Louisiana.—Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387.

Maryland.—Pennington *v.* Philadelphia, etc., R. Co., 62 Md. 95.

Mississippi.—Illinois Cent. R. Co. *v.* Marlett, 75 Miss. 956, 23 So. 583.

Missouri.—Leyser *v.* Chicago, etc., R. Co., 138 Mo. App. 34, 119 S. W. 1068.

New York.—Barker *v.* Coflin (N. Y.), 31 Barb. 556; Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Kelsey *v.* Michigan Cent. R. Co. (N. Y.), 28 Hun 460; Maxson *v.* Pennsylvania R. Co., 97 N. Y. S. 962, 49 Misc. Rep. 502; Elmore *v.* Sands, 54 N. Y. 512, 13 Am. Rep. 617.

New Jersey.—Shelton *v.* Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A., N. S., 727, 9 Am. & Eng. Ann. Cas. 883.

Ohio.—Powell *v.* Pittsburg, etc., R. Co., 2 Am. L. Rec. 403, 5 O. Dec. 89, affirmed in 25 O. St. 70.

Oklahoma.—St. Louis, etc., R. Co. *v.* Johnson, 25 Okla. 833, 108 Pac. 378, construing Comp. Laws 1909, §§ 504, 506.

Texas.—Texas, etc., R. Co. *v.* Demilley (Tex. Civ. App.), 41 S. W. 147, affirmed in 42 S. W. 540, 91 Tex. 215; Gulf, etc., R. Co. *v.* Riney, 41 Tex. Civ. App. 398, 92 S. W. 54.

West Virginia.—Grogan *v.* Chesapeake, etc., R. Co., 39 W. Va. 415, 19 S. E. 563.

Illustrations.—July 8th plaintiff purchased a ticket from defendant to Toronto and return, good for thirty days. On it was written, "Limited to August 8th," and a printed condition was that, before returning, plaintiff should identify himself to an agent at Toronto, and that the ticket should be good only fifteen days thereafter. Plaintiff so identified himself on July 14th, and on August 3d, on tendering the ticket for his fare, was ejected from the train. Held, that defendant is not liable. Rawitzky *v.* Louisville, etc., R. Co., 40 La. Ann. 47, 3 So. 387.

Where a passenger purchases a return ticket providing that the ticket was not to be good for return passage after midnight of the last day allowed for return, and in no event later than October 4th, and such passenger starts on his return on October 4th, and on October 5th, while continuing his return, he is ejected from the train, such passenger can not recover damages for the ejection. Mitchell *v.* Southern R. Co., 27 So. 834, 77 Miss. 917.

Effect of passengers' explanations.—Where a passenger on a return trip presents to a conductor a ticket expired on its face, accompanied by an oral statement that he had applied for identification to an agent of a connecting line, as the ticket required, in time to have allowed his return before its expiration, but had been advised to delay identification, as yellow fever was interfering with the operation of some connecting lines, and he could readily get his ticket extended, and that the agent then refused to identify in time to enable him to complete his return before the ticket expired, and that the company had also refused to extend the ticket, such statement is not sufficient to make the conductor's ejection of the passenger wrongful, so as to enable him to recover damages therefor. Mitchell *v.* Southern R. Co., 27 So. 834, 77 Miss. 917.

Stop-over limitation expired.—A "stop-over" ticket from New York to St. Louis, good for thirty days, does not give an unlimited right to stop at intermediate stations on connecting roads. Where the holder of such a ticket received a check good for a ten-days stop at such a station, held, that he was properly ejected from the train after ten days, though within the thirty, for a refusal to pay fare from such station to the terminus of that road. Kelsey *v.* Michigan Cent. R. Co. (N. Y.), 28 Hun 460.

Fault of connecting line.—H. bought at T., of defendant (acting for itself and other companies), a ticket to W. and return, limited to expire on March 10th. He left W. in time to arrive at T. before midnight of the latter date, but, without his fault, the train did not arrive at the connecting point until after defendant's train had left for T. Without application for permission, H. entered a later train on the morning of March 11, tendered the ticket and explained the delay and its cause. It was the duty of the conductor, under the rules of the company, to remove a passenger from the train who neither presented a ticket by its terms giving a right to ride on that train nor tendered the proper fare in money. It was held that the removal of H. was a proper exercise by the conductor of the right of defendant, for which the latter was not liable in damages. Pennsylvania Co. *v.* Hine, 41 O. St. 276.

44. Street car transfers.—Garrison *v.* United R., etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452.

45. Pennington *v.* Illinois Cent. R. Co., 252 Ill. 584, 97 N. E. 289, 37 L. R. A., N. S., 983, reversing judgment 160 Ill. App. 128.

a rule of a railroad that a conductor should honor a ticket apparently out of date, if the circumstances warranted it, it is held that the railroad is liable for the ejection of a passenger because of the expiration of his ticket where the circumstances warranted the conductor in receiving it as fare.[46] It has been held that under a statute making it the duty of carriers to redeem tickets which have expired by time limit, the holder of an excursion ticket who tendered it for fare, offering to pay the conductor the difference between the redemption value of the ticket and the whole fare, may recover of the company for his ejection from the train on the refusal of the conductor to accept the offer.[47]

Where a carrier fails to run its train on time, and the ticket holder boards the first passenger train thereafter, he can not be ejected from the train on the ground that the limit of the ticket has expired.[48] If a street-car passenger takes the first car which passes the point of transfer after alighting from the one on which he originally took passage, he may have an action against the company for being ejected from the latter car on refusal to pay a second fare, even though the time limit on his transfer ticket has expired.[49]

Effect of Collateral Agreement with Ticket Agent.—It is held that a passenger holding a ticket the limitation of which has expired can not insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased that it would be received after the time limited on the face of it; and, on the refusal to pay the fare, ejection from the train is not wrongful.[50] But there is a contrary holding.[51]

46. St. Louis, etc., R. Co. *v.* Furlow, 81 Ark. 496, 99 S. W. 689, wherein it appeared that plaintiff purchased at C. a ticket from C. to A. at a time when no train passing C. in the direction of A. stopped at C. until three o'clock the evening of the next day, but the ticket given him contained a provision that it should not be good after the expiration of the day of sale and that the next day plaintiff walked to R., where he there boarded the train which had stopped at C. but was ejected.

47. Arnold *v.* Pennsylvania R. Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542. Act May 6, 1863 (P. L. 582, § 5; P. & L. Dig. p. 3992).

48. Failure to run train on time.—Marx *v.* Louisiana Western R. Co., 112 La. 1085, 36 So. 862, 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

Where a train was late and passed a flag station, at which a passenger was waiting, without stopping as expected, and the passenger, on boarding the next train, was ejected on the ground that his ticket had expired, the carrier was liable. Marx *v.* Louisiana Western R. Co., 36 So. 862, 112 La. 1085, 13 R. R. R. 635, 36 Am. & Eng. R. Cas., N. S., 635.

Plaintiff purchased a return ticket limited to expire May 20, 1900, and on that day presented himself for return passage at defendant's station in time to take a train scheduled to leave before midnight. The train was delayed, and did not leave until the next day. Plaintiff was accepted as a passenger by the conductor, and when it left the station his ticket was punched to a junction point, where plaintiff was required to change cars. On account of the delay, the connecting train had left the junction when plaintiff arrived, and the conductor of the next train refused to accept plaintiff's ticket, and ejected him, on the ground that the ticket had expired. Held, that the limit on the ticket fixed the latest time for commencing, and not for completing the return journey, and that, as plaintiff was entitled to rely on defendant's train schedule, defendant was liable for such ejection. Morningstar *v.* Louisville, etc., R. Co., 33 So. 156, 135 Ala. 251.

49. Heffron *v.* Detroit City R. Co., 52 N. W. 802, 92 Mich. 406, 16 L. R. A. 345, 31 Am. St. Rep. 601. See Daniel *v.* Brooklyn Heights R. Co., 121 N. Y. S. 577, 67 Misc. Rep. 78.

50. Effect of collateral agreement with ticket agent.—Hall *v.* Memphis, etc., R. Co., 15 Fed. 57.

Where a passenger presents to a conductor a round-trip ticket, which by its terms expired more than twenty-four hours previous thereto, and is ejected for failure to pay fare, he can not, in an action against the railroad company for damages, show that it was agreed between him and defendant's agent, when he purchased the ticket, that if, on the return trip, he boarded one of defendant's trains at a distant city, before the ticket expired, the ticket would be good to the station where it was purchased. Gulf, etc., R. Co. *v.* Daniels (Tex. Civ. App.), 29 S. W. 426.

51. Parol evidence is admissible to show that a railroad ticket agent agreed that a ticket purchased by a passenger

Effect of Mistake of Employee Issuing Ticket.—It is held that the carrier is liable for the ejection of a passenger for refusal to pay fare when he is riding on a railroad ticket or street car transfer which has expired through the fault of the carrier's employee issuing the same. Thus, the carrier is liable when the employee issues a ticket or transfer which has already expired,[52] or one that will expire sooner than intended,[53] as where a mileage book good for one year is punched or stamped so that it expires on the date of issue.[54] But there

was good for a period longer than that stamped on its face. Nelson *v.* Long Island R. Co. (N. Y.), 7 Hun 140.

In an action for ejecting a passenger riding on an overdue return ticket, where the issue was as to whether the return trip could be made within thirty days, as claimed by plaintiff, under oral agreement with the agent before purchase, or had to be made within ten days, as recited in the ticket, a charge to find for defendant if ten days was found to be a reasonable time was erroneous. Gulf, etc., R. Co., *v.* Halbrook, 12 Tex. Civ. App. 475, 33 S. W. 1028.

52. Ticket of transfer already expired.—Where a conductor, by mistake, gives a passenger a transfer which appears on its face to have expired by limitation, and the conductor on the connecting line attempts to eject him, the company is liable. Muckle *v.* Rochester R. Co., 79 Hun 32, 29 N. Y. S. 732, 61 N. Y. St. Rep. 193.

As between a person who buys a ticket bearing a date prior to the purchase and the company, he is entitled to passage on the date of purchase under the provision thereon, "continuous passage within one day of date of sale." Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

Assurance of agent that ticket is good.—It appeared that a passenger called for and paid for a ticket from one station on a railroad to another; that the agent gave him an unused coupon of an excursion ticket, and, in reply to the passenger's request for an explanation, assured him that it was all right, and would be accepted by the conductor; that the depot was so poorly lighted that the passenger could not read the ticket; and that, relying on the agent's assurance, he boarded the first train for his destination, tendered his ticket, which was worthless by reason of expired limitations, and was ejected. Held, that the passenger was without fault, and could recover damages for his ejection. Calloway *v.* Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238.

53. Ticket expiring sooner than intended—Illustrations.—One who asks the ticket agent for a first-class ticket, and, missing the train, though proceeding immediately after getting the ticket to the depot, takes the next train the following morning, and is put off it, the ticket proving to be a first-class limited ticket, out of date the day previous, may maintain an action of tort for forcible ejection. Louisville, etc., R. Co. *v.* Gaines, 99 Ky. 411, 36 S. W. 174, 18 Ky. L. Rep. 387, 59 Am. St. Rep. 465.

Where a return ticket, bought October 27th, provided that it was good for ninety days from its date, to be not later than December 31, 1904, it did not expire until such date, though the return limit was punched for December 14th. Illinois Cent. R. Co. *v.* Gortikov, 45 So. 363, 90 Miss. 787, 14 L. R. A., N. S., 464, 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650.

Where a carrier's ticket agent by mistake punched plaintiff's return ticket so that it expired on November 10th, the date of sale, instead of November 20th, as intended, and the ticket was refused for the return passage on November 12th because it was alleged to have expired, and plaintiff was ejected, the carrier was liable. Missouri, etc., R. Co. *v.* Mitchell, 47 Tex. Civ. App. 307, 105 S. W. 827.

Refusal of agent to correct mistake.—Where a railroad ticket agent orally agreed to sell to plaintiff a return-trip ticket good for thirty days, received the money therefor, and delivered the ticket, and plaintiff soon afterwards found that it was limited to ten days, and demanded a change in the ticket or a return of the money, but was refused, the company could not defend an action for ejecting plaintiff's wife while subsequently riding on the return coupon after ten days, but within thirty, on the ground that the breach of the contract, if any, took place when the agent refused to change the ticket or return the money, and that the subsequent attempt to ride on the return coupon was at the passenger's risk. Gulf, etc., R. Co. *v.* Halbrook, 12 Tex. Civ. App. 475, 33 S. W. 1028.

54. Mileage book expiring on date of issue.—Where, by mistake, a ticket agent, in selling a mileage ticket good for one year, stamps upon it, as the date of issue, 4th March, 1892, instead of 1893, a passenger who tenders it in payment of fare, and, on its rejection, is ejected for nonpayment of fare, can recover damages from the company. Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

In Krueger *v.* Chicago, etc., R. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487, it appeared that plaintiff purchased from defendant's agent a mileage ticket or book containing 2,000 miles of transportation, for which he paid $50. The date of issue was stamped on the ticket, and it was by the mistake of the agent, punched on the margin to expire on the

are cases holding the contrary.[55] In accordance with the rule stated above it is held that where a railroad ticket correctly recites the date of its issuance, but is marked with a punch so that, according to its printed statements, it has expired prior to that date, it is not as a matter of law for this reason void, so that its holder can not recover damages on expulsion from the train when he presents it for passage.[56] And the same rule has been applied to a street car transfer.[57]

Notice of Limitation.—Notice of a rule or regulation limiting the time within which tickets may be used must be in some way brought home to a passenger before he can be charged with it. And in the absence of such notice the carrier is liable for ejecting a passenger riding upon a ticket which has no limitation expressed upon it.[58]

Time Limit Must Be Reasonable.—The time limit within which a ticket must be used, in order to be binding, must be reasonable.[59] So it is held that a railroad company selling return trip excursion tickets to a distant city to allow passengers to attend an auction sale of land can not eject a purchaser of one of such tickets, who uses all diligence after the sale to make the return trip, though the time limit of his ticket had expired.[60] It is held that an explanation to the conductor, by one presenting an expired ticket, of facts showing that the limitation was unreasonable, is equivalent to an expiration to the carrier itself.[61]

Good Faith of Passenger.—Where a passenger on a railway train presents an expired ticket, which is refused, the right to eject him for nonpayment of fare is in no way affected by any belief he may have had as to his right to ride on the ticket after its expiration.[62]

day it was issued, instead of a year later. Plaintiff signed a contract printed on the cover, which stated that the ticket was "void for passage after date punched in margin." He offered this ticket and the mileage thereon, for his fare, but it was refused, and he was ejected by the conductor for refusing to pay other fare. It was held that these facts were sufficient to sustain a verdict for plaintiff.

55. Where defendant's ticket agent, by mistake, sells a person an expired and worthless ticket, which shows on its face its worthlessness, and the conductor refuses to accept it, and, in default of payment of fare, compels the holder to leave the train, but uses no physical force, the latter can not sue in trespass for the expulsion. Baggett *v.* Baltimore, etc., R. Co., 3 App. D. C. 522.

The rule that on refusal to pay fare a person on a train may be expelled therefrom is not altered by the fact that he has an expired limited ticket for which he paid a rate for which the railroad company should have given him an unlimited ticket, nor does the statement of this tact to the conductor render the expulsion actionable. Shelton *v.* Erie R. Co., 66 Atl. 403, 73 N. J. L. 558, 9 L. R. A., N. S., 727, 9 Am. & Eng. Ann. Cas. 883.

Assurance of first conductor that transfer good.—Though the statute imposes a penalty on any carrier failing to give a passenger a transfer to which he is entitled, where a passenger received a transfer which showed that it had then expired, but on calling the conductor's attention to the fact, he was assured that it was all right, but the second conductor refused to take it, and on the passenger's refusal to pay fare ejected him from the car, plaintiff was not entitled to recover for the ejection. Nicholson *v.* Brooklyn Heights R. Co., 103 N. Y. S. 310, 118 App. Div. 13.

56. Jevons *v.* Union Pac. R. Co., 78 Pac. 817, 70 Kan. 491.

57. Where a transfer check given to a passenger on leaving a street car has two punches,—one correctly indicating the hour when issued, and the other showing it to be two hours old,—and the passenger takes the proper car immediately after receiving the check, the conductor has no right to treat the check as old, and ignore the correct time punched thereon, and the company is liable for the passenger's ejection. Laird *v.* Pittsburg Tract. Co., 166 Pa. 4, 31 Atl. 51.

58. Notice of limitation.—Georgia R. Co. *v.* Baldoni, 115 Ga. 1013, 42 S. E. 364, wherein it was held that a placard or notice posted by a railroad company at its ticket office, announcing that tickets of a certain class must be used on the day of sale, is not admissible in the company's favor, in a suit by a passenger for an alleged wrongful ejection on the ground that his ticket had expired, unless it be shown that the passenger had read the placard or had notice of its contents.

59. Time limit must be reasonable.—See ante, "Limitations as to Time," § 2221.

60. Texas, etc., R. Co. *v.* Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400.

61. Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

62. Good faith of passenger.—Rudy *v.* Rio Grande, etc., R. Co., 8 Utah 165, 30 Pac. 366.

Extension of Time.—It is held that a railway company has no right to eject a passenger traveling on an excursion ticket after the original date of limitation, where the same has been extended by an authorized agent of the company.[63]

§§ 2996-3001. Passenger on Wrong Train, or Route, or Carried Past Destination—§§ 2996-2997. Passenger on Wrong Train—§ 2996. In General.—Fault of Passenger.—A passenger who by his own mistake is on a train on which his ticket does not entitle him to ride, may be ejected where he refuses to pay fare.[64] A railroad may eject the holder of an excursion ticket sold at reduced rates, with printed conditions for continuous passage, who enters a train, knowing that it does not go through to the ticket terminus, and intending to stop short of there, though he had been assigned to that train by the company's gate keeper and train dispatcher.[65]

Fault of Carrier.—A carrier is liable for the ejection of one who is on the wrong train by its fault.[66] It is held that where a passenger by mistake is on

63. Extension of time.—Randall *v.* New Orleans, etc., R. Co., 45 La. Ann. 778, 13 So. 166.

64. Passenger on wrong train.—Pittsburgh, etc., R. Co. *v.* Lightcap, 7 Ind. App. 249, 34 N. E. 243; Mace *v.* Southern R. Co., 151 N. C. 404, 66 S. E. 342, 24 L. R. A., N. S., 1178.

If a railroad company give reasonable notice to change cars, and a passenger by his own carelessness neglects to change cars, the fault is his own, and the company is not liable; and if, after starting from the station in the wrong direction, the error is discovered in time for him to go back to the station, and start thence without delay for the place to which he had purchased a ticket, and the company offer him the privilege of going free of charge, and he refuses to return, or to leave the cars, or to pay for the route he is traveling, he may lawfully be ejected from the train. Page *v.* New York Cent. R. Co., 13 N. Y. Super. Ct. 523.

Illustrations.—Plaintiff purchased a ticket over defendant's road to H., a station ten miles beyond B. S., and entered a freight train which was not authorized to carry passengers beyond B. S. He testified that the ticket agent directed him to take it. He was informed by the conductor, after starting, that he could not be carried beyond B. S., but he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on. He surrendered his ticket, which the conductor canceled, and rode to B. S., where he was required by the conductor to leave the train. Held, that defendant was not liable, unless the ticket agent gave the direction testified to by plaintiff. South, etc., R. Co. *v.* Huffman, 76 Ala. 492, 52 Am. Rep. 349.

Plaintiff, who intended to take a train for L., took a train which left the line on a branch road before it reached L. Plaintiff was told by the conductor to get off at N., on the branch, and take a return train, which would carry him to S. in time to take his train for L., neither the conductor nor passenger saying anything as to fare for the return trip, which, under the custom of the company, would have been free. Plaintiff refused to return or pay his fare for passage on the branch road. Held, that plaintiff could not recover for his ejection. Barker *v.* New York Cent. R. Co., 24 N. Y. 599.

When defendant's ticket agent in New York told plaintiff that defendant was selling excursion tickets from New York to Bridgeport, and that the train would reach Bridgeport at 3 p. m., plaintiff purchased such a ticket, which stated, under the words "Rules and Regulations," printed in large letters, that the ticket was not good on the Boston Express, and, on presenting it to the doorkeeper, was admitted to the Boston Express at 1 p. m., and the conductor refused to accept the ticket, and expelled him from the train. Held, that defendant was not liable. Nolan *v.* New York, etc., R. Co., 41 N. Y. Super. Ct. 541.

Where a passenger held an excursion ticket, sold at a reduced rate, which recited that it was not good on a particular train, and, though he did not read the ticket before boarding such train, he was apprised that it did not entitle him to travel thereon, he was not entitled to recover damages for his ejection, accompanied by no unnecessary force. England *v.* International, etc., R. Co., 73 S. W. 24, 32 Tex. Civ. App. 86.

65. Johnson *v.* Philadelphia, etc., R. Co., 63 Md. 106, 18 Am. & Eng. R. Cas. 304.

66. Fault of carrier.—Mace *v.* Southern R. Co., 151 N. C. 404, 66 S. E. 342, 24 L. R. A., N. S., 1178; Pittsburgh, etc., R. Co. *v.* Reynolds, 55 O. St. 370, 45 N. E. 712; Lake Shore, etc., R. Co. *v.* Mortal, 18 O. C. C. 562, 8 O. C. D. 134.

Where one took passage on a train for a destination which necessitated a change of cars, and, when she arrived there, requested the company's porter to direct her to the train she should take, but by reason of his misdirection boarded a train in a different direction, and was

the wrong train through the fault of the conductor, it is the duty of the railroad to return him to the place where the mistake occurred, or at least to leave him at some point where he will not be subjected to any serious annoyance, and return him to the place where he took the wrong train by the first returning train.[67] A ticket holder, informed by the depot master that a certain train would take him to his destination, may recover of the railroad company for expelling him from such train, though the train was chartered, and the conductor expelled him to fulfil the company's obligation to the charterer.[68] Where a passenger was informed by a brakeman that he was on the right train but, after going a few hundred yards, was put off by the conductor as being on the wrong train, and in trying to walk back on the railway track he fell through trestle work, he was not guilty of contributory negligence.[69] Where a passenger receives a transfer ticket which is marked not good on night cars, and at the point of transfer attempts to get on four cars in succession, but is prevented by the conductors on the ground that the cars were only going to the barn, and subsequently gets on the fifth car, which proves to be a night car, and is excluded therefrom when he presents his ticket and refuses to pay an additional fare, the company will be liable as for a wrongful exclusion.[70]

Limitations as to Trains.—A railroad company may define and limit the train upon which a passenger using a ticket is entitled to ride. So when a passenger on a passenger train offers a ticket which on its face entitles him to ride only on a freight train to take care of stock shipments, and he refuses to

ejected by the conductor when he discovered the mistake, the company was liable for the damages sustained by the porter's misdirection on whose statement she was entitled to rely. Bullock *v.* Atlantic, etc., R. Co., 152 N. C. 66, 67 S. E. 60.

Plaintiff had a ticket over a railroad which formed a junction with defendant's road. On arriving at the junction, the train switched off on defendant's road. Plaintiff inquired of the conductor who took charge at that point if she was on the right road, and was told to keep her seat, and a short distance on was ejected by the same conductor. Held, that it was the conductor's duty to examine plaintiff's ticket or inquire as to her destination, and his failure to do so was negligence. International, etc., R. Co. *v.* Gilbert, 64 Tex. 536.

A lady passenger who is on a wrong train by the fault of defendant's agent, and who is put off at night at a lonely place, from where she walks back to the next station, being afraid to remain there, is not precluded from recovering damages for injuries received and fright suffered in walking back to the station by the fact that she was unwilling either to pay fare for being carried further on the train, or to remain at the place where she was put off until the arrival of a return train. International, etc., R. Co. *v.* Smith (Tex.), 1 S. W. 565.

67. International, etc., R. Co. *v.* Gilbert, 64 Tex. 536, cited in St. Louis, etc., R. Co. *v.* Pruitt (Tex. Civ. App.), 79 S. W. 598, writ of error denied in 97 Tex. 487, 80 S. W. 72.

Where a passenger informed the conductor of her destination and route, and was told by him that this was the train which she was to take, and he helped her to board the same, but when he saw her ticket, after the train had started, discovered that she was on the wrong train, and compelled her to get off at the next station, in spite of her advanced age, her protests that she had no money, and her information that if he would carry her to a point some six miles distant she would be subjected to no inconvenience, as she had friends and relatives there, whereas by being compelled to get off at the next station she was greatly delayed and caused much suffering and anguish, on account of lack of accommodations, hunger, etc., the duty of the railroad was not discharged by causing the passenger to get off at the next station, and permitting her to return without charge to the place where she got on, but it was the railroad's duty to carry her to the station where her friends and relatives were. St. Louis, etc., R. Co. *v.* Pruitt (Tex. Civ. App.), 79 S. W. 598, writ of error denied in 80 S. W. 72, 97 Tex. 487.

68. Martin *v.* New York, etc., R. Co., 1 N. Y. St. Rep. 738.

Duty of conductor to make explanation.—The conductor of a specially chartered car has no right to forcibly expel a person who presents a ticket good on another train of the same road, without fully explaining the reason why the ticket is not good on his train. Martin *v.* New York, etc., R. Co., 1 N. Y. St. Rep. 738.

69. Houston, etc., R. Co. *v.* Devainy, 63 Tex. 172.

70. Golden *v.* Pittsburg R. Co., 28 Pa. Super. Ct. 313.

pay fare, and shows no other evidence of right to ride on the train, he can not recover for his ejection, and the fact that he had been allowed on several occasions to ride on passenger trains on similar tickets is immaterial.[71] When a railroad company issues tickets with no special restrictions, but, by a rule of the company, the holders of such tickets can ride only on certain trains, a person purchasing such a ticket, and who is ignorant of the rule, can not be lawfully expelled from a train on which he has taken passage contrary to such regulation.[72]

Reverse Direction.—A person who enters upon a railroad train, with knowledge that his ticket on its face entitles him to be carried in the reverse direction from that in which he proposes to go, and, with ample opportunity to procure another, may be ejected for refusal to pay fare.[73] And this rule is not affected by the fact that such person had before passed over the road upon other tickets in a direction the reverse of that advertised upon their face, and that a conductor upon another train at another time expressed an opinion to him that such ticket would be good for either direction.[74]

§ 2997. Train Not Stopping at Passenger's Destination.—It is generally held that it is the duty of a passenger to ascertain that the train he enters is required by the rules of the company, to stop at the station for which he takes passage, and if he enters a train that does not stop at such station the conductor may eject him for refusal to pay fare to the next station at which the train is required to stop.[75] But in Georgia the contrary is held.[76] It is held

71. Limitations as to trains.—Thorp *v.* Concord R. Co., 61 Vt. 378, 17 Atl. 791.

72. Maroney *v.* Old Colony, etc., R. Co., 106 Mass. 153, 8 Am. Rep. 305; De Board *v.* Camden Interstate R. Co., 62 W. Va. 41, 57 S. E. 279.

73. Entering train with knowledge that ticket is for opposite direction.—Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61; Keeley *v.* Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19.

To compel railroad companies to receive unused tickets, without regard to the direction which the holder wishes to go, would introduce inextricable confusion into their business, and be of no benefit to any person possessed of sufficient intelligence to go upon a train. Godfrey *v.* Ohio, etc., R. Co., 18 N. E. 61, 116 Ind. 30.

Both parts of round-trip ticket stamped for going trip.—In Poulin *v.* Canadian Pac. R. Co., 3 C. C. A. 23, 52 Fed. 197, 17 L. R. A. 800, it appeared that plaintiff paid the price of a ticket from D. to Q. and return, but, by mistake of the ticket agent, was given a ticket both parts of which were stamped for passage from D. to Q. He discovered the mistake when about to take the train, and consulted a person temporarily in charge of the station office during the absence of the agent. This person said he had no authority to correct the mistake, but thought the matter would be all right. The passenger went to Q., and spent several weeks, but on his return trip was ejected from the train. It was held that he was bound to know that the conductor had a right to refuse the ticket, and, therefore, in boarding the train was guilty of negligence barring a recovery in tort, and rendering his damages merely nominal if his action was on contract.

74. Keeley *v.* Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19.

75. Train not stopping at passenger's destination.—*United States.*—Texas, etc., R. Co. *v.* Ludlam, 57 Fed. 481, 6 C. C. A. 454, following Beauchamp *v.* International, etc., R. Co., 56 Tex. 239.

Indiana.—Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611; Pittsburgh, etc., R. Co. *v.* Lightcap, 7 Ind. App. 249, 34 N. E. 243.

Kansas.—Atchison, etc., R. Co. *v.* Gants,

76. Southern R. Co. *v.* Flanigan, 10 Ga. App. 745, 74 S. E. 85, wherein the court said: "The sounder rule on the subject is to impose upon the railroad company the duty of giving the information to the purchaser of the ticket over its railroad as to what train stops at the particular station to which it sells the ticket, and not to impose the duty of inquiry upon the proposed passenger. * * * Certainly this should be the rule, in the absence of any restriction in the ticket itself showing that it is not good for transportation to the particular station to which it had been purchased. When a person goes to a railroad station and buys a ticket from the agent of the company, the reasonable inference from that act is that he intends to become a passenger to his destination on the next train passing the initial point and going to the particular place designated by the ticket; and if the next train is a through train, or one that does not stop at that station, the agent of the company, when he sells the ticket to the proposed passenger, should inform him of the fact."

that the rule stated above applies where the train stopped occasionally, and not regularly, at the passenger's destination.[77] But it is also held that where a train occasionally stops at a station, the carrier has the burden of showing that it was justified in ejecting a passenger destined for that station for refusal to pay additional fare on the failure of the train to stop to permit him to alight.[78] A passenger before boarding a train, is not bound to inform himself as to whether, under the regulations of the carrier, it will stop the train at his destination, where the carrier, by habitually stopping the train at that place, has induced the passenger to believe that its rule that the train should not stop there except under exceptional circumstances had been abrogated.[79]

Fault of Carrier.—A railroad company is liable for all injuries caused by the act of the conductor in ejecting a passenger in accordance with the company's rules, because the train did not stop at the destination called for by the passenger's ticket, if this situation was the result of the negligence of the

38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Kentucky.—Hancock *v.* Louisville, etc., R. Co., 85 S. W. 210, 27 Ky. L. Rep. 434.

Missouri.—Logan *v.* Hannibal, etc., R. Co., 77 Mo. 663; Turner *v.* McCook, 77 Mo. App. 196.

New York.—Fink *v.* Albany, etc., R. Co. (N. Y.), 4 Lans. 147.

Oklahoma.—Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

Texas.—Albin *v.* Gulf, etc., R. Co., 43 Tex. Civ. App. 170, 95 S. W. 589.

Illustrations.—A passenger insisted upon being left at B., where the conductor told him the train did not and would not stop. The train reached A., the last station at which it stopped this side of B., and, upon the refusal of the passenger to pay fare to a station beyond, the conductor put him off the train. Held, that the conductor was justified in so doing. Logan *v.* Hannibal, etc., R. Co., 77 Mo. 663.

A railroad ticket agent, in response to plaintiff's inquiry, stated that the passenger train going north was due in ten minutes, and sold him a ticket to a station on the line of such train at which the train due in ten minutes was not scheduled to stop, but at which a train due in seventy minutes would stop. Held insufficient to show an agreement that the first train would stop at said station. Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

A passenger offering a ticket entitling him to ride to a station at which the train is not scheduled to stop, and refusing to pay his fare to the first stopping place of the train which is beyond his destination, except on consent to stop the train at his station, may be ejected before reaching his station. Caldwell *v.* Lake Shore, etc., R. Co., 8 Pa. Co. Ct. R. 467.

In an action against a railroad company for being put off a freight train, which plaintiff had boarded as a passenger with a ticket, believing that it was his train, it is proper to instruct that it is the duty of passengers to inquire whether a given train stops at their station, and the duty of trainmen to warn passengers not to board or remain on wrong trains. Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

In an action for ejection of a passenger before arrival at her destination, an answer alleged that, though defendant operated a daily train, offering ample passenger accommodations, that stopped at plaintiff's destination, the train plaintiff boarded was a fast passenger train which did not stop there, except on signal or to let off through passengers according to its regular published time card, and that defendant refused to accept plaintiff's fare for transportation on such train except to a station at which the train was scheduled to stop, and plaintiff, having refused to pay fare to such station, was ejected. Held, to state a sufficient defense. Albin *v.* Gulf, etc., R. Co., 43 Tex. Civ. App. 170, 95 S. W. 589.

A person who goes upon a train, knowing that it does not stop at his destination, and refuses to pay fare to the next station at which it does stop, may be put off at any reasonably safe place. The railway company is not required to carry him to the next station or highway, or to a place where it will be convenient for him to get off. New York, etc., R. Co. *v.* Willing, 5 O. C. C., N. S., 137, 14-24 O. C. D. 474.

Necessary allegation of complaint.—In an action by a passenger for wrongful ejection from a train, plaintiff must aver in his complaint that the rules of the company provided that the train on which he took passage should stop at the station named on his ticket. Chicago, etc., R. Co. *v.* Bills, 3 N. E. 611, 104 Ind. 13. And an allegation that the ticket agent told him that he could take such train is not sufficient; such a statement not binding the company. White *v.* Evansville, etc., R. Co., 33 N. E. 273, 133 Ind. 480.

77. Fink *v.* Albany, etc., R. Co. (N. Y.), 4 Lans. 147.

78. Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386.

79. Albin *v.* Gulf, etc., R. Co., 43 Tex. Civ. App. 170, 95 S. W. 589.

company.[80] So where a ticket seller of a railroad company sells a ticket for passage on a particular train, assuring the purchaser that the train will stop at the station at which he desires to alight, he may recover damages from the company if expelled from the train by the conductor solely on the ground that the train does not stop at the station in question,[81] unless the purchaser knew or had reason to believe that the information given him by the ticket agent was incorrect, or that there was a rule or regulation of the company making the agent incompetent to give the information, or prohibiting the conductor from stopping the train at that station.[82] And it is held that where at the time a passenger bought his ticket there was an express agreement between him and the ticket agent that he might travel to his destination on the train which he took, action will lie for his being put off, before arriving at such place, on the ground that the train did not stop there.[83] It is also held that where a holder of a passenger ticket entitling him to passage over a railway from one point to another took passage on a train on the advice of a railway employee provided for that purpose, the employees in charge of the train were required to stop it at the destination of the passenger, and ejecting him at another place subjected the company to damages.[84] But there are cases holding that where a passenger bought a ticket to a station at which he was informed by the ticket agent the train would stop but the conductor advised him that the train did not stop at that station, and that he would have to get off at the station next before on the one side, or pay fare to the one next beyond on the other side, it was the passenger's duty to get off, with the right to sue for whatever damage or expense was caused by his misinformation, but that, having chosen to go on, he could not recover for the ejection.[85]

Statutory Requirement to Stop.—A provision in a ticket good "only on such trains as stop regularly at both stations" is no defense to an action for being ejected between the stations because the train did not so stop, where the ticket was issued after the enactment of a statute commanding the company to stop, and the passenger bought the ticket supposing the train did stop.[86]

Where a passenger agrees to get off at an intermediate point, a conductor receiving and canceling his ticket to a certain point at which he has no authority to stop the train, may expel such passenger from the train if he tries to remain there after reaching the intermediate point.[87]

§ 2998. Passenger on Wrong Route.—Where there is a direct and a circuitous route between two places, and a passenger procures a ticket by the di-

80. Fault of carrier.—Chicago, etc., R. Co. *v.* Spirk, 70 N. W. 926, 51 Neb. 167.

81. Misinformation as to stop of train.—Atkinson *v.* Southern R. Co., 114 Ga. 146, 39 S. E. 888, 55 L. R. A. 223; Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; Reynolds *v.* Pittsburgh, etc., R. Co., 13 O. C. C. 39, 7 O. C. D. 501, affirmed in 55 O. St. 370, 45 N. E. 712.

82. Atkinson *v.* Southern R. Co., 39 S. E. 888, 114 Ga. 146, 55 L. R. A. 225; Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315.

83. Collateral agreement with ticket agent.—Gulf, etc., R. Co. *v.* Moore, 98 Tex. 302, 83 S. W. 362, reversing 80 S. W. 426.

84. International, etc., R. Co. *v.* Smith, 40 Tex. Civ. App. 432, 90 S. W. 709.

85. Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157; Runyon *v.* Pennsylvania R. Co., 74 N. J. L. 225, 68 Atl. 107.

In the operation of a railroad, the safety of those traveling upon it requires that the trains running over it shall be moved according to a prearranged schedule, and this safeguard would be practically destroyed if a conductor was bound to stop his train at a station, not a scheduled stopping point, whenever a passenger was wrongly informed by a ticket agent that the train would take him to such station. Runyon *v.* Pennsylvania R. Co., 68 Atl. 107, 74 N. J. L. 225.

Plaintiff bought a ticket to E., and entered a train pointed out to him by the ticket seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at E., and that he could get off at P. and there resume his journey for E. He refused to get off, and was ejected. Held proper. International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525.

86. Pennsylvania Co. *v.* Wentz, 37 O. St. 333.

87. Haskins *v.* Lake Shore, etc., R. Co., 4 Wkly. L. Bull. 951, 7 O. Dec. 679.

rect route, but proceeds by the circuitous route, he may be ejected on failure to pay the fare demanded,[88] though he was notified to change cars at the point where such change was necessary.[89] But it is held that the carrier is liable in such cases where the passenger takes the wrong route by the erroneous instructions of its ticket agent.[90] It is held that knowledge by the ticket agent of the right of a passenger under a ticket, the passenger having asked for a ticket by one route and been given one by another route, and got on the train by the route for which he asked a ticket, is to be imputed to the conductor of the train.[91] But it is held that where a passenger bought a ticket from the company's agent, with the agreement that he should have the right to go by way of a certain place but the ticket did not so provide, and at a junction where, as his ticket read, he should have changed cars, he was ejected, the company was not liable for the ejection.[92] Where a passenger contracted for a ticket over the route he was traveling on when removed from the train, but by mistake was given a ticket over a different route, when the mistake was discovered the company was not justified in treating the passenger as a trespasser, and refusing him the right to continue his journey by that train, but should have given him a reasonable opportunity, when the train stopped, to purchase other tickets.[93]

§ 2999. Passenger on Wrong Road.—Where one asked a ticket agent at a union depot for a ticket to a certain point, without stating by which route she wished to go, and was given a ticket which showed plainly that it was over a certain road, she was not entitled to recover damages for being put off the train of another road, to which she changed cars, over which the ticket was not good; the agent having the right to assume that plaintiff knew the route she wished to take and could read the ticket so as to have the route changed if she desired.[94] And where a passenger asked the ticket agent, at the point where she changed cars, when the train left for a certain place, and was told that a train left for

88. Direct or circuitous route.—Church *v.* Chicago, etc., R. Co., 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616; Bennett *v.* New York, etc., R. Co., 5 Hun 599, affirmed in 69 N. Y. 594, 35 Am. Rep. 250; Mace *v.* Southern R. Co., 151 N. C. 404, 66 S. E. 342, 24 L. R. A., N. S., 1178.

89. Church *v.* Chicago, etc., R. Co., 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616.

90. Mace *v.* Southern R. Co., 151 N. C. 404, 66 S. E. 342, 24 L. R. A., N. S., 1178.

Ticket not designating which of two routes.—In Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469, it appeared that a railroad company, having two routes between the point where it received a passenger and the place of her destination, sold her a ticket without designation thereon of the route upon which it was good. It was held that it was bound by the direction of its ticket agent to the purchaser as to the proper train for her to take, and liable to the passenger for an ejection from such train.

91. Levan *v.* Atlantic, etc., R. Co., 86 S. C. 514, 68 S. E. 770.

Passenger not charged with notice.—Plaintiff, who asked defendant's agent at U. for a ticket to S. by way of C., and was given a ticket without a coupon, such as was used over the route to S. by way of H., was not charged with notice that the route by way of H. must be taken, because defendant neither owned nor operated a road from U. to S., by way of C., and did own and operate one by way of H., and the ticket had no coupon attached to it from C. to S. on some other road; there being no proof that defendant always indicated the route over roads in this way, and that plaintiff knew or ought to have known it. Levan *v.* Atlantic, etc., R. Co., 68 S. E. 770, 86 S. C. 514.

92. Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 34 S. W. 702, 17 Ky. L. Rep. 1303.

93. Effect of mistake of ticket agent.—Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951.

Negligence of passenger in not examining ticket.—Where in such case the passenger for want of time, did not examine his ticket before boarding the train, which was about to leave, nor before reaching the station where the change of cars is made for the route called for by the ticket, the question as to whether he was negligent in failing to discover the mistake in the ticket before his right to ride was questioned by the conductor was for the jury to determine from all the facts and surrounding circumstances. Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951.

94. Passenger on wrong road.—McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

that place at a certain time on two roads, over one of which she held a ticket, the agent was not guilty of negligence so as to authorize recovery from the company for damages for being ejected from a train on the road over which the ticket was not good.[95]

§ 3000. Passenger on Wrong Part of Road.—Where the ticket presented to the conductor does not entitle the passenger to travel on that portion of the road, the refusal of the passenger to pay fare or to leave the car on request justifies his expulsion therefrom.[96] But there is a conflict of authority where the mistake of the carrier's agent has caused the passenger to be without proper evidence of his right to transportation.[97]

§ 3001. Passenger Carried Past Destination.—A passenger wrongfully carried by his destination and ejected between stations is entitled to recover damages as for a tort.[98] A person about to become a passenger must use reasonable diligence in acquainting himself with the rules and regulations of the company respecting the time when, the place where, and the circumstances under which a train on which he desires to travel may go or stop, according to such rules, and if by neglecting to do so he makes a mistake he can have no remedy if he is carried past his destination.[99] Where a passenger, while intoxicated and irresponsible, is carried past his point of destination, the carrier has the right to put him off the train, though, if it were negligent in carrying him by his station, it is its duty to return him to that point.[1] And where a passenger falls asleep, and is carried past his destination, it is not the duty of the company to carry him to the next station, unless he pays or offers to pay his fare to such station; and, if the conductor has no reason to believe that injury would result therefrom, he has a right to put the passenger off.[2]

§ 3002. Effect of Mistake of Employee Issuing Ticket.—Some cases hold that a passenger who without fault on his part but by the mistake of the carrier's agent, has not been furnished with the proper evidence of his right to transportation, may recover for being ejected upon refusal to pay fare, where

95. McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

96. Passenger on wrong part of road.—Terre Haute, etc., R. Co. *v.* Fitzgerald, 47 Ind. 79.

97. Mistake of ticket agent—Carrier held liable.—It is held that where a person called for a ticket between two named points on a railroad and upon payment received from the agent the ticket of a complicated character, not easily understood by a person unfamiliar with its use, and having started on his journey, was ejected before reaching his destination on the ground that his ticket did not call for passage to that point but in an opposite direction from the starting point, he is entitled to recover damages therefor. Georgia R. Co. *v.* Olds, 77 Ga. 673.

A passenger on a street car line on which the company issued transfers to its various connecting lines received from the conductor a transfer to a line other than the one to which he had requested one. Not noticing the mistake, he presented it to the conductor on the line to which he had requested a transfer, who refused to accept it. The passenger declined to pay further fare, and was ejected. Held, that the carrier was liable. Lawshe *v.* Tacoma R., etc., Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350. See Carpenter *v.* Washington, etc., R. Co., 3 Mackey (14 D. C.) 225.

Carrier held not liable for ejection.—If a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that purpose but only in the opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as for a tort, but the action may and must, be based on the breach of a contract to convey the passenger. McKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913.

98. Person carried past destination.—Book *v.* Chicago, etc., R. Co., 75 Mo. App. 604.

99. Pittsburgh, etc., R. Co. *v.* Lightcap, 34 N. E. 243, 7 Ind. App. 249.

1. Bragg *v.* Norfolk, etc., R. Co., 110 Va. 867, 67 S. E. 593.

2. Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

he has made proper explanations to the conductor as to the mistake.[3] But other cases hold that if the ticket or transfer produced by a passenger does not, by

3. Effect of mistake of employee issuing ticket.—*Arkansas.*—Hot Springs R. Co. *v.* Deloney, 45 S. W. 351, 65 Ark. 177, 67 Am. St. Rep. 913.

District of Columbia.—Carpenter *v.* Washington, etc., R. Co., 3 Mackey (14 D. C.) 225.

Georgia.—Georgia R. Co. *v.* Olds, 77 Ga. 673; Puckett *v.* Southern R. Co., 9 Ga. App. 589, 71 S. E. 944; Georgia R., etc., Co. *v.* Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246.

Indiana.—Calloway *v.* Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; Indianapolis St. R. Co. *v.* Wilson, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261.

Iowa.—Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

New York.—Jacobs *v.* Third Ave. R. Co., 75 N. Y. S. 679, 71 App. Div. 199, 10 N. Y. Ann. Cas. 462; Muckle *v.* Rochester R. Co., 79 Hun 32, 29 N. Y. S. 732, 61 N. Y. St. Rep. 193. But see Nicholson *v.* Brooklyn Heights R. Co., 103 N. Y. S. 310, 118 App. Div. 13; Weber *v.* Rochester, etc., R. Co., 129 N. Y. S. 304, 145 App. Div. 84.

North Carolina.—Norman *v.* East Carolina R. Co., 161 N. C. 330, 77 S. E. 345.

Ohio.—Pittsburgh, etc., R. Co. *v.* Reynolds, 55 O. St. 370, 45 N. E. 712; Lake Shore, etc., R. Co. *v.* Mortal, 18 O. C. C. 562, 8 O. C. D. 134; Cleveland City R. Co. *v.* Conner, 74 O. St. 225, 78 N. E. 376.

Tennessee.—O'Rouke *v.* Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639; Memphis St. R. Co. *v.* Graves, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. Rep. 803.

Texas.—Missouri, etc., R. Co. *v.* Mitchell, 47 Tex. Civ. App. 307, 105 S. W. 827; Missouri, etc., Railway *v.* Lightfoot, 48 Tex. Civ. App. 120, 106 S. W. 395; Houston, etc., R. Co. *v.* Arey, 18 Tex. Civ. App. 457, 44 S. W. 894; Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501, affirmed in 93 Tex. 662, no op.; Gulf, etc., R. Co. *v.* Rather, 3 Tex. Civ. App. 72, 21 S. W. 951.

West Virginia.—Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022, distinguishing McKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913. See ante, "Failure to Comply with Conditions of Ticket," §§ 2990-2994; "Time Limit of Ticket Expired," § 2995; "Passenger on Wrong Train, or Route, or Carried Past Destination," §§ 2996-3001; post, "Conclusiveness of Ticket or Transfer as between Passenger and Conductor," § 3005.

When a passenger has purchased a ticket from a railroad company, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket, and no prior knowledge or notice of rules of the company, which would make such ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection. Erie R. Co. *v.* Littell, 128 Fed. 546, 63 C. C. A. 44.

Illustrations.—Where a passenger calls and pays for a ticket to one place, but is, by a mistake of a railroad company's agent, given a ticket to another place, with which he, without fault, boards the train, believing that he has the proper ticket, he is entitled to ride thereon the distance for which he has paid, on making proper explanation to the conductor; and if the conductor refuses to heed his statements, and ejects him, the company must respond in damages. Evansville, etc., R. Co. *v.* Cates, 14 Ind. App. 172, 41 N. E. 712.

Rev. St. 1895, art. 331a, provides that connecting lines shall be deemed the agents of each other as to through contracts of shipment acquiesced in by such connecting lines. Plaintiff made a through shipment of cattle over the lines of two carriers, and the contract issued by the initial carrier entitled him to return transportation upon presentation of a "return transportation request" issued with the contract. The shipment was carried over the lines of the terminal carrier under the contract, and on presentation of the contract to its agent he stamped it, and returned it to plaintiff, stating that it was "all right," but subsequently plaintiff was ejected from the train of the terminal carrier by the conductor because plaintiff's transportation was not made out as required by the rules of such carrier, whereby a shipper must sign the "drover's pass." Held that, though the conductor acted in good faith, the ejection was wrongful. Texas, etc., R. Co. *v.* Lynch, 43 Tex. Civ. App. 121, 94 S. W. 1093.

Mistake in description of passenger.—Plaintiff purchased return tickets for himself, wife, and children. The agent selling them corrected his mistake as to the time of the tickets. The description of plaintiff as a female was a mistake of the agent. The conductor refused to accept the ticket, and ejected plaintiff on his refusal to pay fare. Held, that plaintiff was entitled to recover the damages sustained. St. Louis, etc., R. Co. *v.* Baty, 88 Ark. 282, 114 S. W. 218.

Same—Failure to give passenger opportunity to identify himself.—Where plaintiff's ticket described him, even to the fact of his having a mustache, defendant's conductor was not entitled to eject him without giving plaintiff an opportunity to further identify himself as the

the agent's mistake, entitle him to transportation, he may be ejected if he refuses to pay his fare otherwise; the passenger's right of action being for breach of contract for failure to furnish a proper ticket.[4] In Massachusetts it is held that if the ticket seller of a railroad corporation sells a punched ticket, assuring the purchaser that it is good, when it is not, and the passenger is expelled for refusing to pay additional fare, he may maintain an action therefor against the corporation.[5] But a passenger to whom the conductor of a street railway car sells a transfer check other than that called for, and who, upon his check, which is insufficient upon its face, being refused in another car, refuses to pay fare, and is ejected, can not maintain an action of tort for the expulsion.[6]

Duty of Passenger to Examine Ticket.—It is held that a person, having

original purchaser of the ticket, because the selling agent by mistake punched the ticket for a female, instead of a male; the passenger not being required to verify the punch marks of the selling agent. Illinois Cent. R. Co. *v.* Gortikov, 45 So. 363, 90 Miss. 787, 14 L. R. A., N. S., 464, 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650.

Failure to stamp issuing station on ticket—Contributory negligence of passenger.—That plaintiff demanded and paid for a ticket at the regular fare, without notice of any stipulation that might invalidate it; and that he was ejected from defendant's train because of the mistake of its agent in not stamping the issuing station on the back of the ticket, was no evidence of plaintiff's contributory negligence. Norman *v.* East Carolina R. Co., 77 S. E. 345, 161 N. C. 330.

Carriage on freight trains.—See ante, "Carriage on Freight Trains," § 2988.

Regulation of carrier no defense.—Where one is ejected from a street car because the hour was not correctly punched in his transfer ticket, a regulation of the company making such a transfer worthless is no defense to an action for the ejection. Jacobs *v.* Third Ave. R. Co., 75 N. Y. S. 679, 71 App. Div. 199, 10 N. Y. Ann. Cas. 462, reversing 69 N. Y. S. 981, 34 Misc. Rep. 512.

Trunk checked to proper place.—A passenger who applies for a ticket to one point, and is by mistake given one to another, but has her trunk checked to her destination, may recover for her ejection by a conductor who is informed of these circumstances, and of her inability to pay the fare. Georgia R., etc., Co. *v.* Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499.

Failure to make explanation.—It has been held that the failure by a person to make a statement or explanation, before he was put off a street car, for having a wrong transfer, through the mistake of the conductor of the initial car, would not of itself defeat his right to recover, but such fact is admissible in evidence as part of the res gestæ, as bearing upon the question of his good faith in accepting and using the improper transfer and as affecting the amount of damages. Cleveland City R. Co. *v.* Conner, 74 O. St. 225, 78 N. E. 376.

4. *Alabama.*—Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25.

Connecticut.—Norton *v.* Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

District of Columbia.—Baggett *v.* Baltimore, etc., R. Co., 3 App. D. C. 522.

Illinois.— Kiley *v.* Chicago City R. Co., 90 Ill. App. 275, judgment affirmed in 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460.

Kentucky.—Illinois Cent. R. Co. *v.* Jackson, 117 Ky. 900, 25 Ky. L. Rep. 2087, 79 S. W. 1187; Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71; Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 34 S. W. 702, 17 Ky. L. Rep. 1303; Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209, 20 Ky. L. Rep. 516. But see Louisville, etc., R. Co. *v.* Gaines, 99 Ky. 411, 36 S. W. 174, 18 Ky. L. Rep. 387, 59 Am. St. Rep. 465.

New Jersey.—Shelton *v.* Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A., N. S., 727, 9 Am. & Eng. Ann. Cas. 883.

Washington.—Loy *v.* Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372, wherein the court said: "We do not intend to modify the rule announced in Lawshe *v.* Tacoma R., etc., Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350." But see Olson *v.* Northern Pac. R. Co., 49 Wash. 626, 96 Pac. 150, 18 L. R. A., N. S., 209. See ante, "Failure to Comply with Conditions of Ticket," §§ 2990-2994; "Time Limit of Ticket Expired," § 2995; "Passenger on Wrong Train, or Route, or Carried Past Destination," §§ 2996-3001; post, "Conclusiveness of Ticket or Transfer as between Passenger and Conductor," § 3005.

5. Assurance of agent that ticket is good.—Murdock *v.* Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307.

6. Transfer insufficient upon its face.—Bradshaw *v.* South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481, 16 Am. & Eng. R. Cas. 386, distinguished in Murdock *v.* Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307.

applied for the proper ticket, is entitled to rely upon the one delivered to him by the ticket agent as the proper one, without examining it, where there are no intervening circumstances requiring him to do so.[7]

Mistake of Conductor Issuing Stop-Over Ticket.—It is held that although a stop-over ticket is issued by a conductor through mistake and in violation of the rules of the carrier, the carrier is bound by it and liable for the ejection of the holder of such ticket by a subsequent conductor.[8] But it is also held that where a passenger who has paid his fare between two points, but desires to stop at an intermediate point, asks the proper conductor for a stop-over ticket, as required by railroad regulations, and, through the conductor's fault, receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train.[9]

Ticket Over Connecting Lines.—A passenger having paid for passage over three lines of road is entitled to be carried to destination without further payment of fare, notwithstanding the error of the intermediate line in issuing a ticket in return for original ticket.[10]

Retaining Ticket with Knowledge of Mistake.—Where one, who by the mistake of a ticket agent has been given a wrong ticket, retains it for more than four months with full knowledge of its import, without disclosing the mistake to any one connected with the management of the road, he will be regarded as ratifying the contract according to its terms and can not recover for ejection when attempting to ride on such ticket.[11]

7. Duty of passenger to examine ticket.—Puckett *v.* Southern R. Co., 9 Ga. App. 589, 71 S. E. 944; Georgia R., etc., Co. *v.* Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499. See Southern R. Co. *v.* Bunnell, 138 Ala. 247, 36 So. 380, and Golden *v.* Pittsburg R. Co., 28 Pa. Super. Ct. 313.

Street car transfer.—Memphis St. R. Co. *v.* Graves, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. Rep. 803.

Where it was a street car conductor's duty under the railroad law (Laws 1890, c. 565, p. 1082, and amendments) to have given a certain transfer, a passenger had a right to assume, without examination, that he would receive the proper transfer. Moon *v.* Interurban St. R. Co., 85 N. Y. S. 363.

Contributory negligence.—Where one is ejected from a street car because his transfer ticket was not properly punched, he is not to be charged with contributory negligence in receiving the same, he not understanding the ticket, and being ignorant of whether it was correctly punched. Jacobs *v.* Third Ave. R. Co., 75 N. Y. S. 679, 71 App. Div. 199, 10 N. Y. Ann. Cas. 462, reversing 69 N. Y. S. 981, 34 Misc. Rep. 512.

A passenger is not guilty of negligence in failing to examine ticket to ascertain blunder of agent in issuing it, where the ticket contained eleven paragraphs in fine print. Ann Arbor R. Co. *v.* Amos, 97 N. E. 978, 85 O. St. 300.

Question for jury.—A passenger is not bound as a matter of law to examine his transportation before boarding a train, but may rely on the ticket agent, and it is for the jury to say whether the passenger is negligent in not discovering the agent's mistake in making out the ticket before taking the train. Olson *v.* Northern Pac. R. Co., 96 Pac. 150, 49 Wash. 626, 18 L. R. A., N. S., 209.

8. Mistake of conductor issuing stop-over ticket.—Plaintiff boarded a car on defendant's railroad and paid her fare to her destination. She asked the conductor for a stop-over, to enable her to leave the car at a point on the way, and take the next car, and the conductor gave her a ticket which, as punched by him, gave her an apparent right to ride to her destination, and he stopped the car for her to get off at the desired point. There was nothing on the ticket, or in any published rules of the company, to give plaintiff notice of any limitation upon the conductor's right to give such ticket. She boarded the next car, the conductor of which demanded fare, and upon her refusal to pay required her to leave the car. Held that, the ejection of the plaintiff from the second car was wrongful. Ray *v.* Cortland, etc., Tract. Co., 46 N. Y. S. 521, 19 App. Div. 530.

9. Yorton *v.* Milwaukee, etc., R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23.

10. Ticket over connecting lines.—Ann Arbor R. Co. *v.* Amos, 85 O. St. 300, 97 N. E. 978.

11. Retaining ticket with knowledge of mistake.—Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30, 18 N. E. 61, wherein the court said: "It is quite probable, it the plaintiff, without having ample opportunity to correct the mistake after discovering it, had offered the ticket on the first trip,

§ 3003. Effect of Mistake of First Conductor.—It is held that the carrier is liable where, through the fault of a conductor in detaching,[12] taking up,[13] or punching the wrong part of a ticket,[14] it is rendered defective and the holder is ejected by a subsequent conductor upon refusal to pay fare. And this rule has been applied where the conductor gave a trip check or slip in return for a ticket and the passenger was ejected by a subsequent conductor.[15] But it is also held that a passenger can not recover for an ejection when, holding a round-trip excursion ticket, and knowing that the conductor of the outgoing train had canceled the return coupon, he presents such coupon for a return

and had been refused passage, he would have been entitled to recover for any injury, in case he had been ejected after having done all he reasonably could to rectify the mistake."

12. Effect of mistake of first conductor.—Moore *v.* Central, etc., R. Co., 1 Ga. App. 514, 58 S. E. 63. See Ohio, etc., R. Co. *v.* Cope, 36 Ill. App. 97.

13. Taking up wrong part of ticket.—Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439; Lake Erie, etc., R. Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464 (Passenger not noticing mistake).

Where the conductor of a railroad train returns to a passenger the wrong portion of a return-trip ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable. Kansas, etc., R. Co. *v.* Riley, 68 Miss. 765, 9 So. 443, 24 Am. St. Rep. 309, 13 L. R. A. 38, wherein the court said: "Where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse at the peril of inviting an action for damages against his principal if the statement be true."

A street railroad company had an arrangement with another company whereby it ran its cars over the tracks of the other in leaving and entering a city, and they sold coupon tickets, one portion of which was good over the line of the city company and a part of the line of the other company. The conductor of the city company took up the tickets as to its line and such part of the trip over the line of the other company before the conductor of the rural line took charge of the car. When the car reached the end of the city company's line, but before it had reached the point to which plaintiff was entitled to ride by virtue of the first coupon, the conductor of the rural company took charge of the car, and demanded plaintiff's fare, when it was ascertained that the conductor of the city company had collected the wrong coupon. Held, that the conductor of the rural line had no authority to eject plaintiff before the car reached the point to which plaintiff was entitled to ride by virtue of his first coupon, as his uncollected ticket tendered to the conductor was sufficent to entitle him to ride to the point to which it was issued. Vining *v.* Detroit, etc., Railway, 80 N. W. 1080, 122 Mich. 248.

14. Punching wrong part of ticket.—A passenger with a round trip ticket between W. and P. handed it to the conductor, who tore the coupons apart, and, by mistake, punched the wrong one. He then wrote upon the back of it, "Canceled by mistake," and returned it, saying that it was all right. This was not according to the rules of the company, and on the return trip the passenger, after refusing to pay additional fare, was ejected from the train. Held, that he was entitled to damages for the unlawful interference with his person and the indignity to his feelings. Philadelphia, etc., R. Co. *v.* Rice, 64 Md. 63, 21 Atl. 97.

15. Conductor's check given in exchange for ticket.—Plaintiff purchased from the agent of defendant a round-trip ticket from E. to O. and return. This ticket was lifted by the conductor of the train going to O., and a trip check or slip given in return. Plaintiff, innocently relying upon said check as her return ticket, entered upon defendant's cars to make her return journey to E., and the conductor's check was rejected by the conductor of the return train, and plaintiff was required to leave the train before reaching E., and walked the remaining distance, about eight miles. Held, that defendant was liable. Baltimore, etc., R. Co. *v.* Bambrey (Pa.), 16 Atl. 67.

In Toledo, etc., R. Co. *v.* McDonough, 53 Ind. 289, it appeared that the plaintiff purchased a ticket entitling him to ride to a certain point on defendant's road; that he entered a car attached to a freight train, and its conductor took up his ticket, gave him an ordinary conductor's check, showing that he was a passenger to such point. He desiring to get to the city sooner than the freight train would carry him, the conductor advised him to get an express train at a certain station, and assured him that the check he had given him was good for a passage on the express train to his destination. The passenger, acting on this advice and assurance, entered the express train, but the conductor of that train refused to accept such check, and ejected him from the train. It was held that plaintiff was entitled to a recovery against the defendant carrier.

passage, and the conductor, in obedience to the rule of the company ejects him on his refusal to pay fare.[16] And where a passenger buys an excursion ticket containing a return coupon, and the conductor of the outgoing train takes the return coupon, the railroad company is not liable because the conductor of the returning train refuses to accept the other part of the ticket, and ejects the passenger,[17] if the passenger, before entering the returning train, could, by using ordinary diligence, have discovered the mistake of the other conductor.[18]

§ 3004. Effect of Collateral Agreement With Ticket Agent.—See ante and post, the different sections under "Defective or Invalid Ticket," §§ 2989-3005.

§ 3005. Conclusiveness of Ticket or Transfer as between Passenger and Conductor.—Holding That Ticket Conclusive.—There is a decided conflict in the cases as to the conclusiveness of a ticket or transfer check as between the passenger and conductor. Some of the cases hold that the face of a ticket is conclusive evidence to the conductor of the terms of the contract between the passenger and the company, and the purchaser of a defective ticket, who is ejected for failure to pay his fare, can not recover for the ejection but must rely upon his action against the company for the negligent mistake of the ticket agent;[19] since the conductor can not stop to investigate the right of a

16. Mullin *v.* Long Island R. Co., 121 N. Y. S. 458, 136 App. Div. 733.

17. Wiggins *v.* King, 36 N. Y. S. 768, 91 Hun 340, 71 N. Y. St. Rep. 861.

In Brown *v.* Rapid R. Co., 130 Mich. 483, 90 N. W. 290, it appeared that defendant railroad sold to plaintiff a ticket with eight coupons, four for the going trip and four for the return. On the outward trip the first two conductors tore off returning coupons, and the third conductor tore off the first two going coupons, and returned them to plaintiff, informing him of the mistake and told him that the portions returned would be accepted by succeeding conductors. On the return trip, the conductor would not honor these coupons, and on plaintiff's refusing to pay a cash fare, put him off the car in such a manner that he sustained personal injuries. He took the next car, and paid his fare. It was held that he could recover the extra fare paid, but no damages for being ejected from the car.

18. Wiggins *v.* King, 36 N. Y. S. 768, 91 Hun 340, 71 N. Y. St. Rep. 861.

19. Conclusiveness of ticket as between passenger and conductor.—*United States.*—Mosher *v.* St. Louis, etc., R. Co., 23 Fed. 326; New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 1 C. C. A. 544; Poulin *v.* Canadian Pac. R. Co., 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

Alabama.—McGhee *v.* Reynolds, 117 Ala. 413, 23 So. 68. See Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25.

Connecticut.—Norton *v.* Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

District of Columbia.—Baggett *v.* Baltimore, etc., R. Co., 3 App. D. C. 522.

Illinois.—Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626; Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499; Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

Kentucky.—Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209; Southern R. Co. *v.* Hawkins, 121 Ky. 415, 28 Ky. L. Rep. 364, 89 S. W. 258; Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71; Illinois Cent. R. Co. *v.* Jackson, 117 Ky. 900, 25 Ky. L. Rep. 2087, 79 S. W. 1187.

Maryland.—Western Maryland R. Co. *v.* Stocksdale, 83 Md. 245, 34 Atl. 880.

Michigan.—Brown *v.* Rapid R. Co., 134 Mich. 591, 96 N. W. 925; Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; Hufford *v.* Grand Rapids, etc., R. Co., 53 Mich. 118, 18 N. W. 580; Keen *v.* Detroit Elect. Railway, 123 Mich. 247, 81 N. W. 1084; Frederick *v.* Marquette, etc., R. Co., 37 Mich. 342, 26 Am. Rep. 531. But see Hufford *v.* Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859, holding that where a passenger has purchased a ticket of the authorized agent of a railroad company believing in good faith that it is genuine, and states such facts to the conductor, the conductor is bound to take such facts as true until the contrary is proven, without regard to any words, figures, or other marks on the ticket.

Missouri.—Woods *v.* Metropolitan St. R. Co., 48 Mo. App. 125.

New York.—Maxson *v.* Pennsylvania R. Co., 97 N. Y. S. 962, 49 Misc. Rep. 502; Nicholson *v.* Brooklyn Heights R. Co., 103 N. Y. S. 310, 118 App. Div. 13; Parish *v.* Ulster, etc., R. Co., 90 N. Y. S. 1000, 99 App. Div. 10. But see Muckle *v.* Rochester R. Co., 79 Hun 32, 29 N. Y. S. 732, 61 N. Y. St. Rep. 193.

New Jersey.—Shelton *v.* Erie R. Co., 73

passenger to carriage aside from the evidence presented to him.[20] So it is held that the fact that a passenger has the return coupons of a round-trip ticket does not make it the duty of a conductor on the outward trip to accept the passenger's statement that the other coupons were by mistake taken up by another conductor who should have taken but one of them.[21]

Holding That Ticket Not Conclusive.—Some cases hold that a railroad ticket is not conclusive evidence of the passengers right to transportation but that in a proper case the conductor must heed the reasonable explanations of a passenger as to his ticket or his right to ride, before demanding the payment of fare on pain of expulsion from the train.[22] And where a passenger is aboard a

N. J. L. 558, 66 Atl. 403, 9 L. R. A., N. S., 727, 9 Am. & Eng. Ann. Cas. 883; Wilson *v.* West Jersey, etc., R. Co., 83 N. J. L. 755, 85 Atl. 347, 43 L. R. A., N. S., 1148 (ferry ticket.)

Virginia.—Virginia, etc., R. Co. *v.* Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A., N. S., 899.

Washington.—Loy *v.* Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372.

West Virginia.—McKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, distinguished in Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022. See ante, "Effect of Mistake of Employee Issuing Ticket," § 3002; "Effect of Mistake of First Conductor," § 3003.

Illustrations.—A woman who presented for passage a mileage book made out in the name of Mr. H. M. P., and which provided on its face that it was good only for the person in whose name it was issued, and would be forfeited if presented by any other person, was properly ejected from the train by the conductor on refusal to pay her fare, and the conductor was under no obligation to listen to her explanation to the effect that "H. M." were the initials of her name, which was "P.," and that the "Mr." was a mistake of the railroad's check, as the book had been bought for her and paid for with her money. Parish *v.* Ulster, etc., R. Co., 90 N. Y. S. 1000, 99 App. Div. 10.

Defendant street car company changed its transfer regulations by limiting transfers to use on only one of two lines for which they were formerly issued. Plaintiff attempted to ride on the line from which the transfer privilege had been withdrawn on a transfer issued for the other line, and was ejected by the conductor. Held, in an action for damages counted solely on the ejection, that plaintiff could not recover, since his transfer did not, on its face, entitle him to ride on the car which he entered, and, as between plaintiff and the conductor, the transfer was conclusive evidence of plaintiff's rights. Keen *v.* Detroit Elect. Railway, 81 N. W. 1084, 123 Mich. 247.

A ticket containing a full printed contract, signed in ink by the purchaser, that it should expire on a date shown by punch marks on the margin, is conclusive evidence to the conductor of the contract between the carrier and the passenger as to the time the ticket continues in force. Rolfs *v.* Atchison, etc., R. Co., 71 Pac. 526, 66 Kan. 272.

20. Woods *v.* Metropolitan St. R. Co., 48 Mo. App. 125.

21. Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354.

22. Holding that ticket not conclusive.—*Indiana.*—Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439.

Iowa.—Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

Kansas.—Walker *v.* Price, 9 Kan. App. 720, 59 Pac. 1102.

Mississippi.—Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469; Alabama, etc., R. Co. *v.* Holmes, 75 Miss. 371, 23 So. 187; Kansas, etc., R. Co. *v.* Riley, 58 Miss. 765, 9 So. 443, 24 Am. St. Rep. 309, 13 L. R. A. 38. See Mitchell *v.* Southern R. Co., 77 Miss. 917, 27 So. 834, distinguishing the two cases last cited.

South Carolina.—Smith *v.* Southern Railway, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708; Corley *v.* Southern Railway, 89 S. C. 432, 71 S. E. 1035.

Texas.—Gulf, etc., R. Co. *v.* Halbrook, 12 Tex. Civ. App. 475, 33 S. W. 1028. See Texas, etc., R. Co. *v.* Dennis, 4 Tex. Civ. App. 90, 23 S. W. 400, affirmed in 93 Tex. 674, no op. See ante, "Effect of Mistake of Employee Issuing Ticket," § 3002; "Effect of Mistake of First Conductor," § 3003.

Plaintiff shipped horses over connecting railroad lines, of which defendant was one, and was to receive return transportation for himself on condition that he present to defendant's agent the transportation request issued with the contract for a return pass. Held, that the fact that plaintiff did not present the form of request furnished was immaterial where he did present the contract itself, and his identity was unquestioned, and no objection to the form of the request was made, and in answer thereto the agent received the contract, stamped it, and returned it to plaintiff with the statement that it would be "all right;" and plaintiff would not be precluded from recovering damages for being ejected from a train for failure to present the return pass or pay

street car without the proper transfer ticket, which is due to the mistake or fault of the conductor of the car from which he was transferred, and not to the fault of the passenger, the conductor in charge of the car must accept the reasonable explanations of the passenger in regard to the transfer in dispute.[23]

Where Ticket Indicates Probability of Mistake.—The rule which justifies the conductor of a train in ejecting a passenger who does not present a proper ticket and refuses to pay fare does not apply where, from the ticket itself, or from surrounding circumstances known to the conductor, the probability of a mistake on the part of the company in issuing the ticket is so strong as to reasonably require further investigation before the passenger is ejected.[24]

§ 3006. Ejection Through Mistake of Holder of Valid Ticket.—A carrier is liable for the ejection of a passenger traveling on a ticket which entitles him to transportation, even though such ejection was by reason of a mistake of the conductor.[25] Ejection of the holder of a street car transfer by a con-

his fare. Texas, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 73 S. W. 65.

Explanation as to unreasonableness of limitation.—An explanation to the conductor, by one presenting an expired ticket, of facts showing that the limitation was unreasonable, is equivalent to an explanation to the carrier itself. Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

Explanations substantiated by baggage check and way-bill.—In Alabama, etc., R. Co. *v.* Holmes, 75 Miss. 371, 23 So. 187, it is held that the conductor of a passenger train is not justified in ejecting a passenger between stations because of an error in her ticket, if the passenger's explanation of the error is reasonable and is substantiated by her baggage check and the way-bill for its transportation, it being a rule of the carrier to check baggage only upon a proper ticket.

23. *Georgia.*—Georgia R., etc., Co. *v.* Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A., N. S., 103, 114 Am. St. Rep. 246.

Indiana.—Indianapolis St. R. Co. *v.* Wilson, 66 N. E. 950, 161 Ind. 153, 100 Am. St. Rep. 261, rehearing denied in 67 N. E. 993; Citizens' St. R. Co. *v.* Clark, 71 N. E. 53, 33 Ind. App. 190, 104 Am. St. Rep. 249.

Ohio.—Cleveland City R. Co. *v.* Conner, 74 O. St. 225, 78 N. E. 376.

Tennessee.—O'Rouke *v.* Citizens' St. R. Co., 52 S. W. 872, 103 Tenn. 124, 46 L. R. A. 614, 76 Am. St. Rep. 639.

24. Where ticket indicates probability of mistake.—Krueger *v.* Chicago, etc., R. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487.

Illustrations.—A conductor is not justified in ejecting a passenger who presents a mileage book containing, when issued, 2,000 miles of transportation, having thereon a legible stamp showing the date of issue to have been the same as that on which it expired. Krueger *v.* Chicago, etc., R. Co., 71 N. W. 683, 68 Minn. 445, 64 Am. St. Rep. 487.

Plaintiff paid for her carriage as a passenger from Newport News to Parkersburg, W. Va., by boat to Baltimore and from there over defendant's railroad to destination. She received a ticket stating that it was good to the station printed thereon which was punched, and which contained a printed list of the stations on defendant's road as far as Cincinnati, but the agent neglected to punch it for Parkersburg and plaintiff did not notice the omission. The ticket was properly stamped by the agent, and plaintiff's baggage checked thereon to Parkersburg, the fact of the checking being indicated by the letters "B. C.," punched therein. It was also accepted and punched on the boat and by defendant's gateman at Baltimore, but the conductor on the train refused to receive it and although she explained the facts ejected plaintiff at Washington, where she was obliged to lay over, but was finally carried to her destination on the same ticket. Held that, conceding that as between conductor and passenger the ticket is conclusive evidence of the contract of carriage, it was the duty of the conductor before ejecting plaintiff to use all reasonable means to ascertain therefrom the extent of her rights; that her ticket was not void, but contained on its face evidence that the agent had made a mistake in failing to punch any station, and also, in connection with the baggage check referred to therein, evidence which should have been accepted by any reasonable man as a confirmation of her statements, and that in ejecting her he committed a tort for which defendant was liable in damages. Baltimore, etc., R. Co. *v.* Thornton, 188 Fed. 868, 110 C. C. A. 502.

25. Mistake of conductor as to right to transportation.—It is no excuse for the expulsion of a passenger from a railroad train that the conductor made a negligent mistake as to the station indicated on the face of the ticket which the passenger had exhibited and surrendered to the same conductor. Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Where a conductor refuses to accept the return coupon of a railroad ticket, thinking it not genuine, though it was

ductor, from a car of the company by which it was issued, contrary to the terms thereof, and refusal to carry him, on his failure and refusal to pay an additional fare, is actionable.[26] Where a street railway company was legally bound to issue a transfer at a certain point, and its conductor in fact issued such transfer, it was not entitled to defend an action for wrongful ejection because of the passenger's refusal to pay fare except by the surrender of such transfer on the ground that it did not issue transfers at such point.[27] That a statute does not require the issuance of a transfer between the particular lines in question is no defense to an action of ejection where a street car company, according to its rules, issues transfers from and to certain lines, and the passenger presents a transfer which is not honored by the conductor, and the passenger is ejected.[28]

Intent of Holder of Ticket.—One who enters a railway train in possession of a ticket entitling him to ride thereon is, if he does so with the bona fide intention of using the ticket for the purpose of making the journey for which it is good, entitled to recover whatever damages he may sustain by reason of a wrongful expulsion, although before going upon the train he may have had reason to believe the ticket would not be accepted for passage thereon by the conductor.[29]

perfect in letters, figures, and stamp, it having while in the passenger's possession lost its blue color, unknown to him, by being wet, the passenger can recover damages. Chicago, etc., R. Co. *v.* Conley, 6 Ind. App. 9, 32 N. E. 96, 865.

A railroad ticket read: "I. G. Ry. Special Excursion Ticket. Going Coupon. One First-Class Passage from Austin, Tex., to San Antonio, Tex. Rate sold, $1.50." It stated passengers would not be allowed to stop off, and had the stamp of the Austin ticket office, with date. Held, that it embodied a contract entitling the holder to transportation from Austin to San Antonio, was assignable, and the carrier was liable for ejecting the holder of such ticket. International, etc., R. Co. *v.* Ing, 29 Tex. Civ. App. 398, 68 S. W. 722.

Where the evidence showed that plaintiff's wife and children had a first-class full-fare ticket on defendant's road, entitling them to ride on a regular train, but the conductor thereon, without looking at the ticket, ejected them in a rough and humiliating manner, saying all who had excursion tickets would have to leave and take the next train, on which plaintiff's wife was compelled to stand, holding one of her children, and delaying her arrival, it was held to show right of recovery and should have been submitted to the jury. Alley *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 35 S. W. 735.

Where a railroad company fails to inform its conductor of a change in rules as to the sale of tickets and stoppage of trains, and such conductor, through want of such information, wrongfully refuses to carry a passenger, and ejects him from the train, the company is liable therefor. Sheets *v.* Ohio River R. Co., 39 W. Va. 475, 20 S. E. 566.

Drover's pass.—A passenger who presents to a conductor a "stock pass" from the railroad company, which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for nonpayment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. Graham *v.* Pacific R. Co., 66 Mo. 536.

A drover's pass was made out for two persons, the maximum number allowed to ride on such a pass; but the agent of the company, at the request of the parties, inserted the name of a third person, informing them the pass would be good for all three. The conductor of the train on which the parties sought to ride refused to allow all three to ride on the pass, and was informed by them which two persons were in charge of the stock. One of these two drew straws with the third person to determine which should get off the train, and, on losing, he was ordered off. Held, that he did not forfeit his right by the drawing, and the company was liable for his ejection. San Antonio, etc., R. Co. *v.* Newman, 43 S. W. 915, 17 Tex. Civ. App. 606.

26. De Board *v.* Camden Interstate R. Co., 57 S. E. 279, 62 W. Va. 41.

27. Chiert *v.* Interurban St. R. Co., 92 N. Y. S. 781.

28. Transfers not required by statute.—Arnold *v.* Rhode Island Co., 28 R. I. 118, 163, 66 Atl. 60.

29. Intent of holder of ticket.—Southern R. Co. *v.* Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166.

§§ 3007-3008. Extra Fares or Charges—§ 3007. In General.—Entering Another Car of Same Train.—Where a carrier has a rule which requires the collection of fares on each car of the train by the separate conductors on said cars, and that passengers changing cars must pay a second fare, a passenger, after taking passage on one car and paying his fare, is not authorized to take another car and refuse to pay a second fare when demanded, after being informed of the rule, although insufficient accommodations are provided on the first car.[30]

Violation of Regulation as to Entering Car.—A regulation of a street railway company that requires persons desiring to take its cars at a transfer station to enter the cars within, and not beyond, the prescribed limits of the station, and for their failure to do so declaring their right of transportation forfeited except upon payment of an additional fare, is reasonable, and, in its proper and reasonable enforcement, will justify the ejection of a passenger who has entered a car in violation of it and refuses to pay the required additional fare.[31] It is an unreasonable, arbitrary, and oppressive enforcement of the regulation for the company's agents to eject one who, to their knowledge, had paid regular fare, because he had entered a car, in which there was abundant room, while it was standing a few feet beyond the station line, upon his refusal to pay an additional fare.[32]

Passenger on Special Train without Notice of Requirement of Ticket.—When a person gets aboard a train for the purpose of traveling, he has the right, generally, to presume that he will only be required to pay the usual fare, and if the railroad imposes conditions with which he is compelled to comply before he can become a passenger, it must show that he had notice of such conditions. So a railroad is liable for ejecting a person from its excursion train where he does not have notice of a condition that passengers thereon were required to purchase round-trip tickets, and offers to pay his fare for a single trip.[33]

A street car passenger desiring to test the company's power to withhold a transfer from him, or to refuse him carriage without payment of another fare on a second car, should have withdrawn when the company asserted its position adverse to his claim to a transfer, and tested his rights in the courts, and should not have remained on the car without paying fare, and invited application of force to eject him.[34]

§ 3008. Failure to Procure Ticket.—Where a passenger fails to provide himself with a ticket, he may be compelled to pay the extra fare required by a reasonable regulation of the carrier and on refusal may be ejected, provided his failure was due to his own fault and negligence, and not to any fault of the carrier.[35] But it has been held that the conductor or other agent of the

30. Entering another car of same train.—Birmingham, etc., Co. *v.* Stallings, 154 Ala. 527, 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319, 45 So. 650; Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 44 So. 960, 13 L. R. A., N. S., 445; Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 46 So. 747.

31. Violation of regulation as to entering car.—Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

32. Unreasonable enforcement of regulation.—Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

33. Passenger on special train without notice of requirement of ticket.—Kirkland *v.* Charleston, etc., Railway, 79 S. C. 273, 60 S. E. 668, 15 L. R. A., N. S., 435.

34. Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S. 991.

35. Extra fare for failure to procure ticket.—*United States.*—Harrison *v.* Fink, 42 Fed. 787.

Alabama.—Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771; Kennedy *v.* Birmingham R., etc., Co., 138 Ala. 225, 35 So. 108.

Arkansas.—McCook *v.* Northup, 65 Ark. 225, 45 S. W. 547.

Connecticut.—Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Georgia.—Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268; Southern R. Co. *v.* Jones, 8 Ga. App. 225, 68

carrier who passes upon the merits of the excuse offered by the passenger for not having provided himself with a ticket or refuses to hear the excuse does so at the peril of the carrier.[36] It has been held that where a sick passenger left a train delayed overnight by a wreck and boarded another train the next day for his destination and presented the check given him as a substitute for his ticket by the first conductor, offering to pay regular fare, the second

S. E. 1011; McCook *v.* Dublin, etc., R. Co., 2 Ga. App. 374, 58 S. E. 491; Southern R. Co. *v.* Fleming, 128 Ga. 241, 57 S. E. 481, 10 Am. & Eng. Ann. Cas. 921.

Illinois.—Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; St. Louis, etc., R. Co. *v.* South, 43 Ill. 176, 92 Am. Dec. 103; Chicago, etc., R. Co. *v.* Brisbane, 24 Ill. App. 463; Lake Erie, etc., R. Co. *v.* Quisenberry, 48 Ill. App. 338.

Indiana.—Chicago, etc., R. Co. *v.* Graham, 3 Ind. App. 28, 29 N. E. 170; Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106; Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771; Toledo, etc., R. Co. *v.* Wright, 68 Ind. 586, 34 Am. Rep. 277; Evansville, etc., R. Co. *v.* Gilmore, 1 Ind. App. 468, 27 N. E. 992.

Iowa.—State *v.* Chovin, 7 Iowa 204; Everett *v.* Chicago, etc., R. Co., 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

Under Laws 15th Gen. Assem. c. 68, providing that a passenger who has a reasonable opportunity to purchase a ticket before boarding a train, and fails to do so, may be charged ten cents extra, the fact that a conductor takes and retain sixteen cents from a passenger, the price of a ticket for the four miles he wished to go, will not prevent demand of the ten cents extra, and ejection of the passenger on refusal to pay it. Hoffbauer, Delhi, etc., R. Co., 52 Iowa, 342, 3 N. W. 121, 35 Am. Rep. 278.

Kansas.—Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Kentucky.—Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 23 S. W. 509, 15 Ky. L. Rep. 380; Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498; Wicks *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 605.

Louisiana.—McGowen *v.* Morgan's, etc., Steamship Co., 41 La. Ann. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817.

Maine.—State *v.* Goold, 53 Me. 279.

Massachusetts.—Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432.

Michigan.—Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514.

Minnesota.—DuLaurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102; State *v.* Hungerford, 39 Minn. 6, 38 N. W. 628; Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

Mississippi.—Forsee *v.* Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801; Rivers *v.* Kansas, etc., R. Co., 86 Miss. 571, 38 So. 508.

New Hampshire.—Hilliard *v.* Goold, 34 N. H. 230, 66 Am. Dec. 765.

North Carolina.—Ammons *v.* Southern R. Co., 138 N. C. 555, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340, 51 S. E. 127.

Ohio.—Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580; Cincinnati, etc., R. Co. *v.* Skillman, 39 O. St. 444.

Oregon.—Poole *v.* Northern Pac. R. Co., 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Pennsylvania.—Muldowney *v.* Pittsburg, etc., Tract. Co., 8 Pa. Super. Ct. 335; Reese *v.* Pennsylvania R. Co., 131 Pa. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818.

South Carolina.—Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Texas.—Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; Easton *v.* Waters, 4 Texas App. Civ. Cas., § 71, 16 S. W. 540.

Illustrations.—Where plaintiff was traveling with his adult sister, having the money and tickets of both, and, on its transpiring that one of the tickets was lost, tendered the other for himself, and offered to pay three cents per mile for the sister, but refused to pay the extra cent per mile which the railroad was authorized by law to collect when cash fares were offered, such refusal was sufficient to justify the conductor in ejecting him from the train. Houston, etc., R. Co. *v.* Faulkner (Tex. Civ. App.), 63 S. W. 655.

A railroad's regulations allowed a discount on tickets from D. to L., to those who purchased of the ticket agent at D. A., desiring to take passage to L., went to the ticket office at D. after the advertised time for the train to leave. As the agent had remained only till the advertised time, A. failed to procure a ticket, but, taking passage on the train, and refusing to pay more than the price asked at the ticket office, he was ejected at W. by the conductor. On tendering the money for a ticket from W. to L. to the agent at W., the latter accepted it, but, on learning the facts, refused to sell the ticket, and tendered back the money, which A. refused to receive, and the train left W. without him. Held, that A. could not recover for the ejection and refusal to sell the ticket. Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432.

36. Southern R. Co. *v.* Jones, 8 Ga. App. 225, 68 S. E. 1011.

conductor was not entitled to eject him for refusal to pay extra fare.[37] It is held that where a passenger truthfully told a conductor that he had obtained a ticket and lost it, and offered to pay the ticket fare, which the conductor accepted, without demanding more, he had no right thereafter to eject the passenger on his refusal to pay the additional amount necessary to make the train fare, though the conductor might have had the right originally to demand the train fare.[38]

Opportunity to Procure Ticket.—To justify the expulsion of a passenger on a railroad train, who refuses to pay the difference between the price of a ticket to his destination and the rate charged where no ticket is purchased, the company must afford the passenger a reasonable and proper opportunity to purchase tickets, and avoid the discrimination.[39] Thus a passenger can not be law-

37. Louisville, etc., R. Co. *v.* Wilsey, 11 Ky. L. Rep. 419, 12 S. W. 275, 5 L. R. A. 855.

38. Where ticket lost.—Louisville, etc., R. Co. *v.* Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206.

39. Opportunity to procure ticket.—*United States.*—Pennsylvania Co. *v.* Lenhart, 56 C. C. A. 467, 120 Fed. 61.

Alabama.—Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771.

Arkansas.—St. Louis, etc., R. Co. *v.* Hammett, 98 Ark. 418, 40 R. R. R. 702, 63 Am. & Eng. R. Cas., N. S., 702, 136 S. W. 191.

Georgia.—Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Georgia, etc., R. Co. *v.* Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268.

Illinois.—Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562; Illinois Cent R. Co. *v.* Cunningham, 67 Ill. 316; Illinois Cent. R. Co. *v.* Johnson, 67 Ill. 312; Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; St. Louis, etc., R. Co. *v.* South, 43 Ill. 176, 92 Am. Dec. 103.

Indiana.—Chicago, etc., R. Co. *v.* Graham, 3 Ind. App. 28, 29 N. E. 170; Cleveland, etc., R. Co. *v.* Beckett, 11 Ind. App. 547, 39 N. E. 439; Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293; Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103; S. C., 28 Ind. 1, 92 Am. Dec. 276; Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106; Pittsburg, etc., R. Co. *v.* Street, 26 Ind. App. 224, 59 N. E. 404; Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771.

Iowa.—Everett *v.* Chicago, etc., R. Co., 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

Kansas.—Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975; Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500; Atchison, etc., R. Co. *v.* Hogue, 50 Kan. 40, 31 Pac. 698.

Kentucky.—Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

Louisiana.—McGowen *v.* Morgan's, etc., Steamship Co., 41 La. Ann.. 732, 6 So. 606, 17 Am. St. Rep. 415, 5 L. R. A. 817.

Massachusetts.—Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432.

Minnesota.—DuLaurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

Mississippi. — Forsee *v.* Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801; Rivers *v.* Kansas, etc., R. Co., 86 Miss. Miss. 571, 38 So. 508.

New York.—Chase *v.* New York Cent. R. Co., 26 N. Y. 523; Nellis *v.* New York Cent. R. Co., 30 N. Y. 505; Porter *v.* New York Cent. R. Co. (N. Y.), 34 Barb. 353. But see Bordeaux *v.* Erie R. Co. (N. Y.), 8 Hun 579.

North Carolina.—Ammons *v.* Southern R. Co., 138 N. C. 555, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340, 51 S. E. 127.

Oregon.—Poole *v.* Northern Pac. R. Co., 16 Ore. 261, 19 Pac. 107, 8 Am. St. Rep. 289.

Pennsylvania.—Reese *v.* Pennsylvania R. Co., 131 Pa. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818.

Tennessee.—Lane *v.* East Tennessee, etc., R. Co., 73 Tenn. (5 Lea) 124.

Texas.—Gulf, etc., R. Co. *v.* Sparger (Tex. Civ. App.), 39 S. W. 1001; Fordyce *v.* Manuel, 82 Tex. 527, 18 S. W. 657; Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; Missouri Pac. R. Co. *v.* McClanahan, 66 Tex. 530, 1 S. W. 576.

West Virginia.—Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158.

Wisconsin. — Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

Illustrations.—In an action against a railway company for damages for ejecting plaintiff from its train, a complaint alleging that plaintiff applied for a ticket of defendant's agent, and, being informed that he had no ticket for his destination and that he would have to pay his fare on the train, boarded the train and was ejected by the conductor for refusal to pay an additional charge demanded above the fare usually paid by others to plaintiff's destination, states a good cause of action. Phillips *v.* Southern R. Co., 40 S. E. 268, 114 Ga. 284.

Under the rules of the state railroad commission, providing that railway com-

fully ejected for refusal to pay the extra fare where he has been unable to procure a ticket because there was no ticket office,[40] or the ticket office was not kept open for a proper time,[41] or the agent was absent,[42] or attending to other business,[43] or refused to sell him a ticket without good cause.[44] Where a pas-

panies shall keep their ticket offices open for the sale of tickets for a reasonable time before the departure of trains from all stations, a passenger who was not afforded a reasonable opportunity to purchase a ticket at the station where his journey began is not bound to leave the train at an intermediate station to purchase a ticket back to the station where he started, and another to his destination; and, if ejected for refusing to do so, he may recover of the company. Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

Promise of agent to tell conductor that supply of tickets exhausted.—In an action against a railroad for wrongfully ejecting plaintiff from one of its trains, plaintiff testified that, on applying for a ticket, defendant's agent told him he was out of tickets, but to board the train, and he would tell the conductor not to charge plaintiff extra fare; defendant's rule requiring the payment of twenty-five cents extra when a passenger has no ticket. The conductor refused to accept plaintiff's statement that the agent had no tickets, and ejected him from the train on his refusal to pay extra fare. Held, that plaintiffs right of recovery did not depend on the conductor's knowledge or ignorance of the fact that the agent had no tickets for sale, and refused to submit the case to the jury under proper instructions was error. Ammons *v.* Southern R. Co., 51 S. E. 127, 138 N. C. 555, 18 R. R. R. 340, 41 Am. & Eng. R. Cas., N. S., 340.

40. No ticket office.—In an action against a railroad for ejection from one of defendant's trains, it appeared that plaintiff purchased a ticket over defendant's road from S. to P.; that, on arriving at P., plaintiff decided to go to T., the next station beyond; that there was no ticket office at P.; and that, after the train left P., plaintiff tendered defendant's conductor the amount of the regular fare to T., and, on refusing to pay twenty-five cents additional, was ejected from the car. Held, that such ejection was illegal. Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

Ticket office one thousand feet away.—A regulation of a street railway company requiring a higher rate where cash is paid the conductor than is charged for a ticket, furnishes no justification for ejection of a passenger tendering only the price of a ticket, where he is taken on at a place where tickets are not for sale, though they are for sale at a station 1,009 feet away. Kennedy *v.* Birmingham R., etc., Co., 35 So. 108, 138 Ala. 225.

41. Ticket office not kept open.—White *v.* Chesapeake, etc., R. Co., 26 W. Va. 800. See Hall *v.* South Carolina R. Co., 25 S. C. 564.

Texas statute—Failure of passenger to apply for ticket.—Gen. Laws 18th Leg. p. 70, requires railroads to keep open their ticket offices for one-half hour before the departure of trains, and allows them to collect extra fare from those who fail to purchase tickets at offices thus kept open. They can not demand this extra fare when they fail to observe this statute, even though the passenger did not apply for his ticket during the specified time; and, if they eject one thus refusing to pay extra fare, they are liable for damages. Missouri Pac. R. Co. *v.* McClanahan, 66 Tex. 530, 1 S. W. 576.

What is a reasonable time before the departure of trains for a ticket office at a railway station to be kept open in order to afford passengers an opportunity to purchase tickets is a question for the jury, under instructions from the court. Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

Contra.—Where the price of a ticket to plaintiff's destination was fifty cents, and by rule of the company the fare was fifty-five cents if paid on the train, plaintiff, who had no ticket, and refused to pay but fifty cents, can not recover for his ejection from the train, though he was unable to get a ticket before boarding the train owing to the ticket office being closed. Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

42. Where agent absent.—Forsee *v.* Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801; Gulf, etc., R. Co. *v.* Sparger (Tex. Civ. App.), 39 S. W. 1001. See Georgia R., etc., Co. *v.* Murden, 86 Ga. 434, 12 S. E. 630.

43. Agent engaged in other business.—A passenger boarded a railroad train to go to S., and tendered a mileage book which on examination was found to contain sufficient mileage only to M., and the conductor informed the passenger that he stopped at M., that the ticket office would be open, and the passenger could buy a ticket at that point. The passenger left the train at M. to buy a ticket, but the agent was engaged in other business. There was sufficient time for the ticket to be purchased if the agent had tended to the matter, and plaintiff boarded the train without a ticket when it was about to depart to the knowledge of the conductor, and tendered the conductor three cents per mile from M. to S. Held, that the conductor had no legal right to put him off because he refused to pay four cents per mile, the charge imposed on those who ride without tickets. Brown *v.* Central, etc., R. Co., 58 S. E. 163, 128 Ga. 635.

44. Refusal to sell ticket.—Indianapolis,

senger made no effort to get a ticket at a certain junction, not knowing there was a ticket office there, he was not precluded thereby from urging that the time was short, and during most of it the way to the office was obstructed, and the agent was engaged in transferring mail, etc., as an excuse to the conductor for not having a ticket.[45] It is held that where a passenger concludes to go to a station beyond the one to which he has a ticket, he can not demand that the train be stopped long enough for him to buy a ticket, and the company is justified in ejecting him on his refusal to pay the train fare.[46]

Amount in Excess of Legal Charge.—A rule of a railroad company requiring a passenger failing to procure a ticket to either pay an amount in excess of the highest amount which can be legally charged for his passage, or be expelled from the train, is not a valid rule; and hence the company is liable to a passenger expelled by the conductor, though in good faith and without unnecessary force, in enforcing the rule.[47]

Waiver of Right to Demand Extra Fare.—It has been held that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare and is liable for ejecting him for refusal to pay such fare.[48] In a later decision by the same court it was held that the rule just stated is, assuming the conductor's authority to waive the payment of extra fare, correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in believing that it was accepted in full for his fare to the place of his destination.[49] Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment the latter would have the right to assume that the amount paid was satisfactory.[50] But though the conductor receives a sum less than the true fare to a passenger's destination, and afterwards discovers that it is too little, his retention of it until the train reaches the next station is no waiver of his right to require payment of the balance on penalty of ejection from the train at such station, even if he has any authority to make such a waiver.[51] By starting its car before demanding fare, a street railway company does not waive its right to eject a passenger who unlawfully refuses to pay extra fare, especially when the demand of fare was made simultaneously with starting the car, and the circumstances were such as to justify the expectation that fare would be paid.[52]

§§ 3009-3012. Tender or Payment of Fare to Avoid Ejection—§ 3009. Duty to Pay Fare to Avoid Ejection.—Where a passenger's ticket is a proper one, but the conductor claims otherwise and threatens to put him off the train, the passenger is not under any legal duty to pay fare to prevent his ejection;[53] although he might take the other course and pay his fare, rather

etc., R. Co. *v.* Rinard, 46 Ind. 293; Lake Erie, etc., R. Co. *v.* Cloes, 32 N. E. 588, 5 Ind. App. 444; Cleveland, etc., R. Co. *v.* Beckett, 39 N. E. 429, 11 Ind. App. 547.

45. Bowsher *v.* Chicago, etc., R. Co., 113 Iowa 16, 84 N. W. 958.

46. Faston *v.* Waters, 4 Texas App. Civ. Cas., § 71, 16 S. W. 540.

47. Amount in excess of legal charge.—Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975. See Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514; Smith *v.* Pittsburg, etc., R. Co., 23 O. St. 10.

48. Waiver of right to demand extra fare.—Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

49. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596, qualifying Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

50. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

51. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

52. Starting car before demanding fare.—Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

53. Duty to pay fare to avoid ejection.—McGhee *v.* Cashin (Ala.), 40 So. 63; Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439.

than be ejected, and recover such damages as he sustains in that event.[54] It is held that where a railroad's agent wrongfully refused to indorse a return trip ticket, and the passenger in consequence was ejected from a train, he was entitled to recover for his expulsion, it not having been incumbent on him to purchase a ticket or to pay his fare.[55] But it is also held that where a passenger is aboard a street car with a transfer ticket which by the mistake of another conductor is erroneous, it is the duty of the passenger to either pay the fare demanded or peaceably leave the car.[56] And it is held that a passenger presenting a ticket with an erroneous date must either pay another fare or peaceably leave the train and rely upon his remedy in damages.[57]

Extra Fare.—Where a passenger properly applied at the ticket office for a ticket, and without any fault of his failed to secure it, and fare in addition to the price of the ticket was demanded by the conductor on the cars, he could pay the excess under protest and afterwards recover it by suit; but he was entitled to be carried at the ticket rate without paying the excess, and had the choice of paying the excess or of insisting on his right to be carried at the ticket rate and holding the company responsible in damages for refusal to carry him.[58]

Duty to Pay Excessive or Second Fare.—See ante, "Refusal to Pay Excessive or Second Fare," § 2984.

Where one by mistake takes a train which does not stop at his destination, and fare is demanded of him upon the train by the conductor to the first station at which the train is to stop, and he is able to pay the same, but refuses to do so, and then the conductor stops the train and requests him to leave or pay, he should either pay his fare or get off. If his mistake was induced by the ticket agent of the company, then the extra fare which he pays is an element of damages, in addition to such as are occasioned by his being carried beyond his destination.[59]

§§ 3010-3012. Effect of Tender of Fare—§ 3010. Before Ejection.—Failure to Have Ticket.—As a general rule because a traveler on a railway train has no ticket, it is no ground for putting him off the train, and if he offers to pay the fare the railway company ejects him at its peril.[60] But where a ticket is required as a condition precedent to right of carriage a passenger who has no ticket may be ejected regardless of the tender of fare in money.[61] And

One entitled to ride on mileage book coupons was not bound to tender his fare in money, to prevent his ejection, in order to recover substantial damages therefor. Harvey *v.* Atlantic, etc., R. Co., 69 S. E. 627, 153 N. C. 567.

Where a passenger is entitled to ride on the ticket presented by him, though his name is signed thereto by another, the provision that it be signed by him having been waived, and he is unable to satisfactorily identify himself, and a cash fare is wrongfully demanded, he need not pay it or leave the train, but may stand on his right and recover for his ejectment. Elser *v.* Southern Pac. Co., 7 Cal. App. 493, 94 Pac. 852.

Street car transfer.—Where a passenger on a street car line presented a valid transfer, which the conductor refused to honor, and, as the passenger refused to pay fare, ejected him from the car, he was entitled to recover damages for the ejection; it not being necessary for him to pay his fare, and then resort to an action to recover it back. Arnold *v.* Rhode Island Co., 66 Atl. 60, 28 R. I. 118, 163.

54. Pennsylvania Co. *v.* Bray, 25 N. E. 439, 125 Ind. 229.

55. Wrongful refusal of agent to indorse ticket.—Texas, etc., R. Co. *v.* Payne, 99 Tex. 46, 87 S. W. 330, 70 L. R. A. 946, 122 Am. St. Rep. 603.

56. Norton *v.* Consolidated R. Co., 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

57. Arnold *v.* Atchison, etc., R. Co., 81 Kan. 400, 105 Pac. 541.

58. Extra fare.—Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.

59. Passenger on wrong train.—Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780. See Burgess *v.* Atchison, etc., R. Co., 112 Pac. 103, 83 Kan. 497.

60. Failure to have ticket.—Ford *v.* East Louisiana R. Co., 110 La. 414, 34 So. 585.

61. See ante, "Requiring Ticket as Condition Precedent to Right of Carriage," §§ 2987-2988.

where a person is in the employ of a connecting line, and because thereof is permitted to ride free on the trains of the other company, and is warned not to traffic in the excursion tickets of the company, and, disregarding this warning, is detected in scalping tickets on the train, the conductor might be justified in stopping the train and putting him off, even though he offered to pay the fare.[62]

Failure to Pay Fare on Demand.—Though a passenger on a railroad train may have failed to pay his fare when demanded, yet if before being ejected he tenders it, it is the duty of the conductor to receive it and not eject the passenger.[63] But a mere willingness on the part of a passenger to pay the fare, unaccompanied by a move or act calculated to suggest willingness to the conductor, is not sufficient to place the conductor in the wrong in ejecting the passenger.[64] And the mere handing of money to the conductor as security for the fare does not constitute a payment thereof.[65]

When Tender Unnecessary.—It is railway company's duty to demand proper fare, but tender is unnecessary where it is evident that it would not have been accepted.[66]

Tender by Third Person.—It is immaterial to the carrier from whom it receives a fare, and, if another than the passenger offers to pay, it is the same as if the passenger himself offers to do so, and the conductor is bound to accept and has no right to eject the passenger.[67] But such payment must be acquiesced

62. Ford *v.* East Louisiana R. Co., 34 So. 585, 110 La. 414.

63. **Tender after failure to pay fare on demand.**—Gould *v.* Chicago, etc., R. Co., 18 Fed. 155, 5 McCrary 502; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Beck *v.* Quincy, etc., R. Co., 129 Mo. App. 7, 108 S. W. 132.

Plaintiff had a dispute with the conductor as to the amount of his fare, and the conductor, after receiving the fare to the next station, told the passenger that he must leave the train there. When the train arrived, the passenger offered to pay fare to destination, but the conductor refused to receive it, and forcibly ejected the passenger. Held, that the company was liable. Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126.

Where a person boards a train at a place where the company does not receive passengers, and rides several miles, with knowledge of the conductor, who does not eject him as a trespasser, and the conductor demands his fare for transportation, the latter has no right to eject him for nonpayment of fare, where, before the conductor took any steps to eject him, he produced money and offered to pay, as the conductor has elected to treat him as a passenger. Kansas, etc., R. Co. *v.* Holden, 53 S. W. 45, 66 Ark. 602.

64. Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

65. **Tender as security for fare.**—Plaintiff with his father boarded one of defendant's trains. The father had given plaintiff money to purchase the tickets, which he did. Plaintiff had mislaid the tickets, and was unable to find them at once, and, to avoid immediate ejection by the conductor, plaintiff's father handed the conductor a $10 bill and requested him to go on taking up tickets. The conductor asked them where they were going, to which the father replied: "The tickets will show. I don't want you to take our fare out of that ten dollars." The conductor continued to take up tickets, then returned, and on being informed that they had not found the tickets, ejected them and finally surrendered the $10 to plaintiff's sister. Held, that the handing of the $10 to the conductor did not constitute a payment of the fare, and should be considered only on the question of plaintiff's good faith in attempting to gain time to find his tickets. Anderson *v.* Louisville, etc., R. Co., 120 S. W. 298, 134 Ky. 343, 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220, 20 Am. & Eng. Ann. Cas. 920.

66. **When tender of fare unnecessary.**—Southern Pac. Co. *v.* Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194.

67. **Tender by third person.**—*United States.*—Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am & Eng Ann. Cas. 939.

Missouri.—Randell *v.* Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

New York.—O'Brien *v.* New York, etc., R. Co., 80 N. Y. 236; Guy *v.* New York, etc., R. Co. (N. Y.), 30 Hun 399.

Pennsylvania.—Ham *v.* Delaware, etc., Canal Co., 142 Pa. 617, 21 Atl. 1012.

Tennessee.—Louisville, etc., R. Co. *v.* Garrett, 76 Tenn. (8 Lea) 438, 41 Am. Rep. 640.

Washington.—Kirk *v.* Seattle Elec. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S., 991.

Offer of a person, in company with plaintiff and others on a train, to pay fare for all of them, accompanied by his taking out his money, more than suffi-

in by the passenger, either by express or silent consent.[68] So an ejected passenger who did not tender his fare, and expressly repudiated a tender of his fare by others, can not claim any benefit from their offers.[69] But where a tender of fare is made on behalf of a passenger prior to his ejection, in his presence or hearing, by a fellow passenger, and such tender is not repudiated by him, he will be presumed to have acquiesced in the effort so made in his behalf, so that proof of such fact is sufficient to sustain an allegation that his fare was duly tendered.[70]

§ 3011. After Ejection Commenced.—After a person has refused to present a proper ticket or fare on demand and has been given a reasonable time to comply therewith, he acquires no right to passage by tendering the fare demanded after his ejection has commenced,[71] as where the train has been stopped

cient so to pay, all before the conductor ordered plaintiff off or made any attempt to stop the train, followed by refusal of the conductor to carry them, was a sufficient offer to make the expulsion. Baltimore, etc., R. Co. *v.* Norris, 46 N. E. 554, 17 Ind. App. 189, 60 Am. St. Rep. 166.

After ejection commenced.—See post, "After Ejection Commenced," § 3011.

68. Necessity of acquiesence by passenger.—*United States.*—Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann. Cas. 939.

Missouri.—Gates *v.* Quincy, etc., R. Co., 125 Mo. App. 334, 102 S. W. 50.

Pennsylvania.—Muldowney *v.* Pittsburg, etc., Tract. Co., 8 Pa. Super. Ct. 335.

Washington.—Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 108 Pac. 604, 31 L. R. A., N. S., 991,

69. Repudiation of tender.— Kirk *v.* Seattle Elect. Co., 108 Pac. 604, 58 Wash. 283, 31 L. R. A., N. S., 991.

70. Presumption as to acquiescence.— Gates *v.* Quincy, etc., R. Co., 102 S. W. 50, 125 Mo. App. 334.

71. Effect of tender after ejection.—*United States.*—Harrison *v.* Fink, 42 Fed. 787.

Georgia.—Georgia, etc., R. Co. *v.* Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, limiting South Carolina R. Co. *v.* Nix, 68 Ga. 572.

Illinois.—Illinois Cent. R. Co. *v.* Bauer, 66 Ill. App. 124.

Iowa.—Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep 278.

Kansas.—Atchison, etc., R. Co. *v.* Dwelle, 44 Kan. 394, 24 Pac. 500.

Maryland.—Garrison *v.* United R., etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452.

Massachusetts.—O'Brien *v.* Boston, etc., R. Co. (Mass.), 15 Gray 20, 77 Am. Dec. 347.

Mississippi.—Mullins *v.* Illinois Cent. R. Co., 93 Miss. 184, 46 So. 529.

New York.—Pease *v.* Delaware, etc., R. Co., 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699; People *v.* Jillson (N. Y.), 3 Parker Cr. R. 234; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455; Behr *v.* Erie R. Co., 74 N. Y. S. 1007, 69 App. Div. 416.

North Carolina.—Pickens *v.* Richmond, etc., R. Co., 104 N. C. 312, 10 S. E. 556.

Ohio.—Cincinnati, etc., R. Co. *v.* Skillman, 39 O. St. 444.

Tennessee.—Louisville, etc., R. Co. *v.* Harris, 77 Tenn. (6 Lea) 180, 42 Am. Rep. 668.

Texas.—Texas, etc., R. Co. *v.* Bond, 62 Tex. 442, 50 Am. Rep. 532; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179; Galveston, etc., R. Co. *v.* Turner (Tex. Civ. App.), 23 S. W. 83.

Washington.—Loy *v.* Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372.

Tender nullified by disorderly conduct.—If the passenger's refusal to produce a ticket or pay fare, be accompanied by violent and abusive conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right to remain on the train, and the conductor, using proper discretion, may eject such person, notwithstanding tender of full fare is then made. Gould *v.* Chicago, etc., R. Co., 18 Fed. 155, 5 McCrary 502.

Exceptions to rule.—A passenger on a railway train gave to the conductor the fare which he had been accustomed to pay, and the conductor demanded a further sum as due because the passenger had no ticket. This was refused, and the conductor stopped the train. Then the passenger tendered the additional sum, but the conductor refused it, and ejected him. It was held that under the circumstances of the case the ejection was unlawful as the passenger's conduct was not willful. Texas, etc., R. Co. *v.* Bond, 62 Tex. 442, 50 Am. Rep. 532.

In an action for ejection from defendant's train, there was evidence that plaintiff fell asleep after entering the train, and, on recovering consciousness, found he was being ejected from the car by the conductor; that, before he reached the door, he informed the conductor that he had a ticket, but was not allowed to present it. Held, that an instruction that, if the conductor started plaintiff rightfully towards the door, and plaintiff tendered him the ticket at any time before reaching the ground, he should have received it, was correct. Ferguson *v.* Michigan Cent. R. Co., 98 Mich. 533, 57 N. W. 801.

for the purpose of ejecting him,[72] or the conductor has rung the bell to stop the train.[73] But in Kentucky[74] and Missouri,[75] the contrary rule is held. The same rule applies where the tender is made by a third person as when made by the person ejected.[76] A passenger on a railway train who refuses to accede to a wrongful demand for fare is entitled to be carried on acceding to the demand, though the train may have been stopped with a view to his expulsions.[77] The

72. *United States.*—Harrison *v.* Fink, 42 Fed. 787.

Illinois.—Illinois Cent. R. Co. *v.* Bauer, 66 Ill. App. 124.

Massachusetts.—O'Brien *v.* Boston, etc., R. Co. (Mass.), 15 Gray 20, 77 Am. Dec. 347.

Mississippi.—Mullins *v.* Illinois Cent. R. Co., 93 Miss. 184, 46 So. 529.

New York.—Pease *v.* Delaware, etc., R. Co. (N. Y.), 11 Daly 350 .

North Carolina.—Pickens *v.* Richmond, etc., R. Co., 104 N. C. 312, 10 S. E. 556.

Ohio.—Railroad Co. *v.* Skillman, 39 O. St. 444; New York, etc., R. Co. *v.* Willing, 5 O. C. C., N. S., 137, 14-24 O. C. D. 474, 481.

73. Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. 23; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

74. In Kentucky a valid tender made after ejection is begun restores the rights as a passenger of the person being ejected. Louisville, etc., R. Co. *v.* Cottengim (Ky.), 104 S. W. 280, citing Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 34 S. W. 702, 17 Ky. L. Rep. 1303.

Sufficient tender.—Where plaintiff, while having the money in his hand to pay his fare, said to defendant's conductor, "Here, I will pay you," and reached the money out, and one of the trainmen had plaintiff under his arms and another had him by the legs in process of ejection, plaintiff's tender of fare was sufficient. Louisville, etc., R. Co. *v.* Cottengim (Ky.), 119 S. W. 751.

75. In Missouri a distinction is made between a mere offer to pay fare and a tender thereof, and a mere offer to pay without an actual tender after process of ejection is commenced is unavailing. But though the conductor has signaled the engineer to stop the train and commenced the ejection of a passenger who merely offered to pay his fare without actual tender thereof, his rights may be reinstated if he actually tenders payment before the ejection is complete. Short *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 488. See Beck *v.* Quincy, etc., R. Co., 129 Mo. App. 7, 108 S. W. 132.

Plaintiff applied to defendant's station agent for a ticket, laying down a $10 bill in payment, and exhibiting a contract for a rebate on the purchase of a certain number of tickets, which entitled him to receive a credit certificate for each ticket bought. The agent prepared the ticket, but could not make the change. When the train arrived, he, in company with plaintiff, asked the conductor to change the bill, explaining that plaintiff wished to purchase a ticket, and that he had a credential contract. The conductor refused to make the change, but told plaintiff he could get on the train. Afterwards he demanded plaintiff's fare, and plaintiff stated he wished his credit slip. After threats to eject plaintiff, the conductor jerked the bell cord, and the train began to slow up, whereupon plaintiff said he would pay his fare. Thereupon the conductor pulled the cord to go ahead. Plaintiff then asked him to "go through the train, and then come back and see me," whereupon the conductor grabbed him, and started towards the vestibule. Plaintiff offered evidence of a custom among conductors to issue credit slips to passengers in such cases. Held, that if plaintiff, after the conductor attempted to eject him the second time, tendered his fare, it was the conductor's duty, under the circumstances, to accept it, and in ejecting him afterwards the company would be liable. Holt *v.* Hannibal, etc., R. Co., 74 S. W. 631, 174 Mo. 524, affirming 87 Mo. App. 203.

76. Tender by third person.—Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann. Cas. 939, reversing 6 Ind. T. 99, 89 S. W. 668; Gates *v.* Quincy, etc., R. Co., 125 Mo. App. 334, 102 S. W. 50.

A passenger boarded a train, intending not to pay the fare. When called on for a ticket he stated that he had no ticket or money. He was told that he would have to pay his fare or get off. The conductor stopped the train at a town and ejected him. There was no pretense of rudeness. When the train was nearly at a stop, a stranger offered to pay the fare, but the conductor refused to accept it. The passenger, after being ejected, stopped with a relative and suffered no trouble or inconvenience. Held, that he was not entitled to recover for his ejection from the train. Mullins *v.* Illinois Cent. R. Co., 93 Miss. 184, 46 So. 529.

In an action for damages against a railroad company for ejecting plaintiff from defendant's cars, evidence that a friend of plaintiff offered to pay the amount claimed by the conductor while the latter was attempting to put plaintiff off of the train for refusal to pay his fare was not proper evidence to show that plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance. Perkins *v.* Missouri, etc., Railroad, 55 Mo. 201.

77. Wrongful demand for fare.—Georgia R., etc., Co. *v.* Davis, 6 Ga. App. 645, 65 S. E. 785.

fact that, while plaintiff was being wrongfully ejected on the ground that she had not paid her fare, another passenger offered to pay the fare and plaintiff would not permit it, did not preclude plaintiff from recovering for all injuries and damages suffered after her refusal to permit such payment.[78]

§ 3012. Effect as Waiver of Rights under Ticket.—If a passenger pays his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermediate station, the demand of fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station; and by paying on such demand, his action will be as complete as if he resists the demand, and suffers himself to be ejected.[79] The fact that the passenger, though claiming his right to passage on his ticket, offered to pay the regular fare, refusing only to pay the extra charges on train, does not prevent his recovery for ejection, his offer not having been accepted.[80]

§ 3013. What Constitutes Ejection.—Physical Ejection Not Essential.—In order that a passenger may recover for wrongful ejection from a train, it is not necessary that the conductor should have put his hands on him.[81] Merely leaving the train in obedience to the conductor's command constitutes an ejection.[82] The passenger can not, however, avail himself of a formal order of the conductor, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion.[83] Evidence showing that the conductor told the passenger that it was dangerous for her with her infant children to go on the train to a station, may be sufficient to show that she was coerced by the conductor to leave the train, for coercion may re-

78. Effect of repudiation of tender by third person.—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 386, 45 So. 164.

79. Effect as waiver of rights under ticket.—Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499.

80. Ellsworth *v.* Chicago, etc., R. Co., 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173.

81. Physical ejection not essential.—Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Where a railroad conductor told a passenger he would not be carried, and that if he did not get off he would be thrown off, and followed the passenger onto the platform, and, standing over him, threatened to throw him off if he did not alight, there was, in law, a forcible ejection, though the conductor did not touch the passenger. Indiana, etc., R. Co. *v.* Ditto, 64 N. E. 222, 158 Ind. 669.

82. Leaving car in obedience to command.—Consolidated Tract. Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685; Ferguson *v.* Missouri Pac. R. Co., 144 Mo. App. 262, 128 S. W. 799; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Ray *v.* Cortland, etc., Tract. Co., 46 N. Y. S. 521, 19 App. Div. 530; Eddy *v.* Syracuse Rapid Trans. R. Co., 63 N. Y. S. 645, 50 App. Div. 109.

If before or after the train reaches a certain station he is ordered by the conductor to get off at that station, the order seeming to be peremptory and the passenger so understanding it, he may yield to the conductor's authority and leave the train at the station indicated, though the conductor be not immediately present when this is done. In such case, if the passenger acts contrary to his own will and in obedience to the conductor's command, he is coerced and is entitled to redress for his expulsion. Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Where a street railway passenger is wrongfully ordered to leave the car under circumstances which show that force will be used unless the order is obeyed, his right of action for ejection is complete, and it is not essential that actual force shall have been used. Morrill *v.* Minneapolis St. R. Co., 115 N. W. 395, 103 Minn. 362.

Obedience to conductor's command to porter to see that the passenger got off at the next station is an ejection. Boling *v.* St. Louis, etc., R. Co., 189 Mo. 219, 88 S. W. 35.

Passenger on steamboat.—Where a passenger left a steamboat at the request of the captain or person in charge, and of a police officer acting under this person's directions, it was equivalent to an ejection from the boat. Reasor *v.* Paducah, etc., Ferry Co., 153 S. W. 222, 152 Ky. 220, 43 L. R. A., N. S., 820.

83. Mere formal order.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

sult from fear.[84] If the conductor refuse to pass a child traveling on half-fare rate because he believes it to be over the limited age, and the mother also leaves the train, she may recover damages, if the refusal be wrongful, although the conductor offer to pass her upon her own ticket without the child.[85]

Acts Not Constituting Ejection.—For a passenger, whose ticket the conductor had refused to accept, to leave the train of her own accord, and against his advice that she remain, and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good, is not an ejection.[86] And where several cars were waiting at a station to be loaded with passengers, and a passenger, after voluntarily leaving one car, was told by the conductor that he could not ride on that car, but was directed to take passage on another car, there was no ejection.[87] The promise of a conductor to put off at her destination a passenger eight years of age did not make it his duty to act as her special attendant, to see that she did not leave her seat, and therefore the mere fact that one who was not identified as the conductor assisted her from train before she reached her station does not render the carrier liable in an action for forcible ejection.[88]

§§ 3014-3015. Place of Ejection—§ 3014. In General.—Where there is no statute requiring the ejection of a person refusing to pay his fare at a station, the right to eject may be exercised between stations,[89] at any reasonable place,[90] though it be inconvenient,[91] provided the place selected is not such as to work an injury to the party ejected,[92] and care is taken not to expose him to injury or danger.[93] So the fact that a passenger is ejected for refusal to pay his fare, at a point remote from a station, if in other respects he is subjected to no unreasonable danger, will not make the company liable.[94] It is held that

84. Louisville, etc., R. Co. *v.* Quinn, 145 Ala. 657, 39 So. 616.

85. Gibson *v.* East Tennessee, etc., R. Co., 30 Fed. 904.

86. Leaving train of own accord.—Boling *v.* St. Louis, etc., R. Co., 189 Mo. 219, 88 S. W. 35.

87. Dobbins *v.* Little Rock R., etc., Co., 79 Ark. 85, 95 S. W. 794.

88. Louisville, etc., R. Co. *v.* Jordan, 112 Ky. 473, 66 S. W. 27, 23 Ky. L. Rep. 1730.

89. Place of ejection.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Lewis, 69 Ark. 81, 61 S. W. 163; Hobbs *v.* Texas, etc., R. Co., 49 Ark. 357, 5 S. W. 586.

Indiana.—Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1, 92 Am. Dec. 276.

Iowa.—Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

Maryland.—McClure *v.* Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

Ohio.—Cincinnati, etc., R. Co. *v.* Skillman, 39 O. St. 444.

South Carolina.—Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Utah.—Rudy *v.* Rio Grande, etc., R. Co., 8 Utah 165, 30 Pac. 366.

A rule of the company providing that, in case a passenger fails to pay the fare demanded, it shall be the duty of the conductor to put him off at the next station, does not enter into the contract between the passenger and the company, so that the conductor can not eject the passenger until arrival at the next station; for, as the passenger refused to consent to the regulations made by the company in regard to the transportation of passengers, no contract existed between the parties in respect thereto. Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

In Minnesota it is held that a railroad company, having the right to eject from its train one not a trespasser, must do so at a regular station. Hardenbergh *v.* St. Paul, etc., R. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610, distinguishing Wyman *v.* Northern Pac. R. Co., 34 Minn. 210, 25 N. W. 349, holding that a person who enters a railway train and refuses to pay his fare when lawfully demanded may be put off at any place, between stations provided care is taken not to expose him to serious injury or danger.

90. Reasonable place.—Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

91. Inconvenient place.—Great Western R. Co. *v.* Miller, 19 Mich. 305.

92. Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781; Rudy *v.* Rio Grande, etc., R. Co., 8 Utah 165, 30 Pac. 366 (must not be unreasonably exposed to danger).

93. Cincinnati, etc., R. Co. *v.* Skillman, 39 O. St. 444.

94. Remote place.—Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

Because she had no ticket and refused to pay her fare plaintiff was put off defendant's passenger train at a late hour on a dark and rainy night at a point somewhat more than a mile from the sta-

a railroad company is not liable for ejecting a passenger from its train at any safe place along its line, though, at the time, a storm was pending, and there was a possibility that the person ejected might be caught in it.[95] A conductor who requires a passenger to disembark from the train because of the insufficiency of her ticket and her refusal to pay fare must know of the perils of the place where he requires the passenger to disembark, and the passenger may assume that the place is safe.[96] And in ejecting a passenger, even though on proper grounds, at least ordinary or reasonable care must be used in selecting a safe place for such ejection, and negligence in this respect will render the carrier liable for damages.[97] So, if a passenger was ejected from a railroad train at a time and place when serious injury would likely result, the railroad company would be liable for resulting injuries,[98] though its servants, by reason of the darkness, may not have been aware of the danger.[99] If a passenger, through the fault of servants of a railway company, takes the wrong train, it is the duty of the company to return him in safety to the place where the mistake was

tion at which she boarded it, and was compelled to walk back to such station, carrying her baggage and a four year old child, but was able to reach the station in time to take a train on the road over which her ticket was good to final destination, whereas, if she had been carried to the next station and put off, she probably could not have procured accommodations and would have been compelled to wait until the next day to get another train. Plaintiff did not request to be carried to the next station and put off. Held, that she could not complain because of the place at which she was put off. McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

95. Storm pending.—Burch *v.* Baltimore, etc., R. Co., 3 App. D. C. 346, 26 L. R. A. 129.

96. Passenger may assume that place is safe.—Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

97. Carrier must exercise ordinary care.—Texas, etc., R. Co. *v.* McDonald, 2 Texas App. Civ. Cas., § 163; Louisville, etc., R. Co. *v.* Setser, 138 Ky. 476, 128 S. W. 341; Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

"In determining whether such care has been exercised, all the circumstances should be considered, as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc., etc." Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487.

Illustrations.—A. purchased a railroad ticket good for a continuous trip to a certain point and return within thirty days. He testified that he did not know that such a ticket was not good on a "limited express," and that he had previously traveled on such tickets by such trains. He boarded the "limited express," with his ticket, but the regulations of the company required the purchase of special tickets for passage on that train. The conductor refused to receive A.'s ticket, or to receive his fare in cash, but stopped the train, at night, and expelled him, without violence, at a point where there were many railroad tracks, and where many trains were continually passing, and A. was knocked down and injured, it was supposed, by a train in motion. Held, that the company could not treat him as a mere trespasser, but only as a passenger who had by mistake taken the wrong train; and that, if the place where he was landed was dangerous, the company was liable in damages for the injury. Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

A passenger on a railroad train, having failed to pay his fare, was told by the conductor that he must get off at the next station. Not being notified when the train reached such station, he did not get off. A short distance beyond he was put off the train, the time being midnight, the weather very cold, and the passenger a cripple and thinly clad. Held to warrant a verdict for the plaintiff. Texas, etc., R. Co. *v.* McDonald, 2 Texas App. Civ. Cas., § 163.

Where plaintiff, misinformed by a brakeman, entered the wrong train, and conductor, on examining his ticket, stopped the train, and put him off near a trestle, on a dark night, and plaintiff, returning to station, fell into a ravine and was injured, it is not error to charge, in an action for damages against the company, that the conductor was justified in putting him off, but was required to do so at a safe place. Houston, etc., R. Co. *v.* Devainy, 63 Tex. 172.

98. McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

An ejected passenger should not be put off in a cut where he would not be safe from passing trains. Louisville, etc., R. Co. *v.* Setser, 138 Ky. 476, 128 S. W. 341.

99. Louisville, etc., R. Co. *v.* Gatewood, 14 Ky. L. Rep. 108.

made, or leave him at a convenient place for the taking of the proper train; if the passenger is ejected at an uncomfortable and an unsafe place, the company is liable.[1] But where a passenger boards the wrong train, without being misled by an employee of the company, and refuses to pay his fare to the next station, it is not the conductor's duty to carry him to the next station, or to a place where he could rest in comfort, so that he migh return on the next train.[2] Where a person was ejected from a railway train at a street corner near the track, but afterwards left the vicinity of the track, and went to a place 25 or 30 feet distant in a well-frequented public street, and was subsequently injured by a train, the question of the fitness of the place where he was originally put off was eliminated in a suit for his injuries on the ground that he had been put off at an improper place, and the case should be viewed as if he had been originally ejected at the point in the street which he afterwards safely reached.[3]

Contributory Negligence.—Where a conductor refused to accept fare from plaintiff's wife, and ejected her at an unsuitable place, the plaintiff's negligence in putting her on the train, and forgetting to give her ticket to her, was immaterial to recovery.[4]

Passengers under Disability.—See post, "Ejection of Passenger under Disability," §§ 3020-3021.

§ 3015. Statutory Regulation.—In many states the place of ejection is regulated by statute, it being generally provided that a passenger must be ejected at a usual stopping place or station, or near a dwelling house.[5] Under such a

1. **Passenger taking wrong train.**—International, etc., R. Co. *v.* Gilbert, 64 Tex. 536.

Plaintiff, having a ticket over another road, showed it to the brakeman of defendant's train before getting on, and he assisted her and her children on. Held, that the conductor was not justified in putting her off the train at a station that was not a reasonably safe and convenient point from which she could expeditiously reach a train on the road over which she had her ticket. Patry *v.* Chicago, etc., R. Co., 82 Wis. 408, 52 N. W. 312.

2. Missouri, etc., R. Co. *v.* Dawson, 10 Tex. Civ. App. 19, 29 S. W. 1106.

3. Gaukler *v.* Detroit, etc., R. Co., 130 Mich. 666, 90 N. W. 660.

4. **Contributory negligence.**—Southern Kansas R. Co. *v.* Wallace (Tex. Civ. App.), 152 S. W. 873.

5. *Arkansas.*—The statute provides that a passenger refusing to pay fare may be ejected at any usual stopping place the conductor may select. Mansf. Dig., § 5474; Sand & H. Dig., § 6192.

Under the statute a passenger refusing to pay fare can not be ejected except at a usual stopping place even though that would take him to his destination. St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524.

The statute applies only to the ejection of passengers for nonpayment of fares. St. Louis, etc., R. Co. *v.* Lewis, 69 Ark. 81, 61 S. W. 163. So the ejection of one attempting to ride on a freight train at a place other than a usual stopping place is not a violation of the statute. Hobbs *v.* Texas, etc., R. Co., 49 Ark. 357, 5 S. W. 586. And one ejected a quarter of a mile beyond her designated station because of her failure to alight at the station after an ample stop had been made can not recover for such ejection. St. Louis, etc., R. Co. *v.* Lewis, 69 Ark. 81, 61 S. W. 163.

Under the statute neglect to purchase a ticket before entering the train, when required by a rule of the company, amounts to a refusal to pay fare, and justifies an expulsion only at regular stations. McCook *v.* Northup, 45 S. W. 547, 65 Ark. 225.

The statute applies to one who has boarded a train at a place where the company does not receive passengers, and whom the conductor has elected to treat as a passenger by demanding his fare, after being informed as to where he boarded the train. Kansas, etc., R. Co. *v.* Holden, 66 Ark. 602, 53 S. W. 45.

One carelessly entering a train, which he should have known did not stop at his destination, but which he hoped would stop either there or near there, and who has a ticket to such destination, which he offers to the conductor, is a passenger, within the statute. St. Louis, etc., R. Co. *v.* Harper, 61 S. W. 911, 69 Ark. 186, 53 L. R. A. 220, 86 Am. St. Rep. 190.

California.—Civ. Code, § 487, requiring ejection to be at any usual stopping place or near any dwelling house, is sufficiently met, where plaintiff testified that the ejection occurred at the railroad station at A., and other witnesses alluded to A. as a small town where the train stopped. Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740.

Florida.—Laws, c. 1987, § 41, which prohibits the expulsion of a passenger by a railroad company for nonpayment of fare at any point other than a usual stopping

statute it is held that the passenger need not be ejected at the first station, but

place, or near some dwelling house, does not apply to the expulsion of a passenger wantonly violating any other reasonable rule of the company, and he may be expelled at any convenient and safe point that may be selected by the officer in charge. South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

Illinois.—Under the statute a passenger refusing to pay his fare may be ejected at any usual stopping place or station but not elsewhere. Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, etc., R. Co. *v.* Roberts, 40 Ill. 503; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138.

A railroad company may expel a passenger from its cars for refusing to surrender his ticket, at any place. Such refusal is not the same as refusing to pay fare, for which the statute only permits him to be expelled at a station. Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138.

The regular station at which a passenger who refuses to pay his fare may be ejected, means "the place on the railroad where passenger trains usually stop for the purpose of having passengers get on and off," and not the town or village in which the depot building is situated. Illinois Cent. R. Co. *v.* Latimer, 28 Ill. App. 552, affirmed in 128 Ill. 163, 21 N. E. 7.

The statute was held to apply although, on being asked for fare, the passenger said that if the conductor would stop the train he would get off, and the conductor did stop. Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253.

One who wilfully neglects to comply with the rules of a railroad company as to purchasing a ticket before entering the cars, may be expelled at a usual place for the discharge of passengers, but not elsewhere. Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133.

The rule that a passenger ought not to be expelled except at a regular station does not apply to a passenger who, after being so expelled, jumps upon the train after it has again started; otherwise he might steal his ride by repeating the act at each station. Kent *v.* Mason, 1 Ill. App. 466.

Indiana.—Rev. St. 1881, § 3921, provides that a passenger refusing to pay his fare may be ejected "at any usual stopping place."

In Toledo, etc., R. Co. *v.* Wright, 68 Ind. 586, 34 Am. Rep. 277, it was held that the statute was pursuasive only, and did not prohibit the railroad company from doing at any other point what it authorized them to do at a usual stopping place.

Missouri.—Rev. St. 1899, § 1047 (Ann. St. 1906, p. 923), providing that a passenger may only be ejected at a station or near a dwelling house was sufficiently complied with where a passenger was ejected at a point where he could see a dwelling house "across the field." Petty *v.* St. Louis, etc., R. Co., 149 Mo. App. 360, 130 S. W. 85.

One who has entered a train with intent to travel on a commutation ticket which has expired by limitation is not a passenger, under Wag. St., p. 307, § 28, who, in case of his refusal to pay fare, is entitled to be put off near the station or dwelling house. Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255.

The rule of a railroad company that, if a passenger boards a train having a ticket for a station at which it does not stop, he shall be put off either there or at the first station at which the train stops, does not relieve it from liability for ejecting him at a point between stations. Stevens *v.* Atchison, etc., R. Co., 1 Mo. App. Rep'r 247.

New Hampshire.—A "passenger station," within the meaning of Gen. Laws, c. 163, § 22, providing that "no railroad corporation shall eject any person from its cars for nonpayment of fare, excepting at some passenger station," is a stopping place at which passenger tickets are ordinarily sold. Baldwin *v.* Grand Trunk R. Co., 64 N. H. 596, 15 Atl. 411.

A carrier which ejected a person from a train for nonpayment of fare at a place other than a passenger station, in violation of Pub. St. 1901, c. 160, § 6, is not necessarily liable for the resulting damage, but it must appear that it occurred through its failure to perform the duty imposed by statute; and, to recover, the ejected person must prove the insufficiency of the station at the place of expulsion, his own care, and that the injury resulted from defendant's fault. Caher *v.* Grand Trunk R. Co., 71 Atl. 225, 75 N. H. 125.

North Carolina.—Revisal 1905, § 2629, Bullock *v.* Atlantic, etc., R. Co., 152 N. C. 66, 67 S. E. 60.

Oklahoma.—Comp. Laws 1909, § 1394; Chicago, etc., R. Co. *v.* Radford, 36 Okla. 657, 129 Pac. 834.

New York.—Under the statute providing that a passenger who refuses to pay his fare may be ejected "near any dwelling house," whether the train is "near" a dwelling house thirty rods away is a question for the jury. Loomis *v.* Jewett (N. Y.), 35 Hun 313.

Utah.—Under Comp. Laws, § 2354, which provides that "any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employee of the company may elect," the company has no right to eject a passenger for nonpayment of fare except at a stopping

may be ejected at any subsequent station.[6]

Pleading and Proof of Statute.—When a passenger who has been put off the cars for nonpayment of fare brings an action for damages, and relies on a foreign statute to sustain his recovery, which allows defaulting passengers to be put off only at a station or near a dwelling house, whereas he was put off remote from either, he must aver and prove such statute.[7]

§§ 3016-3018. Manner of Ejection—§ 3016. In General.—In ejecting from its train a passenger who has forfeited the right to remain thereon, the carrier owes him the duty of reasonable or ordinary care.[8] The removal must be effected in a proper manner, and with no more confusion than is reasonably necessary for the purpose.[9] The right of ejection must be exercised with great regard to the safety and preservation of limb, and much more of the life, of the passenger;[10] and so the carrier is liable for ejecting a passenger in such a manner as to imperil his life or subject him to danger of bodily injury.[11] The right must be exercised without violating the duty of respectful treatment which continues until the passenger is actually expelled.[12] The carrier is liable

place. Nichols *v.* Union Pac. R. Co., 7 Utah 510, 27 Pac. 693.

Vermont.—By Comp. St. p. 202, § 52, a railroad company can not eject a passenger from one of its trains except at a usual stopping place. Stephen *v.* Smith, 29 Vt. 160.

Wisconsin.—Rev. St. 1898, § 1818, authorizing a conductor to eject a passenger refusing to pay his fare "at any usual stopping place or near any dwelling house," prohibts by implication such ejectment at other places. Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506. So the ejection of a passenger for nonpayment of fare, at a point three-fourths of a mile from any station or dwelling house, is unlawful. Phettiplace *v.* Northern Pac. R. Co., 84 Wis. 412, 54 N. W. 1092, 20 L. R. A. 483.

In an action under the statute, the fact that plaintiff claimed to be riding on a ticket purchased on Sunday does not preclude a recovery; the action being ex delicto, and not ex contractu. Masterson *v.* Chicago, etc., R. Co., 78 N. W. 757, 102 Wis. 571.

It is held that the words "usual stopping place" as used in the statute do not mean "station or passenger station," but rather a place reasonably safe for the discharge of passengers, and where they would not be exposed to unreasonable hazard, and hence the statute was satisfied by ejecting the passenger at a point where a large number of employees engaged in mills were received and discharged by defendant in going to and coming from a city, accessible dwelling houses being not more than 500 or 600 feet away, and a hotel within sixty rods, though there was no depot or ticket office at that point. Habeck *v.* Chicago, etc., R. Co., 132 N. W. 618, 146 Wis. 645, Ann. Cas. 1912C, 485.

Texas.—The words "any usual stopping place" in Paschal's Dig., art. 4892, providing that where any passenger shall refuse to pay his fare it shall be lawful for the conductor to put him out of the cars at "any usual stopping place" which the conductor may select, mean either a regular station, or any other place which the company expressly, by public notice or otherwise, or impliedly by user for such purpose, has designated as a proper place for passengers to board or alight from trains, and where they will, in consequence thereof, have the right to demand the exercise of such privilege. So a place at which a train is stopped for wood or water only, is not "a usual stopping place," within the statute. Texas, etc., R. Co. *v.* Casey, 52 Tex. 112.

6. Lake Erie, etc., R. Co. *v.* Mayo, 4 Ind. App. 413, 30 N. E. 1106.

7. Pleading and proof of statute.—Great Western R. Co. *v.* Miller, 19 Mich. 305.

8. Manner of ejection—Ordinary care required.—*Iowa.*—Brown *v.* Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487. See Bettis *v.* Chicago, etc., R. Co., 108 N. W. 103, 131 Iowa 46.

Kentucky.—See Louisville City R. Co. *v.* Mercer, 11 Ky. L. Rep. 810.

Texas.—Ft. Worth, etc., R. Co. *v.* Gribble, 46 Tex. Civ. App. 78, 102 S. W. 157; International, etc., R. Co. *v.* Bohannon (Tex. Civ. App.), 71 S. W. 776; Texas, etc., R. Co. *v.* Lyons (Tex. Civ. App.), 50 S. W. 161, affirmed in 93 Tex. 741, no op.

9. Gallena *v.* Hot Springs Railroad, 13 Fed. 116, 4 McCrary 371.

10. Great regard for safety of passenger.—South Carolina R. Co. *v.* Nix, 68 Ga. 572. See Nashville St. R. Co. *v.* Griffin, 57 S. W. 153, 104 Tenn. 81, 49 L. R. A. 451.

11. Louisville, etc., R. Co. *v.* Tuggle, 152 S. W. 270, 151 Ky. 409. See Railway Co. *v.* Valleley, 32 O. St. 345, 30 Am. Rep. 601.

12. Duty of respectful treatment.—Louisville, etc., R. Co. *v.* Forrest, 65 S. E. 808, 6 Ga. App. 766.

Conductor acting maliciously.—If the conductor of a traction car while in the

if the conductor offers insult or indignity to the passenger [13] or uses insulting or improper language.[14] It is held that mere rudeness of speech does not render the carrier liable.[15]

Provocation by Passenger.—It is held that where the conductor's conduct was caused by the acts of the passenger, the railway company is not liable.[16]

line of his duty acts in a willful and malicious manner in ejecting a passenger, the traction company is liable in damages. Scioto Valley Tract. Co. *v.* Craybill, 19-29 O. C. D. 95, 8 O. C. C., N. S., 469.

13. Insult or indignity to passenger.—McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

14. Improper language.—Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842; Atlanta Consol. St. R. Co. *v.* Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824; Georgia R. Co. *v.* Olds, 77 Ga. 673; Georgia R. Co. *v.* Homer, 73 Ga. 251; Leyser *v.* Chicago, etc., R. Co., 119 S. W. 1068, 138 Mo. App. 34.

Plaintiff's wife, desiring to go to A., where she resided, and believing that defendant's fast train stopped there to let off interstate passengers, as she was, boarded the train in accordance with the direction of defendant's station agent, who sold her a ticket, and, after being directed to change from one car to another en route, was informed by defendant's conductor that the train would not stop at A., and that she would either have to pay her fare to D. or alight at the last stopping place before the train reached A. She declined to do either, whereupon the conductor said to her that, if she lived at A., she knew that the train did not stop there, and then, before attempting to eject her, said "Do not disgrace yourself here," and pulled her up out of her seat and called on the auditor to help him eject her, when she paid the fare demanded to the next station. Held, that the statements of the conductor imputed a falsehood to her as well as a charge of disgraceful conduct, and that, if this distressed and humiliated her, plaintiff was entitled to recover damages therefor. Missouri, etc., R. Co. *v.* Morgan (Tex. Civ. App.), 138 S. W. 216.

Contra.—Where a person is ejected from a train because of his refusal to pay fare, or to produce ticket on demand of the conductor, or to leave the train, he is not entitled to recover of the company because of unnecessarily insulting and abusive language addressed to him by the conductor while ejecting him, there being, in such case, no proof that the relation of passenger and carrier existed between the parties. Memphis, etc., R. Co. *v.* Benson, 85 Tenn. (1 Pickle) 627, 4 S. W. 5, 4 Am. St. Rep. 776.

15. Mere rudeness of speech.—A woman with two infant children, traveling on a second-class ticket, boarded a limited train, on which first-class tickets only were valid. The conductor refused her ticket, and at the next important station she was put off. It was in the evening, and she remained at the depot for a time, till at her request she was sent to a hotel, and the next day money was collected with which she returned home, where she had an attack of nervous prostration. She testified, concerning the language of the conductor in refusing her ticket: "It was very rough; so much so that is what scared me most. If he had spoken pleasant to me, it would have been so much better. He spoke up in such a commanding way." She further said that at the depot the conductor said something about sending her to a hospital in a patrol wagon. Held, that the evidently imperative manner and form of speeech of the conductor were not actionable in the absence of violence, or other willful misconduct, and a verdict for defendant should have been directed. New York, etc., R. Co. *v.* Bennett, 50 Fed. 496, 1 C. C. A. 544.

In an action for putting plaintiff and her husband off a railway train, it appeared that, their tickets not being stamped as required, the conductor told the husband that they must pay or get off, and at the next station returned and said, in a "brusque, decided manner," to the husband, "This is H., if you are going to get off;" and, he replying that, he had no intention of getting off unless ordered, the conductor said, "very decidedly, quickly, and rudely," "Then I order you off;" at which they got off, but returned, and paid their fare. Held, that the company was not liable for damages for the manner of the expulsion, though plaintiff was riding on pillows, and apparently an invalid. Rose *v.* Wilmington, etc., R. Co. 106 N. C. 168, 11 S. E. 526.

16. Provocation by passenger.—A passenger ejected for nonpayment of fare can not claim damages on account of the conductor drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked and caused by the acts of the passenger. Harrison *v.* Fink, 42 Fed. 787.

If a disorderly passenger defies the conductor, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train, and after expulsion he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences though the expelled passenger be wounded in the conflict, even if the conductor, excited by

Ejection of Passenger under Disability.—See post, "Ejection of Passenger under Disability," §§ 3020-3021.

§ 3017. Use of Force.—Where ejection is proper all the force necessary to remove the passenger from the carrier's conveyance may be used.[17] And

danger and irritated by insult, be not fully excusable for the shooting. Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334.

While, under ordinary circumstances, a railway company will be held legally responsible for the manner in which its conductor undertakes to exercise its right to expel from its cars one not entitled to ride thereon, yet where such a person expressly refuses voluntarily to alight, insultingly challenges the conductor to attempt to put him off, and then violently assaults the conductor upon his proceeding in a lawful manner to make the expulsion, and the latter thereupon resents and responds to the attack by resorting to great and unnecessary violence, the company will not be liable in damages for personal injuries thus inflicted, provided the assault made upon its servant was of such a nature as to excite his passions and render him unfit for properly performing the duties devolving upon him in the premises. This is so, because the person injured, by his own grossly improper conduct, is to be regarded as having forfeited his right to immunity from unnecessary violence by inviting the conductor to disregard and abandon his official duties and enter into a personal encounter on his own account and upon his individual responsibility. City Elect. R. Co. *v.* Shropshire, 101 Ga. 33, 28 S. E. 508.

17. Use of necessary force.—*United States.*—Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

California.—Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Georgia.—Higgins *v.* Southern R. Co., 98 Ga. 751, 25 S. E. 837; Peavy *v.* Georgia R. Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Georgia R. Co. *v.* Baldoni, 115 Ga. 1013, 42 S. E. 364; Wenz *v.* Savannah, etc., R. Co., 108 Ga. 290, 33 S. E. 970.

Illinois.—Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; Chicaga, etc., R. Co. *v.* Brisbane, 24 Ill. App. 463.

Kentucky.—Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433.

Missouri.—Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255.

New York.— Weber *v.* Brooklyn, etc., R. Co., 62 N. Y. S. 1, 47 App. Div. 306; McCullen *v.* New York, etc., R. Co., 74 N. Y. S. 209, 69 App. Div. 269; Miller *v.* Brooklyn Heights R. Co., 111 N. Y. S. 47, 127 App. Div. 197

Pennsylvania.—McMillan *v.* Federal, etc., R. Co., 172 Pa. 523, 33 Atl. 560.

South Carolina.—Moore *v.* Columbia, etc., R. Co., 38 S. C. 1, 16 S. E. 781.

Texas.—Galveston, etc., R. Co. *v.* Zantzinger, 92 Tex. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859; Houston, etc., R. Co. *v.* Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; International, etc., R. Co. *v.* Leak, 64 Tex. 654

Virginia.—Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

Washington.—Mills *v.* Seattle, etc., R. Co., 50 Wash. 20, 96 Pac. 520, 19 L. R. A., N. S., 704.

Where a passenger on a street car refused to pay his fare when demanded, and made the conductor understand that he would resist being put off, the conductor was justified in using force in putting him off after for the third time telling him that he must pay his fare or get off. McGarry *v.* Holyoke St. R. Co., 65 N. E. 45, 182 Mass. 123.

A passenger wrongfully on a railway train can recover no damages for his removel and exclusion therefrom, except for needless violence. He can not complain of an indignity which it was his duty to avoid, and which he was bound to expect. Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157.

Conductors of freight trains may, if the rules of the company so direct or the exigencies of the case require it, refuse to carry passengers in their cabs or on their trains, and in case of the refusal of an applicant for passage to leave the train the conductor may use such reasonable force as is necessary to eject him. Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

Illustrations.—Where a railway passenger failed to produce evidence of his right to ride on a train or to pay his fare it was not unlawful for the conductor and brakeman to loosen his hands from the seat on which he was sitting and to raise him to his feet for the purpose of ejecting him from the train. Breen *v.* Texas, etc., R. Co., 50 Tex. 43.

Where a passenger remained on a car, sleeping, after arrival at his destination, the terminus of the road, the carrier's employees had the right to resort to whatever means were reasonably necessary to awaken him and get him off the train, and were not guilty of unlawful assault in using such means. Kaase *v.* Gulf, etc., R. Co., 41 Tex. Civ. App. 370, 92 S. W. 444.

In an action for personal injuries to a wife, defendant was entitled to an instruction, there being evidence justifying same, that if the conductor of defendant's train requested plaintiff to pay his fare or leave the train, and he refused, the con-

when a passenger was lawfully ejected from a train, and prevented from re-entering the same, he had no cause of action, unless more force than was necessary to accomplish these ends was employed.[18] But the carrier is liable for the use of unnecessary force and violence in ejecting a passenger.[19] If a passenger is

ductor had the right to call to his aid in ejecting him a police officer, who was justified in using whatsoever force was necessary thereto; and that if plaintiff's wife interferred, and assaulted him without provocation, he had the right to use such force as was reasonably necessary to prevent further violence on her part, and that defendant was not liable for resulting damages. Houston, etc., R. Co. *v.* Ritter, 41 S. W. 753, 16 Tex. Civ. App. 482.

18. Coyle *v.* Southern R. Co., 37 S. E. 163, 112 Ga. 121.

A railway conductor ejected a passenger at a station for his refusal to pay fare. The conductor asked him to get off, and, when he did not, the conductor lifted him to his feet, when he walked out. The train started, but was stopped because the passenger attempted to board it. When the train started again, the conductor got on the rear platform of the last car. The passenger took hold of the railing, and the conductor was unable to loosen his grip, and struck him, causing him to fall. Held, that the conductor was justified in doing what he did. Lindsay *v.* Wabash R. Co., 104 N. W. 656, 141 Mich. 204.

19. Use of unnecessary force.—*United States.*—Gallena *v.* Hot Springs Railroad, 13 Fed. 116, 4 McCrary 371.

Alabama.—Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 46 So. 747; Moore *v.* Nashville, etc., Railroad, 34 So. 617, 137 Ala. 495.

Georgia.—Louisville, etc., R. Co. *v.* Forrest, 6 Ga. App. 766, 65 S. E. 808; Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

Illinois.—Chicago, etc., R. Co. *v.* Herring, 57 Ill. 59.

Indiana.—Citizens St. R. Co. *v.* Clark, 71 N. E. 53, 33 Ind. App. 190, 104 Am. St. Rep. 249; Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70; Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611; Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627.

Kentucky.—McKinley *v.* Louisville, etc., R. Co., 137 Ky. 845, 127 S. W. 483, 28 L. R. A., N. S., 611.

Maryland.—Philadelphia, etc., R. Co. *v.* Larkin, 47 Md. 155, 28 Am. Rep. 442.

Minnesota.—Brown *v.* Minneapolis, etc., R. Co., 113 N. W. 895, 102 Minn. 298.

Missouri.—Leyser *v.* Chicago, etc., R. Co., 138 Mo. App. 34, 119 S. W. 1068; McQuerry *v.* Metropolitan St. R. Co., 92 S. W. 912, 117 Mo. App. 255; Ickenroth *v.* St. Louis Trans. Co., 102 Mo. App. 597, 77 S. W. 162.

Nebraska.—Haman *v.* Omaha Horse R. Co., 35 Neb. 74, 52 N. W. 830.

New Jersey.—State *v.* Ross, 26 N. J. L. 224; Jardine *v.* Cornell, 50 N. J. L. 485, 14 Atl. 590.

New York.—Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Higgins *v.* Watervliet, etc., R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Sanford *v.* Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286, affirming 20 N. Y. Super. Ct. 122.

Ohio.—Corry *v.* Cincinnati, etc., R. Co., 3 O. Dec. 82; Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. 23; Healey *v.* City Passenger R. Co., 28 O. St. 23.

Texas.—Breen *v.* Texas, etc., R. Co., 50 Tex. 43; International, etc., R. Co. *v.* Leak, 64 Tex. 654; Texas Pac. R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347; Wilcox *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379, affirmed in 93 Tex. 653, no op.

Virginia.—Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

Washington.—Mills *v.* Seattle, etc., R. Co., 50 Wash. 20, 96 Pac. 520, 19 L. R. A., N. S., 704.

Illustrations.—Plaintiff was a passenger on one of defendant's cars, and secured a transfer to another line of defendant, and was directed by the conductor who issued the transfer to take a certain car, the conductor of which informed him that the transfer was not good, and asked plaintiff if he was not going to get off, and took him by the arm and roughly pulled him onto the pavement. Held to justify a verdict for plaintiff. Hayter *v.* Brunswick Tract. Co., 49 Atl. 714, 66 N. J. L. 575.

Railroad is liable where its conductor commences expulsion of plaintiff who had previously ridden on baggage-car platform unknown to conductor, with an assault, while plaintiff was quietly sitting in smoking-car, followed by demand for his fare which was tendered, but not accepted by the conductor, who continued the assault by cutting, striking and finally throwing plaintiff from the car. Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

Aggravation of disease.—It is no defense to an action against a railroad company for excessive violence in expelling plaintiff from a car, which aggravated a disease known to plaintiff but not to the servants of the company, that plaintiff gave such servants no caution in relation to the disease. Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

The fact that a passenger has been drinking and is boisterous, though it may warrant his expulsion from the train, if his conduct is calculated to disturb other passengers, does not authorize an assault

wrongfully ejected from a train, he may recover damages irrespective of the degree of force used in putting him off.[20] In determining whether excessive force has been used in ejecting passengers from trains, the degree of force is to be determined, not by results simply, but other facts must be taken into consideration, the chief among which is the resistance made by the passenger. If words will accomplish the object, force should not be used.[21] Neither the court nor jury should be required to weigh with too much nicety the amount of force necessary to eject in the face of offered resistance.[22] The law as to unnecessary violence in expulsion of persons from trains is the same whether such persons were rightfully or wrongfully on board.[23] Evidence that the conductor, in the presence of other passengers, compelled plaintiff to leave the train, and took him by the shoulder to remove him, was sufficient to permit an award of damages in view of plaintiff's having been compelled "by superior force, or threat of superior force," to comply with the conductor's order.[24]

Contributory Negligence of Passenger.—In an action for injuries by being ejected from a train with unnecessary force, the question of contributory negligence does not enter into the case, as it is no defense against an intentional wrong.[25] A passenger's voluntary intoxication would not prevent his recovery for personal injuries in being ejected if undue violence was used.[26]

Where Passenger Resists Ejection.—It is held that an injury inflicted by employees of a railroad in overcoming, without unnecessary force, a passenger's resistance to rightful ejection, is justifiable.[27] But the carrier is liable for un-

on the passenger by the conductor. St. Louis, etc., R. Co. *v.* Johnson, 68 S. W. 58, 29 Tex. Civ. App. 184.

Disobedience of the rules of the carrier will constitute no defense to an action for damages where unnecessary violence is used in the ejectment of passengers. Texas, etc., R. Co. *v.* Pearl, 3 Texas App. Civ Cas., § 4.

In an action by a passenger for damages for being forcibly ejected from a depot platform by the railway company's employees, the jury should not be instructed that reasonable cause for believing that plaintiff was violating the company's rules, in soliciting for a hotel at the time of the ejection, will excuse the act of defendant, where there is evidence that unnecessary force was used in making the ejection. St. Louis, etc., R. Co. *v.* Osborn, 55 S. W. 142, 67 Ark. 399.

Indecent, insulting, and provoking language of a passenger, unaccompanied by threats or violence, does not justify the conductor in assaulting him. The conductor may use sufficient force to eject him, but no more. Weber *v.* Brooklyn, etc., R. Co., 62 N. Y. S. 1, 47 App. Div. 306.

Although one got on a train knowing that no passengers were allowed on it, and though it was the duty of the brakeman to put him off, still, if the latter, in the discharge of that duty, willfully assaulted and beat plaintiff, merely because he declined to get off while it was running at a rate of speed rendering the attempt hazardous, the company would be liable for punitive damages. Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45[illegible]9 So. 303, 30 Am. St. Rep. 28.

20. Unauthorized ejection.—Chicago, etc., R. Co. *v.* Bills, 3 N. E. 611, 104 Ind 13.

21. Determining degree of force.—Chicago, etc., R. Co. *v.* Bills, 3 N. E. 611, 104 Ind. 13. See Kirk *v.* Seattle Elect. Co., 108 Pac. 604, 58 Wash. 283, 31 L. R. A., N. S., 991.

22. Kirk *v.* Seattle Elect. Co., 108 Pac. 604, 58 Wash. 283, 31 L. R. A., N. S., 991.

23. Southern Pac. R. Co. *v.* Kennedy, 9 Tex. Civ. App. 232, 29 S. W. 394. See post, "Licensees, Trespassers, Intruders, Etc." Chap. 26.

24. Pennsylvania Co. *v.* Scofield, 121 Fed. 814, 58 C. C. A. 176.

25. Contributory negligence.—Chicago, etc., R. Co. *v.* Bills, 118 Ind 221, 20 N. E. 775; Schaefer *v.* North Chicago St. R. Co., 82 Ill. App. 473; Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; Randell *v.* Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

Plaintiff, having been ejected from a passenger train on the alleged ground of his failure to furnish a ticket or pay his fare, as the train began moving attempted to re-enter, and, getting upon the steps of one of the cars, the brakeman kicked plaintiff so as to cause him to lose his hold and fall from the moving train, sustaining an injury. Held, that the act of the barkeman was a willful assault, and therefore plaintiff, though not entitled to re-enter the train, in placing himself in such position, was not a contributing cause of the injury. Moore *v.* Atchison, etc., R. Co., 110 Pac. 1059, 26 Okla. 682.

26. Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

27. Where passenger resists ejection.—Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433; Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018. See Devine *v.* Chi-

necessary violence in overcoming the passenger's resistance.[28] If a train hand, in repelling an assault made upon him by a passenger, uses more force than is reasonably necessary for the purpose of defending himself from the attack and ejecting the passenger from the train, the company is liable for damages resulting from such excess of violence.[29] And a railroad company is liable for excessive force used by its servants, even in self-defense, in expelling from a train a disorderly person who has paid his fare and been allowed to ride to his destination.[30]

Ejection from Ladies' Car.—A railroad company which has set apart a car for ladies, and has authorized its employees to exclude therefrom men traveling without female company, will be liable to a male passenger who is ejected by an employee with excessive force.[31] If a male passenger peaceably enters such car without being forbidden by the conductor, this may be regarded as a license to enter, and he can not rightfully be removed by force without offering him a seat elsewhere; and in no event should such removal incur special danger; but if barred or forbidden to enter he must not attempt to enter by force.[32]

§ 3018. Ejection from Moving Train or Car.—A railroad or street car company is liable for damages sustained by a passenger in being ejected from its conveyance, though ejection was rightful, if he was forcibly ejected while the train or car was in motion.[33] And the passenger may recover though no force was used, where he left a moving train against his own will in compliance with an apparently peremptory order of the conductor.[34] In such case the passenger is not guilty of contributory negligence.[35] But a mere requirement

cago City R. Co., 141 Ill. App. 583, judgment affirmed in 86 N. E. 689. See post, "Right of Passenger to Resist Ejection," § 3019.

In an action against a railroad company for death resulting from the ejection of plaintiff's intestate for refusing to pay his fare, though the court charged that, if a passenger refused to pay his fare, the conductor could then employ as much force as was necessary to effect his removal, using no violence and committing no unnecessary injury, its refusal to further charge that "if, however, the passenger refused to comply, and an injury happens," the company was not responsible, was error, necessitating reversal of plaintiff's judgment. McCullen *v.* New York, etc., R. Co., 74 N. Y. S. 209, 68 App. Div. 269.

28. Norfolk, etc., R. Co. *v.* Brame, 109 Va. 422, 63 S. E. 1018.

29. Haver *v.* Central R. Co., 45 Atl. 593, 64 N. J. L. 312.

30. Chicago, etc., R. Co. *v.* Barrett, 16 Ill. App. 17.

31. Ejection from ladies' car.—Peck *v.* New York, etc., R. Co., 70 N. Y. 587, affirming 4 Hun 236, 6 Thomp. & C. 436.

32. Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

33. Ejection from moving train or car.—*Alabama.*—Louisville, etc., R. Co. *v.* Whitman, 79 Ala. 328.

Georgia.—Southern R. Co. *v.* Merritt, 120 Ga. 409, 47 S. E. 908; Brunswick, etc., R. Co. *v.* Bostwick, 100 Ga. 96, 27 S. E. 725; McIver *v.* Florida, etc., R. Co., 36 S. E. 775, 110 Ga. 223, 65 L. R. A. 437.

Illinois.—Illinois Cent. R. Co. *v.* Davenport, 177 Ill. 110, 52 N. E. 266, affirming, 75 Ill. App. 579; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Chicago City R. Co. *v.* Pelletier, 33 Ill. App. 455, affirmed in 134 Ill. 120, 24 N. E. 770.

Indiana.—Indiana, etc., R. Co. *v.* Ditto, 158 Ind. 669, 64 N. E. 222.

Iowa.—Law *v.* Illinois Cent. R. Co., 32 Iowa 534.

Louisiana.—Young *v.* Texas, etc., R. Co., 25 So. 69, 51 La. Ann. 295.

Missiouri.—Brown *v.* Hanibal, etc., R. Co., 66 Mo. 588.

Ohio.—Cleveland City R. Co. *v.* Roebuck, 22 O. C. C. 99, 12 O. C. D. 262; Healey *v.* City Passenger R. Co., 28 O. St. 23.

Washington.—Mills *v.* Seattle, etc., R. Co., 96 Pac. 520, 50 Wash. 20, 19 L. R. A., N. S., 704.

West Virginia.—Styles *v.* Chesapeake, etc., R. Co., 62 W. Va. 650, 59 S. E. 609.

Wisconsin.—Hirte *v.* Eastern Wisconsin R., etc., Co., 106 N. W. 1068, 127 Wis. 230.

34. Leaving car in obedience to command.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490. See Gallena *v.* Hot Springs Railroad, 13 Fed. 116, 4 McCrary 371, and Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

35. Passenger not guilty of contributory negligence.—International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525.

A declaration against a railroad company for personal injuries alleged that plaintiff had a ticket over defendant's road, and boarded a freight train, which

or command by a conductor to a passenger to get off a moving train, when the danger of doing so is evident, if unattended with force, threats, or overpowering intimidation, is not enough to make the railroad company liable for injuries resulting from the passenger's compliance.[36] Where one, on tending to become a passenger, boarded the front platform of a street car, and was thrown therefrom by the gripman, while it was in motion, his recovery therefor is not prohibited by the fact that he boarded the car while it was in motion, since having placed himself in a position of safety, so far as the movement of the car had any bearing on his injury, such act was not contributory negligence.[37] Where the proximate cause of a boy's injury by being run over by a train was the brakeman's act in pushing him down the steps from the platform while the train was moving rapidly, the company is liable for the injury, though the boy, in falling, grabbed the hand rail, which threw him to one side and under the wheels.[38] An action may be maintained against a railway company for forcibly ejecting a disorderly passenger while the train was in motion, though no special injury was occasioned thereby.[39]

§ 3019. Right of Passenger to Resist Ejection.—A passenger without a proper ticket and refusing to pay fare must leave the carrier's conveyance when ordered to do so and can not invite force in his ejection or removal, merely to make a case against the carrier or to increase his damages.[40] In such case the carrier will not be liable for injuries inflicted, unless they were willful, wanton, or malicious,[41] or unnecessary force was used in overcoming the

did not carry passengers, in the belief that the ticket was good on such train; that the conductor refused to stop the train, and ordered him to get off while it was running at a high rate of speed; that the conductor, in violent language, threatened to eject plaintiff from the train if he did not obey the order, and had force at his command to execute such threat; and that plaintiff believed that resistance would result in greater injury than leaving the train; and that he jumped, and was injured. Held, that there was a sufficient allegation of compulsion to excuse plaintiff from the charge of contributory negligence in jumping. Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

36. Bosworth *v.* Walker, 83 Fed. 58, 27 C. C. A. 402.

37. Passenger boarding moving car.—Hart *v.* Metropolitan St. R. Co., 69 N. Y. S. 906, 34 Misc. Rep. 521.

38. St. Louis, etc., R. Co. *v.* Kilpatrick, 54 S. W. 971, 67 Ark. 47.

39. Necessity for special injury.—Oppenheimer *v.* Manhattan R. Co., 63 Hun 633, 18 N. Y. S. 411, 45 N. Y. St. Rep. 134.

40. Right to resist ejection.—*United States.*—Hall *v.* Memphis, etc., R. Co., 9 Fed. 585; S. C., 15 Fed. 57.

California.—Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Connecticut.—Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

Illinois.—Devine *v.* Chicago City R. Co., 141 Ill. App. 583, affirmed in 86 N. E. 689; Chicago, etc., R. Co. *v.* Wilson, 23 Ill. App. 63.

Kansas.—Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Kentucky.—Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433.

Washington.—Loy *v.* Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372.

In Norton *v.* Consolidated R. Co., 79 Conn. 109, 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437, 63 Atl. 1087, 118 Am. St. Rep. 132, it is held that a passenger who is on a street car without a proper transfer, due to the negligence of the conductor of the other car, may sue for breach of contract for failure to furnish a proper ticket and recover the loss necessarily resulting therefrom, but can not refuse to pay his fare, and forcibly resist being expelled from the car, and where he does so, and no more force is used than is necessary to remove him from the car, he can recover only nominal damages.

Except in defense against impending bodily injury it is the passenger's duty when he is being rightfully ejected to submit to expulsion without resistance. Hall *v.* Memphis, etc., R. Co., 15 Fed. 57.

41. Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Ejection at place other than that required by law.—One who refuses to leave a train when ordered to do so for failure to pay an extra fare demanded, for want of a ticket, can not recover for injuries received at the hands of the conductor, caused by his own resistance, unless the expulsion was malicious or wanton, even though he was not ejected at a station or usual place for receiving and discharging passengers as required by law. Chicago, etc., R. Co. *v.* Wilson, 23 Ill. App. 63.

passenger's resistance.[42] And it is held that a passenger who is about unlawfully to be ejected can not resist, but must either pay his fare or peaceably leave the carrier's conveyance.[43] But there are cases holding that a passenger wrongfully ejected is entitled to compensation for any increased injury due to such resistance as he is entitled to make to show that he is removed against his will.[44] And in such case it has been held that the passenger has the right to offer such resistance as may be necessary to prevent his being ejected; and if, in consequence of his resistence, extraordinary force becomes necessary, and is used, to remove him, and he is injured thereby, he can recover of the carrier for such injury.[45]

Ejection in Improper Manner or at Improper Place.—Where the servants of a carrier, without authority, attempt to expel a passenger in an improper manner or at an improper place, the passenger may resist such attempt to such an extent as is necessary to maintain his right.[46] A passenger on a railroad train has the right to resist an attempt to eject him, for nonpayment of fare, while the train is in motion, so that his being put off would subject him to great peril.[47]

§§ 3020-3021. Ejection of Passenger under Disability—§ 3020. In General.—A carrier in ejecting an aged female passenger must consider her safety, and not eject her at a dangerous place.[48] And such is its duty as to a child of tender years.[49] And it is liable for ejecting a sick passenger at an

42. Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626; Devine *v.* Chicago City R. Co., 141 Ill. App. 583, affirmed in 86 N. E. 689.

43. Unauthorized ejection.—Chicago Union Tract. Co. *v.* Brethauer, 125 Ill. App. 204, judgment affirmed in 79 N. E. 287, 223 Ill. 521; Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

"The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for every indignity offered, and for all damages sustained." Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

Even if a passenger on a street car, carried beyond his destination, had the right to be carried back without payment of fare, he should have left the car peaceably on being ordered to do so by the trainmen, since his cause of action was complete when he was ordered to leave the car, and public order and the safety and comfort of the passengers forbade a decision of the justice of his claim by wager of battle. Willard *v.* St. Paul City R. Co., 116 Minn. 183, 133 N. W. 465.

If a street car conductor was justified, under reasonable rules, in refusing a transfer, the holder could not remain on the car after being requested to get off, so as to be entitled to recover for assault in putting him off, even if the original contract of carriage was valid. Daniel *v.* Brooklyn Heights R. Co., 121 N. Y. S. 577, 67 Misc. Rep. 78.

44. New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356; Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 14 C. C. A. 612; Brown *v.* Memphis, etc., R. Co., 7 Fed. 51; United States *v.* Kane, 19 Fed. 42; Gulf, etc., R. Co. *v.* Dyer, 43 Tex. Civ. App. 93, 95 S. W. 12, affirmed in 101 Tex. 639, no op.

Resistance should not be encouraged, as it leads to affrays and turbulence, and is generally useless where there is a determination to remove the passenger from the train. Brown *v.* Memphis, etc., R. Co., 7 Fed. 51.

45. English *v.* Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep. 69, affirming 4 Hun 683.

46. Ejection in improper manner or at improper place.—Indianapolis Tract., etc., Co. *v.* Lockman, 49 Ind. App. 143, 96 N. E. 970.

47. Resisting dangerous ejection.—English *v.* Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep. 69, affirming 4 Hun 683. See Sanford *v.* Eighth Ave. R. Co., 20 N. Y. Super. Ct. 122, affirmed in 23 N. Y. 343, 80 Am. Dec. 286.

48. Ejecting aged female passenger.—Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

49. Child of tender years.—In trespass for ejecting plaintiff, a child six years of age, from defendant's train, where it appears that she was put off the train for nonpayment of fare about half a mile from the depot from which she started, but within the corporate limits of the town, evidence that another train was expected to arrive at the place of plaintiff's removal within a few moments is admissible, as bearing on the question whether that was a proper place for such removal. Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7, affirming 28 Ill. App. 552.

improper time or place.[50] So where one believed to have smallpox is ejected, the carrier must eject him where there is every reasonable ground to believe that he can find accommodations.[51] Greater care must be used in ejecting a crippled person from a train, than it would be necessary to use in case of a person in good physical condition.[52] While when an unattended passenger becomes insane on a train, it is the carrier's duty to remove him, if required for the comfort and safety of other passengers, the carrier in so doing must exercise such care as reasonable prudence demands for his safety.[53]

§ 3021. Drunken Passenger.—In ejecting a drunken passenger, a carrier is bound to exercise reasonable care,[54] and must see that, considering the degree of intoxication, he is exposed to no unnecessary peril.[55] But to render a carrier liable for the ejection of a drunken passenger for failure to pay his fare, resulting in his injury, his condition must be such as to reasonably indicate that, in view of the surrounding circumstances, he would be liable to the injury.[56] If the passenger is in a helpless condition, and he is put off the train in a place known by the conductor to be dangerous to one in his condition, the company is liable for the resulting damages.[57] If, having exercised reasonable pru-

50. Sick passenger.—Before reaching his destination, a sick passenger was ejected by the conductor, on a cold night, at a flag station where there was neither depot nor light. The conductor stood holding the passenger up until the train passed, and then left him, where he was found dead next morning. Near him was his ticket. He was comfortably dressed. Held, that the giving of a peremptory charge for defendant was error. Eidson *v.* Southern R. Co. (Miss.), 23 So. 369.

A passenger stricken with apoplexy on a street car, although attended with severe vomiting, to the inconvenience and great discomfort of other passengers, can not be removed while in a speechless and helpless condition, and laid in the open street, on a black, drizzling December day, and there abandoned, with no effort to procure him attention, without a gross violation by the carrier of its duty as such, and liability for resulting damage. Conolly *v.* Crescent City R. Co., 37 Am. & Eng. R. Cas. 117, 41 La. Ann. 57, 5 So. 259, 6 So. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389.

51. Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

52. Crippled passenger.—Young *v.* Texas, etc., R. Co., 51 La. Ann. 295, 25 So. 69.

53. Insane passenger.—St. Louis, etc., R. Co. *v.* Woodruff, 89 Ark. 9, 115 S. W. 953.

54. Ejection of drunken passenger.—McCoy *v.* Millville Tract. Co., 83 N. J. L. 508, 85 Atl. 358.

55. Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39.

56. Tuttle *v.* Cincinnati, etc., R. Co., 80 S. W. 802, 26 Ky. L. Rep. 152.

57. Ejection at dangerous place.—*Alabama.*—Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Louisville, etc., R. Co. *v.* Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372.

Arkansas.—St. Louis, etc., R. Co. *v.* Dallas, 93 Ark. 209, 124 S. W. 247.

Georgia.—Central R. Co. *v.* Glass, 60 Ga. 441.

Iowa.—Johnson *v.* Chicago, etc., R. Co., 58 Iowa 348, 12 N. W. 329.

Kentucky.—Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 5 Ky. L. Rep. 722, 50 Am. Rep. 186, distinguishing in Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232, 10 Ky. L. Rep. 798, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80, and Brown *v.* Louisville, etc., R. Co., 103 Ky. 211, 19 Ky. L. Rep. 1873, 44 S. W. 648.

Virginia.—Bragg *v.* Norfolk, etc., R. Co., 110 Va. 867, 67 S. E. 593.

Illustrations.—In an action for the death of plaintiff's intestate, it appeared that deceased was a passenger on one of defendant's night trains; that he was very drunk, refused to pay his fare, and was thereupon ejected; that it was very dark and rainy, and that he was put off in a cut in the road, from which there was no way to escape except up or down the track, along the sides of which was room for a person to walk; that the track was ballasted with mixed stone, and was rough; that at the south end were cattle guards which could be passed only by walking on the track; and that at this point deceased was struck by a train following close after the one from which he was ejected. Held, that defendant, in ejecting deceased in such a place, was chargeable with negligence. Louisville, etc., R. Co. *v.* Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372.

A railway company is liable for injuries sustained by a person ejected while so intoxicated that he was unable to walk, in the winter, whereby he was injured by being frozen. Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 5 Ky. L. Rep. 722, 50 Am. Rep. 186.

Deceased, while in a helpless state of intoxication, was ejected from defend-

dence, considering the time, place, and circumstances, as also the condition of the drunken man himself, the carrier expels such passenger, who is afterwards run over and killed by another train, not in fault, the carrier is not liable.[58]

ant's train by defendant's agents, who knew of his condition, at a point some distance from a station, where there were high banks and fences on both sides of the track, and was run over by another train, the fact that the latter train was soon due being known to the employees who ejected deceased. Held, that defendant was liable. Louisville, etc., R. Co. *v.* Ellis, 17 Ky. L. Rep. 259, 97 Ky. 330, 30 S. W. 979, 2 Am. & Eng. R. Cas., N. S., 132.

Where a passenger on a street car is drunk, and can not be aroused to pay his fare, it is not the due and proper care, required of the company in ejecting him, to put him, on a dark and stormy night, in an unlighted road, some distance from buildings, but where street cars are passing in each direction, and teams are likely to be. Hudson *v.* Lynn, etc., R. Co., 59 N. E. 647, 178 Mass. 64.

If a railroad employee puts a man off a car in a cut between stations, because he will not pay his fare, when he is so drunk as to be unable to take care of himself, and the man is suffocated in a pool of water, the company may be liable, notwithstanding the fact of intoxication. Gill *v.* Rochester, etc., R. Co. (N. Y.), 37 Hun 107.

Where a passenger entered a street car in a visibly intoxicated condition, having a ticket to his destination, consisting of three several coupons, one of which the conductor collected, and on demanding the second coupon, such passenger, being stupid with drink, paid no attention to the request, though not consciously refusing to produce and surrender the ticket, a verdict for damages for ejecting such passenger at night in his condition will be sustained. Clark *v.* Harrisburg Tract. Co., 20 Pa. Super. Ct. 76.

58. Where carrier exercises reasonable prudence.—Railway Co. *v.* Valleley, 32 O. St. 345, 30 Am. Rep. 601.

Illustrations.—Plaintiff's intestate boarded a passenger train about seven o'clock at night, apparently under the influence of liquor, but sensible of his surroundings and capable of controlling his movements. After the train started, he refused to state his destination or pay his fare, and was ejected at a point about 300 yards from the station, with lighted houses near. The next morning he was found near the track, dead, either from exposure or cocaine poisoning. Held, the conductor was justified in ejecting him from the train under the circumstances. Korn *v.* Chesapeake, etc., R. Co., 125 Fed. 897, 62 C. C. A. 417, 63 L. R. A. 872.

The company is not liable for the death of a passenger rightfully ejected, when run over by another train after he was ejected, though he was intoxicated, where his intoxication was not sufficient to destroy consciousness, and the place where he was put off, with which he was familiar, was dangerous only to persons unnecessarily going on the track. Louisville, etc., R. Co. *v.* Johnson, 92 Ala. 204, 9 So. 269, 25 Am. St. Rep. 35. See S. C., 108 Ala. 62, 19 So. 51, 31 L. R. A. 372.

Plaintiff, while somewhat intoxicated, but able to walk and talk, was ejected from defendant's train, and left standing twenty-five or thirty feet from the track, in a frequented public street, talking to a constable and deputy sheriff, and afterwards went on the track and was injured. Held, as a matter of law, that it was not negligent to leave plaintiff, in such state of intoxication, at the place described. Gaukler *v.* Detroit, etc., R. Co., 90 N. W. 660, 130 Mich. 666.

Deceased was ejected from a railway train early in the evening, for failure to pay fare, and was found frozen the next morning. It appeared that he was intoxicated at the station where he got aboard. The conductor knew he was under the influence of liquor, heard him ask for food at the railway eating house, and next saw him on the train, awake, and declaring he had neither money nor ticket. When told he must get off, deceased rose and got off without assistance. The temperature at the time was not freezing, although it got colder before morning. The place was near a dwelling, as required by Code, § 1962, and about half a mile from the station. Held, that the conductor was warranted in supposing that deceased was not so intoxicated but that he could reach a place of safety, and hence there was no question of the railroad's negligence for submission to a jury. The conductor was not bound to act on the subsequent suggestion of a passenger as to deceased's condition, and so stop the train to pick him up, or to make inquiries of other passengers in that regard. Roseman *v.* Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766, 34 Am. St. Rep. 524, 19 L. R. A. 327.

Decedent boarded defendant's passenger train, and, on refusing to surrender a ticket or pay fare, was ejected at a junction on a platform. He was intoxicated at the time, but able to care for himself, and walked out of the car and got off without assistance. He proceeded to walk along the right of way to a point 2,000 feet distant, where he was struck and killed by another train. Held, insufficient to show that the conductor was negligent in ejecting deceased and leaving him without protection because of his helpless condition. Habeck *v.* Chicago, etc., R. Co., 132 N. W. 618, 146 Wis. 645, Ann. Cas. 1912C, 485.

It has been held that the carrier is liable for ejecting an intoxicated passenger at a dangerous place only in the event he was put off against his will, or when he was incapable of having a will.[59] A railroad company is not liable for ejecting a drunken passenger who entered the ladies' car, and by violence and indecent language alarmed the passengers, and, when locked out of the car, pulled the bell rope, stopping the train, and threatened the conductor with an open knife, where he was ejected two hundred yards from a farm house, on a warm night, which was not very dark.[60] And it is also held that the company is not liable where a drunken passenger having been carried beyond his destination, and not knowing enough to pay further fare or get off, was removed by the train hands, and placed a short distance from the track, from which place he strayed onto the track, and was killed by another train, without special negligence by the employees on that train.[61]

Manner of Ejection.—It is the duty of a conductor undertaking to remove a passenger under the influence of liquor because he did not pay his fare, to act in a prudent manner, using no more force than is necessary, and if he fails to do so and passenger is thereby injured, the carrier will be liable for the injury.[62] Where it is necessary to eject a passenger from a street car because he is drunk and uses profane and insulting language or violates the rules of the company, he should not be ejected while the car is in motion, unless it is absolutely necessary to save the life of the conductor or of a passenger, or to prevent great bodily harm.[63]

Proximate Cause of Injury.—A carrier is not liable for injuries sustained by a drunken passenger subsequent to ejection unless they were the natural and proximate result of the ejection.[64] To render the carrier liable there

59. Bohannon *v.* Southern R. Co., 112 Ky. 106, 65 S. W. 169, 23 Ky. L. Rep. 1390.

If the passenger entered the train knowing it did not stop at the station nearest to his home, but did stop at a coal chute which was nearer to his home than the station, the coal chute must be regarded as his destination; and therefore the court properly instructed the jury to find for defendant if they believed that plaintiff's intestate knew the train did not stop at the station, but did stop at the coal chute, and that he left the train at the chute of his own free will, whether assisted or unassisted, as in that event he assumed the dangers of the locality. Bohannon *v.* Southern R. Co., 112 Ky. 106, 65 S. W. 169, 23 Ky. L. Rep. 1390.

60. Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232, 10 Ky. L. Rep. 798, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80, distinguishing Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 5 Ky. L. Rep. 722, 50 Am. Rep. 186.

The fact that deceased was improperly allowed to board the train as a passenger, because of his drunken condition, did not deprive the conductor of the right to eject him, or render the company liable for his death. Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232, 10 Ky. L. Rep. 798, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80.

61. McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276.

62. Use of force.—Central R. Co. *v.* Mackey, 103 Ill. App. 15.

In an action against a railroad company for the death of plaintiff's husband, where it appeared that the latter was under the influence of liquor and refused to pay his fare or produce his ticket, that the conductor forcibly removed the hands of the deceased from the car railing, so that he fell on the track of the road, and that he died from the injuries then received, it was not error in the court below to refuse to instruct the jury "that, under all the circumstances of the case, their verdict should be for defendant." Pennsylvania R. Co. *v.* Vandiver, 42 Pa. 365, 82 Am. Dec. 520.

63. Ejection while car in motion.—Stringfield *v.* Louisville R. Co., 105 S. W. 1190, 32 Ky. L. Rep. 578.

64. Proximate cause of injury.—Haley *v.* Chicago, etc., R. Co., 21 Iowa 15; McCoy *v.* Millville Tract. Co., 83 N. J. L. 508, 85 Atl. 358; St. Louis, etc., R. Co. *v.* Williams (Tex. Civ. App.), 37 S. W. 992.

Illustrations.—Where a passenger, after being put off a train near a station, walks down the track three or four miles, and is struck by another train, without fault of the crew in charge of the latter train, the railroad company is not liable, though the passenger was drunk when put off, even if those who put him off were in anywise negligent; such negligence not being the proximate cause of the injury. Seaboard, etc., Railway *v.* Smith, 59 S. E. 199, 3 Ga. App. 1.

Where a drunken passenger was ejected from a train shortly after noon, and started towards home, but drank more liquor, and became so drunk that he lay out all night near the railroad, and early the next morning went upon the track, where he

must be negligence as to the time and place of expulsion.[65] Whether the ejection is the proximate cause of the injuries is generally a question for the jury.[66]

Contributory Negligence of Passenger.—If a passenger was not so intoxicated that he was unable to understand the dangers to which he was exposed at the place he was ejected, he could not recover for injuries occurring after he was put off, caused by his failure to exercise due care for his safety.[67]

Defense.—In an action against a railroad company for the death of plaintiff's husband caused by being ejected from a train while in a helpless condition, so that he was run over by a following train, the action being based on the negligence of the servants of the first train, the fact that the evidence showed that the servants in charge of the second train used all ordinary care and diligence in trying to avoid the accident did not prevent a recovery.[68]

§ 3022. Repayment of Fare or Return of Ticket.—Repayment of Fare.—Where a conductor ejects a passenger at an intermediate station for

was injured by a passing train, the injury was not the proximate result of the ejection nor of his condition when ejected. Tuttle *v.* Cincinnati, etc., R. Co., 80 S. W. 802, 26 Ky. L. Rep. 152.

Plaintiff's intestate, on defendant's train, was helpless from intoxication, and he had no ticket, and tendered no fare. Defendant put him off at a depot where three passengers got off, and where there were two hotel porters. Afterwards he wandered on the track, and was run over by an engine, and killed. Held, that defendant was not liable. Brown *v.* Louisville, etc., R. Co., 44 S. W. 648, 19 Ky. L. Rep. 1873, 103 Ky. 211.

The expulsion of a drunken passenger from an electric car, shortly after sunset, upon a public highway, and near dwellings, is not the proximate cause of his death, caused by his wandering upon defendant's tracks, and being struck by another car. Edgerly *v.* Union St. R. Co., 36 Atl. 558, 67 N. H. 312.

Negligence of a railroad company whose conductor puts a passenger, slightly intoxicated, off the train a short distance beyond his station, is not the proximate cause of the passenger's injury, he having gone back to the station in safety, and passed by it onto the bridge of another railroad, where he was killed six hours later, when, if he was still intoxicated, it must have been the result of further drinking. Hamilton *v.* Pittsburg, etc., R. Co., 38 Atl. 1085, 183 Pa. 638.

Where plaintiff's decedent, while in an intoxicated and irresponsible condition, had been ejected from a train at the second station beyond his destination, and was found the next day in an unconscious condition, and died on the same day, the failure to put him off at his point of destination, or at the next station reached by the train, was not the proximate cause of his death. Bragg *v.* Norfolk, etc., R. Co., 67 S. E. 593, 110 Va. 867.

65. McCoy *v.* Millville Tract. Co., 83 N. J. L. 508, 85 Atl. 358.

66. Question for jury.—In an action for injuries against a railroad company, it appeared that plaintiff was ejected by defendant's conductor from the train, and left in the nighttime, in a state of intoxication, near the railroad track, and that several hours after, and at a distance of half a mile from the station where he was ejected, he was injured by another train. Held, that the question whether the ejection of plaintiff, under the circumstances, was the proximate cause of the injuries, was a question for the jury, and that their attention should be called to the distance between the place where plaintiff was left and where he was injured, the time which had elapsed between his ejection from the cars and his injuries, and whether or not his faculties had so far recovered, with the power of locomotion as to enable him to understand the danger of being on the track while the trains were passing. Haley *v.* Chicago, etc., R. Co., 21 Iowa 15.

Fifteen minutes after an intoxicated passenger was wrongfully expelled from a train in a cut about twenty feet deep, he fell on the track, 1,700 feet from the place of expulsion, and was run over by another train, and killed. Held a question for the jury whether the expulsion was the cause of death. Guy *v.* New York, etc., R. Co. (N. Y.), 30 Hun 399.

67. Contributory negligence of passenger.—St. Louis, etc., R. Co. *v.* Dallas, 93 Ark. 209, 124 S. W. 247.

A carrier can not be held liable for the death of a passenger who was ejected from its train where it appears that the passenger, though intoxicated, was able to care for himself, that the place at which he was ejected was a proper one, having regard to his immediate safety and the means at hand, and where the undisputed physical facts manifestly indicate that his death was caused by his own gross negligence in attempting to board another moving train of the carrier after his ejection. Georgia, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813.

68. Defense.—Macon, etc., R. Co. *v.* Moore, 125 Ga. 810, 54 S. E. 700.

refusal to pay the full fare to his destination, he may retain out of the sum actually paid an amount equal to the fare to the station where the passenger is ejected.[69] But an ejection is wrongful where the conductor puts the passenger off before he returns to him the difference between the sum paid and the fare he is entitled to retain, even though he returns it immediately after the ejection.[70] A passenger who is removed from a railway train on account of his refusal to comply with a reasonable regulation of the company forfeits his rights under his ticket, and can not recover the value thereof.[71]

Return of Ticket.—A passenger presenting a void ticket, and refusing to pay his fare, is properly ejected, although the conductor wrongfully retains the ticket.[72] The fact that plaintiff's ticket was not returned to him can not aid him in his action for damages for ejection for refusing to pay an extra charge for riding in a certain car. His claim must be for a return of the ticket money and not for damages for being put off.[73]

§§ 3023-3024. Readmission after Ejection—§ 3023. Right to Readmission.—Where Passenger Rightfully Ejected.—While at common law

69. Repayment of fare.—Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596, overruling Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

70. Wardwell *v.* Chicago, etc., R. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596.

Illustrations.—The plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor thereupon demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on the plaintiff's refusal to pay, ejected him from the cars, and then returned him his money. Held, that the conductor had no right to eject him without first returning the money which he had paid. Bland *v.* Southern Pac. R. Co., 55 Cal. 570, 36 Am. Rep. 50.

Where one purchased a ticket indorsed "Good for this day only," upon the ticket agent's representations that the conductor would give him a stop-over check thereon, held, that the conductor, when informed by him of such promise and of the desire to stop over, was not authorized to expel him from the train without first offering to return the excess of fare paid, or to deduct it from the fare demanded, although the rules of the company prohibited passengers from stopping over upon such tickets. Burnham *v.* Grand Trunk R. Co., 63 Me. 298, 18 Am. Rep. 220.

Passenger standing on platform.—A city ordinance which forbids passengers to ride on the front platforms of street cars does not authorize a street railroad company to accept a fare from a passenger while riding on the front platform when there is no room for him elsewhere, and then eject him from the car without returning the fare. Hanna *v.* Nassau Elect. R. Co., 45 N. Y. S. 437, 18 App. Div. 137.

Failure to pay fare of child.—The forcible ejection and removal of a child of tender years from a railroad train on which it has taken passage with its parent, for the failure of the parent to pay the child's fare, is, whether rightful or wrongful, in effect the ejection and removal of the parent. If, in such case, the parent has paid his own fare before the removal of the child, such fare, or the unearned value thereof, must be returned, or offered to be returned, as a condition precedent to the right of removal. Braun *v.* Northern Pac. R. Co., 82 N. W. 675, 984, 79 Minn. 404, 49 L. R. A. 319, 79 Am. St. Rep. 497.

When a person has paid fare, or purchased a ticket which is taken up by the conductor, the conductor must, before ejecting her and a child with her, on account of her refusal to pay the child's fare, return or offer to return to her the unused value of such ticket or fare over and above the fares of both for the distance already traveled. If the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and expel the parties from the train renders the company liable in damages. Lake Shore, etc., R. Co. *v.* Orndorff, 45 N. E. 447, 55 O. St. 589, 38 L. R. A. 140, 60 Am. St. Rep. 716.

71. Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532.

72. Failure to return ticket.—Elliott *v.* Southern Pac. Co., 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393, distinguishing Bland *v.* Southern Pac. R. Co., 55 Cal. 570, 36 Am. Rep. 50. See Rahilly *v.* St. Paul, etc., R. Co., 66 Minn. 153, 68 N. W. 853, wherein the court said: "Having no right to ride on the ticket, it was his duty to pay his fare or leave the train, and then pursue his remedy against defendant for wrongfully withholding the ticket from him."

73. Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740.

a carrier must accept passengers who present themselves in a proper manner, and are ready and willing to comply with the reasonable rules of the company, the carrier may enforce a reasonable rule preventing a passenger who has willfully refused to pay his fare and provoked expulsion from re-entering the train from which he was expelled.[74] So it is held that after a person has been rightfully expelled from a car for refusal to pay his fare when demanded, he can not re-enter the same train and become a passenger thereon,[75] at least at a place other than a station for receiving passengers.[76] And a railroad which puts off a passenger from a car for refusing to comply with the rules of the company is not obliged to take him back again upon his complying with the rule violated, unless he is at a regular station, and then and there obtains a ticket or tenders his fare.[77] But it is held that where a passenger bought a ticket from the railroad company's agent, with the agreement that he should have the right to go by way of a certain place, but the ticket did not so provide, and at a junction, where, as his ticket read, he should have changed cars, he was quietly ejected from the train, the railroad company could not refuse to carry him on such train after an offer to pay his fare.[78] And it has been held that where a passenger was told by the conductor that his ticket was not good and that he would have to pay his fare or get off, and he got off the train at its regular stopping place without making an effort to get the money or pay his fare, but before the train started told the conductor he could get the money if he would allow him to get back on the train, but the conductor refused to allow him to re-enter the train, he was entitled to damages for the ejection.[79] Where a servant of a news company who was, by agreement with the railroad company, transported by it without payment of fare, subject to the regulations of the railroad company in the same manner as any of its own servants, was ejected from the train, for violation of the rules but subsequently returned, offering to pay his fare to a point to which he desired to go, but was again ejected, such ejection was wrongful.[80]

Where a passenger is wrongfully ejected he is entitled to reboard the

74. Readmission after ejection.—Phillips *v.* Atlantic, etc., R. Co., 90 S. C. 187, 73 S. E. 75, 38 L. R. A., N. S., 1151, Ann. Cas. 1913C, 1244.

75. *Connecticut.*—See Croker *v.* New London, etc., R. Co., 24 Conn. 249.

District of Columbia.—Shortsleeves *v.* Capital Tract. Co., 28 App. D. C. 365, 8 L. R. A., N. S., 287.

Georgia.—Georgia, etc., R. Co. *v.* Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, limiting South Carolina R. Co. *v.* Nix, 68 Ga. 572.

North Carolina.—Pickens *v.* Richmond, etc., R. Co., 104 N. C. 312, 10 S. E. 556.

Oklahoma.—Moore *v.* Atchison, etc., R. Co., 26 Okla. 682, 110 Pac. 1059.

South Carolina.—Phillips *v.* Atlantic, etc., R. Co., 90 S. C. 187, 73 S. E. 75, 38 L. R. A., N. S., 1151, Ann. Cas. 1913C, 1244, construing Civ. Code 1902, § 2134.

Texas.—Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179. See ante, "After Ejection Commenced," § 3011.

Illustrations.—The plaintiff was ejected from a car for refusing to pay his passage except by an excursion ticket issued on a previous day, and marked, "Good for this day only." He then showed a good ticket, and attempted to enter the car, which he was forcibly prevented from doing. Held, that his exclusion was justifiable. State *v.* Campbell, 32 N. J. L. 309.

Where a person ejected from a train at a station for a refusal to pay fare with a warning that he would not be allowed to re-enter sought to re-enter and offered to pay full fare, but was refused by the conductor and forcibly ejected when he attempted to so re-enter, there was no such re-establishment of the relation of passenger as would entitle him to damages for the second ejection. Phillips *v.* Atlantic, etc., R. Co., 90 S. C. 187, 73 S. E. 75, 38 L. R. A., N. S., 1151, Ann. Cas. 1913C, 1244.

76. O'Brien *v.* Boston, etc., R. Co. (Mass.), 15 Gray 20, 77 Am. Dec. 347; Swan *v.* Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

77. Nelson *v.* Long Island R. Co. (N. Y.), 7 Hun 140.

78. Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 17 Ky. L. Rep. 1303, 34 S. W. 702.

79. Gulf, etc., R. Co. *v.* Bunn, 95 S. W. 640, 41 Tex. Civ. App. 503.

80. Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

car and remain therein without the use of excessive force.[81]

§ 3024. Effect of Readmission.—A passenger can not recover for expulsion at an improper place where he had been once rightfully expelled at a proper place, and immediately thereafter again boarded the train.[82] Where a person who gets on an express car without having purchased a ticket, and remains thereon, in violation of the company's rules, is ejected from the train, and he afterwards re-enters it, and is carried to his destination, he receives the full benefit of the contract of carriage, if it was a valid one, and can not recover for the ejection.[83] And it is held that one who was wrongfully ejected from a train, but was invited by the conductor to re-enter the train, which he refused to do until the train was backed to where he was standing, could not recover his damage resulting from delay in his journey.[84]

§§ 3025-3027. Companies and Persons Liable—§ 3025. In General. —Consolidated Company.—Where a carrier, by consolidation with another, became liable on the latter's contracts of carriage, it is liable for ejecting from its trains one presenting a ticket issued by the retiring company.[85]

Ejection from Chartered Train.—A railroad company can not, in chartering one of its trains, to a third person for an excursion, enter into such a contract with such person as will exempt it from liability for negligence and willful misconduct on the ejection of a passenger from such train, such third party being in law an agent of the railroad.[86]

Ejection by Officer of Union Station.—A railroad company using a union station managed through the medium of a distinct corporation, the control and ownership of which were in several railroad companies, including such company, is liable for the wrongful ejection of its passengers therefrom by the station officer while acting within the scope of his duty and employment.[87]

Leaving Train by Order of Quarantine Officer.—A passenger on a railway train who had paid his fare to a given city which was under quarantine regulations, and who, when near the end of his journey, left the train at a station on the railway line, in obedience to the order of a quarantine officer, has no cause of action against the railway company for a wrongful expulsion from its train, although the conductor pointed him out to the health officer, and, after knowledge of such officer's order to the passenger, did not interfere to prevent its execution.[88] And it is held that whether the passenger was ejected by the

81. Where passenger wrongfully ejected.—Indianapolis Tract., etc., Co. *v.* Lockman, 49 Ind. App. 143, 96 N. E. 970.

In an action by a passenger to recover for his wrongful ejection from defendant's train, it was not error to instruct that, if plaintiff was wrongfully removed from the car, he had a right to re-enter, and if, in his endeavor to do so, he was injured by the resistance of the conductor and brakemen, he could recover, unless there was a want of reasonable care on the part of plaintiff, but if in attempting to re-enter, plaintiff did not use reasonable care, he was not entitled to recover. Crocker *v.* New London, etc., R. Co., 24 Conn. 249.

82. Effect of readmission.—Chicago, etc., R. Co. *v.* Boger, 1 Ill. App. 472.

83. Chicago, etc., R. Co. *v.* Olsen, 7 Ind. App. 698, 34 N. E. 531.

84. Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

85. Consolidated company.—Tompkins *v.* Augusta, etc., R. Co., 102 Ga. 436, 30 S. E. 992.

86. Ejection from chartered train.—Kirkland *v.* Charleston, etc., Railway, 60 S. E. 668, 79 S. C. 273, 15 L. R. A., N. S., 425.

Under the Arkansas statute (Sand. & H. Dig., § 6206), authorizing railroad companies to do all things which may be necessary to protect passengers on their cars from fraud, imposition, or annoyance, a railroad company is liable in damages for the exclusion of a passenger from a train leased to a private picnic association, for which the passenger held a ticket purchased from said association, although the exclusion was by members of the association, on the ground that plaintiff was an objectionable person, and without the knowledge of the railroad company. Moore *v.* St. Louis, etc., R. Co., 55 S. W. 161, 67 Ark. 389.

87. Ejection by officer of union station.—Penfield *v.* Cleveland, etc., R. Co., 50 N. Y. S. 79, 26 App. Div. 413.

88. Leaving train by order of quarantine officer.—Baldwin *v.* Seaboard Air Line Railway, 128 Ga. 567, 58 S. E. 35, 13 L. R. A., N. S., 360.

conductor, or left the train at the request of the officer, is immaterial in an action against the railroad company for damages, as they would be nominal in any event.[89] But it is held that the company is liable where the passenger has a health certificate giving him the right to enter a quarantined place, which was shown to the conductor who does not object when the passenger is ordered off by the officer, and the passenger makes no protest because of his weak condition.[90]

Ejection by Police Officer.—See ante, "Liability for Acts of Employees," §§ 2970-2972.

Insane Passenger in Custody of Sheriff.—Where, after an insane passenger has been ejected from a train and left in the carrier's waiting room in charge of the station agent, a sheriff refused to take charge of her in his official capacity, but administered to her wants as an individual, his acts did not effect the carrier's liability for injuries actually sustained by reason of the carrier's negligence.[91]

§ 3026. Connecting and Co-Operating Carriers.—It is generally held that the rights of a purchaser of a coupon ticket calling for passage over several distinct railway lines, and the responsibility and duty of the several railway companies to him, are the same as though a ticket had been purchased by him from each of such companies, as the initial carrier acts as the agent of the connecting lines.[92] So a railroad company whose agent by mistake issues a ticket reading to a destination other than that intended is not liable for the wrongful ejection of the passenger by the conductor of a train on a connecting line.[93] Where a conductor of a railroad company which operates and carries passengers over a line belonging to another company, wrongfully ejects from a train, while passing over such line, a passenger who is traveling on a through ticket issued by third company as agent for such companies, the first-named company is liable.[94] An initial carrier is not liable for ejection of a passenger by a connecting carrier, where it had no knowledge of a rule of the connecting carrier to the effect that the ticket sold was not good on the train from which the passenger was ejected.[95] Where a traveler, whose destination can be reached only by traveling over a connecting line, pays to the conductor of the initial road the fare demanded, which he supposes is the fare to his destination, and the conductor, who has no authority to receive fare except over his own line of road, fails to inform him that the fare paid entitles him to ride to the end of his line only, the company is not liable for his ejection from the train of the connecting road, for a refusal to pay the additional fare demanded for carriage over such connecting road.[96]

Exemption from Liability.—Where one by a written contract with a railway company, in consideration of transportation between certain points, agrees

89. St. Louis, etc., R. Co. *v.* Linam, 68 Ark. 621, 60 S. W. 951.

90. Passenger having health certificate.—St. Louis, etc., R. Co. *v.* Roane, 93 Miss. 7, 46 So. 711.

91. Insane passenger in custody of sheriff.—St. Louis, etc., R. Co. *v.* Woodruff, 115 S. W. 953, 89 Ark. 9.

92. Liability of connecting companies.—Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25; Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238. See Young *v.* Pennsylvania R. Co., 115 Pa. 112, 7 Atl. 741. See post, "Connecting Carriers," Part V.

The ticket agent of one carrier is the agent of a connecting carrier, so as to make the latter liable for his act in giving a passenger a ticket to Y. only, when buying a ticket to I., both points being on latter company's road, but I. being more distant, so that the passenger was put off at Y.; the latter company having recognized tickets sold to points on its line by the former company, and received from it its proportional part of the price of such tickets, and having received said passenger's ticket for transportation to Y. Kansas, etc., R. Co. *v.* Foster, 32 So. 773, 134 Ala. 244, 92 Am. St. Rep. 25.

93. Alabama, etc., R. Co. *v.* Holmes, 75 Miss. 371, 23 So. 187.

94. Young *v.* Pennsylvania R. Co., 115 Pa. 112, 7 Atl. 741.

95. Chicago, etc., R. Co. *v.* Carroll (Tex. Civ. App.), 151 S. W. 1116.

96. Haggerty *v.* Flint, etc., R. Co., 59 Mich. 366, 26 N. W. 639, 60 Am. Rep. 301.

not to hold the company for any damages or injury suffered during the journey, the company is not liable for mental suffering caused by his ejection from a train on a road other than its own.[97] But where a railroad company makes a contract to transport live stock over its own and a connecting line, by the terms of which its liability for damage to the stock is limited to its own line, and at the same time, as incident to such contract, issues to the shipper a drover's pass to and from the point of destination of such stock, the liability of the contracting company for a wrongful ejection of the shipper is not limited to its own line, in the absence of an express limitation to that effect.[98]

In Texas it has been held that where a round-trip ticket for transportation over connecting lines provides that it must be signed or stamped for the return trip by the agent of the terminal carrier at the passenger's destination, the initial carrier is liable for the ejection of the purchaser from one of its trains if the ticket becomes invalid through the fault of such agent, though it is stipulated that it acted only as agent of the connecing line, was not liable beyond its own line, and that no agent of any line had authority to modify the contract of the ticket.[99] But the supreme court of the United States has held differently.[1]

A carrier contracting to carry a passenger beyond the limit of its own line is liable for the wrongful ejection of the passenger by the servants of a connecting carrier.[2] And a proprietor of two connecting lines of steamers, selling a ticket purporting to give passage over both lines, is liable to the buyer for damages occasioned by the refusal of either line to accept the ticket.[3]

Traffic Agreement.—A street railway company is liable for ejecting a person who presents a transfer ticket from a connecting road, not acceptable under the rules of the company because not properly punched, though the mistake was made by an employee of a connecting road, there being a traffic agreement between the two roads, whereby transfers were issued from one to the other.[4]

Common Ticket Agent.—Where a ticket agent is applied to, as the agent of a certain railroad, for a ticket over its road, and receives the fare and issues the ticket, he acts as the agent of such road; and if the ticket he gives the purchaser is over another line of road, for which he is also agent, the latter road is not liable to the purchaser for the agent's negligence or its consequences.[5] Where two railroad companies employ the same ticket agent and use the same track, and it was the custom for each company to accept the tickets of the other on its trains, and the agent, after selling a passenger ticket of one company, directs him to get on a trian of the other, and the conductor refuses the ticket and ejects the passenger, both companies are liable.[6]

Unauthorized Sale of Ticket over Connecting Line.—Money paid by a railroad company as damages and expenses of a suit brought against it for ejecting a passenger, who refused to pay fare except by presenting a coupon issued by a connecting line without authority, can not be recovered from the latter; for the only remedy, as against it, was to refuse to recognize the coupon, and

97. Exemption from liability.—International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 20 S. W. 845, following Harris *v.* Howe, 74 Tex. 534, 12 S. W. 224, 15 Am. St. Rep. 862, 5 L. R. A. 777; Gulf, etc., R. Co. *v.* Baird, 75 Tex. 256, 12 S. W. 530.

98. Gulf, etc., R. Co. *v.* Cole, 8 Tex. Civ. App. 635, 28 S. W. 391, distinguishing Gulf, etc., R. Co. *v.* Ions, 3 Tex. Civ. App. 619, 22 S. W. 1011.

99. Gulf, etc., R. Co. *v.* St. John, 13 Tex. Civ. App. 257, 35 S. W. 501.

1. Mosher *v.* St. Louis, etc., R. Co., 127 U. S. 390, 32 L. Ed. 249, 8 S. Ct. 1324.

2. Contract to carry passenger beyond limit of own line.—Cherry *v.* Kansas, etc., R. Co., 61 Mo. App. 303. See Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

3. Thomas *v.* Mills (N. Y.), 4 E. D. Smith 75.

4. Effect of traffic agreement.—Jacobs *v.* Third Ave. R. Co., 75 N. Y. S. 679, 71 App. Div. 199, 10 N. Y. Ann. Cas. 462, reversing 69 N. Y. S. 981, 34 Misc. Rep. 512, which reversed in 68 N. Y. S. 623, 33 Misc. Rep. 802.

5. Common ticket agent.—Scott *v.* Cleveland, etc., R. Co., 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

6. Texas, etc., R. Co. *v.* Dye (Tex. Civ. App.), 33 S. W. 551.

the subsequent ejection, particularly if accompanied by unnecessary force, was not made legally necessary by its act in selling the ticket, but was upon the sole responsibility of the company causing the same.[7]

Ejection from Pullman Car.—It is held that where a passenger is wrongfully expelled from a Pullman car of a train by the officers of the company operating the road, the Pullman Car Company is not liable; and, if expelled by the officers of the latter, the railroad company is not liable.[8] But it is also held that the conductor of a Pullman car, forming part of a railroad company's train, is, in his dealings with its passengers, to be regarded as its servant, making it responsible for his acts as if he were directly employed by it.[9]

A transit company hauling the cars of railroad companies a bridge may be charged with the tort of a conductor employed by the bridge company to collect fares for transportation over the bridge in unlawfully ejecting from a car of the railroad company a passenger during the transit, for nonpayment of his fare to the conductor, although no arrangement is shown under which the two companies operate.[10]

Liability of Lessor for Ejection by Lessee of Road.—A railroad company can not lease its road to another so as to relieve itself from liability for damages for ejection from a train run by the lessee road.[11]

§ 3027. Carrier's Employees.—The agents of a railroad, who, under orders, are attempting to eject a man from a train, will be liable to him if they use excessive violence.[12]

7. **Unauthorized sale of ticket over connecting line.**—Pennsylvania R. Co. *v.* Wabash, etc., R. Co., 157 U. S. 225, 15 S. Ct. 576, 39 L. Ed. 682.

8. **Ejection from Pullman car.**—Paddock *v.* Atchison, etc., R. Co., 37 Fed. 841, 4 L. R. A. 231.

9. Blake *v.* Kansas City, etc., R. Co., 38 Tex. Civ. App. 337, 85 S. W. 430.

10. **Transit company.**—Union R., etc., Co. *v.* Kallaher, 12 Ill. App. 400, affirmed in 114 Ill. 325, 2 N. E. 77.

11. **Liability of lessor for ejection by lessee of road.**—East Line, etc., R. Co. *v.* Lee, 71 Tex. 538, 9 S. W. 604.

12. **Carrier's employees.**—St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

CHAPTER XXVI.

Licensees, Trespassers, Intruders, Etc.

I. Duties as to Safety of Station Houses, Platforms and Grounds, §§ 3028-3041.
  A. In General, § 3028.
  B. Approaches, Passageways and Platforms, § 3029.
  C. Operation of Trains, § 3030.
  D. Duty Owed to Particular Classes of Persons, §§ 3031-3041.
    a. Duty Owed to Public at Large, § 3031.
    b. Duty Owed to Trespassers, Spectators, Loiterers and Bare Licensees, § 3032.
    c. Persons Having Business with Express Company or Other Carrier, § 3033.
    d. Persons Posting Mail or Receiving Mail, § 3034.
    e. Persons Having Business with Passengers, § 3035.
    f. Hackman, § 3036.
    g. Person Patronizing Restaurant on Premises of Railroad Company, § 3037.
    h. Policeman, § 3038.
    i. Person Crossing Station Grounds, § 3039.
    j. Persons Deviating from Passageways, § 3040.
    k. Persons Meeting Incoming or Speeding Departing Passengers, § 3041.
II. Persons at Station to Assist or Take Leave of Departing Passengers, or to Meet Incoming Passengers, §§ 3042-3056.
  A. Right to Enter Premises, § 3042.
  B. Degree of Care Required, §§ 3043-3047.
    a. In General, § 3043.
    b. As to Station, Approaches, Platforms, etc., §§ 3044-3047.
      (1) Duty in General, § 3044.
      (2) Defects in Platform, § 3045.
      (3) Failure to Sufficiently Light Premises, § 3046.
      (4) Negligence in Handling Baggage, § 3047.
  C. Entering Train or Cars, § 3048.
  D. Affording Opportunity to Leave Train or Cars, §§ 3049-3056.
    a. In General, § 3049.
    b. Duty to Give Notice of Starting, § 3050.
    c. Assumption That Persons Boarding Train Are Passengers, § 3051.
    d. Duty as Affected by Knowledge of Intention of Person Boarding Train, § 3052.
    e. Right to Assume That Train Will Stop for Usual Length of Time, § 3053.
    f. Notice of Purpose in Boarding Train, §§ 3054-3055.
      (1) Necessity, § 3054.
      (2) Sufficiency of Notice, § 3055.
    g. Right to Rely on Information by Employee as to Time of Stop, § 3056.
III. Duties and Liabilities as to Persons on Trains, Cars, etc., §§ 3057-3063.
  A. Trespassers, §§ 3057-3058.
    a. Duty Owed in General, § 3057.
    b. Trespassing Children, § 3058.
  B. Invitees and Licensees, §§ 3059-3063.
    a. In General, § 3059.
    b. Persons on Train in Violation of Rules of Carrier, § 3060.
    c. Children Entering Trains, Cars, etc., § 3061.
    d. Traffic Policeman, § 3062.
    e. Volunteer, § 3063.
IV. Acts and Omissions of Servants and Third Persons for Which Carriers Liable, §§ 3064-3068.
  A. Acts of Employees, §§ 3064-3066.

a. Lessee of Privilege as Servant, § 3064.
b. Proximate Cause of Injury, § 3065.
c. Scope of Employment, § 3066.
B. Acts of Third Persons, §§ 3067-3068.
a. In General, § 3067.
b. Acts of Postal Employees in Throwing Mail Bags from Train, § 3068.
V. Ejection, §§ 3069-3072.
A. In General, § 3069.
B. From Railroad Stations, § 3070.
C. From Railroad Trains, § 3071.
D. From Street Cars, § 3072.
VI. Contributory Negligence of Person Injured, §§ 3073-3082.
A. In General, § 3073.
B. Of Postal Clerks, § 3074.
C. Of Carrier's Employees, § 3075.
D. Of Former Passenger Boarding Train to Secure Return of Money Due Him, § 3076.
E. Of Persons Going to Station or Train to Assist or Meet Passengers, § 3077.
F. Of Persons Boarding Train, Car, or Boat to See or Assist Passengers, § 3078.
G. Of Persons on Train or Car by Invitation or Permission of Carrier's Employees, § 3079.
H. Of Persons Going to Railroad Depot on Business, § 3080.
I. Of Persons on Station Platform Who Have No Business There, § 3081.
J. Of Trespassers, § 3082.
VII. Actions, §§ 3083-3091.
A. Pleading, §§ 3083-3085.
a. Petition, § 3083.
b. Answer or Plea, § 3084.
c. Variance, § 3085.
B. Evidence, §§ 3086-3088.
a. Presumptions and Burden of Proof, § 3086.
b. Admissibility, § 3087.
c. Weight and Sufficiency, § 3088.
C. Questions for Jury, § 3089.
D. Instructions, § 3090.
E. Verdict, § 3091.

§§ 3028-3041. Duties as to Safety of Station Huses, Platforms and Grounds.—See, also, post, "Persons at Station to Assist or Take Leave of Departing Passengers, or to Meet Incoming Passengers," §§ 3042-3056.

§ 3028. In General.—A carrier is not an insurer of the safety of its premises; but where it invites public patronage, and maintains a station as a place for transacting business, it must exercise reasonable care to keep the station house, platforms, and approaches thereto in safe condition. Its liability in this respect is the same as that of any person to another who has by invitation or inducement come upon his premises to transact business.[1]

Statement Requiring Ordinary Care.—A railroad company's obligation of care extends to and embraces all the accessories of its business, including stations and depots, which must be construed and arranged with care, properly lighted, and otherwise made convenient and safe for persons lawfully entering

1. **Reasonable care as to person having business with railroad company.**—Chase *v.* Atchison, etc., R. Co., 134 Mo. App. 655, 114 S. W. 1141; Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72; Central, etc., R. Co. *v.* Hunter, 128 Ga. 600, 58 S. E. 154; Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224; Houston, etc., R. Co. *v.* Phillio, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868, reversing 67 S. W. 915.

thereon for the transaction of business, although the company is bound to use only ordinary care, except in favor of passengers.[2]

Statement Requiring Same Care as for Passenger.—A person doing business at a railroad station is entitled to the same accommodations for that purpose as would be furnished a passenger.[3]

§ 3029. Approaches, Passageways and Platforms.—Approaches and Passageways.—It is the duty of a railroad company to keep the approach to its depots and platform reasonably convenient, accessible, and safe for the public rightfully passing over it, and properly and lawfully doing business with such railroad company.[4] It may be assumed that a railway company will take the utmost care to protect persons from injury in crossing a passage left by it to give access to the depot, when the passage does not actually cross the railway track.[5] When an opening in a train at a station has been made for the passage of persons, the duty to give warning before closing the space is not satisfied by merely ringing the engine bell or sounding the whistle.[6]

Platform.—As to persons coming to its station on business, a railroad company is liable for injuries caused by a defective plank in its platform,[7] or a hole negligently left there.[8] A railroad company has been held liable where it neg-

2. Ordinary care.—Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, 16 Am. Rep. 618.

3. Care same as for passengers.—Smoak *v.* Savannah, etc., R. Co., 65 S. C. 299, 43 S. E. 662.

4. Approaches to depot and platform.—Christie *v.* Chicago, etc., R. Co., 61 Minn. 161, 63 N. W. 482.

Plaintiff, in ascending the platform, at defendant's depot, had her foot injured by the falling of a plank on which she was walking. The plank was unfastened, one end resting on the platform and the other on the ground. It had not been placed there by defendant, but it had been adopted by the public as well as by the station agent, because defendant had provided no step. There was a well beaten path leading to it. The platform was from twenty to thirty inches high except at one corner, which was little used, and there it was about sixteen inches high. Held, that defendant was liable for the injury. Collins *v.* Toledo, etc., R. Co., 80 Mich. 390, 45 N. W. 178.

Licensee.—Plaintiff was a licensee at defendant's depot. There was a platform extending from the east side of the depot to the railroad track, over which passengers passed to and from the cars. Stairs led through the center of the depot to the street on the opposite side, which was several feet lower than the track, and there were also stairs at either end of the depot, leading from the platform to the street. The stairs at the north end of the depot were open at the top, as if they might be used. These stairs, and a platform at the bottom of them about four feet from the ground, were constructed by an express company for its sole use, but they were on defendant's premises, of which defendant had control. Plaintiff, in attempting to pass down these stairs in the dark, from the upper platform to the street, without fault on her part, fell from the lower platform to the ground, striking beyond the limit of defendant's premises, and was injured. Held, that defendant was liable. Beard *v.* Connecticut, etc., R. Co., 48 Vt. 101.

Person going after freight.—The plaintiff received notice from the defendant company that certain goods for him were at its depot. While walking along the passage to the freight room, several boxes of iron, which had been carelessly piled, fell on him. Held, that the plaintiff was a licensee, and defendant company was liable for failure to exercise ordinary care. Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278.

5. Assumption as to safety of passage not crossing tracks.—Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

6. Warning before closing passageway through train.—Louisville, etc., R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

7. Defective plank.—It appearing that the railroad company was required by statute to post at the nearest station house a notice of the killing of stock by their trains, and that one who was missing a cow went upon the platform of the station to read a notice posted there, taking plaintiff with him to do the reading, as he himself was unable to read, and that plaintiff, in climbing up to get at the notice, fell through a defective plank in the platform, and was injured, held that the railroad was liable to plaintiff. St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50.

8. Hole in platform.—A railway company whose station agent knowingly permits a hole caused by the decay of a plank to remain in the floor of the station platform for nearly two years, whereby one sent by his employee to look after freight belonging to the latter sustains severe internal injuries, without any fault on his part, by accidentally stepping into the hole, while lawfully upon the plat-

ligently allowed a hole to remain in its station platform, though it did not know of the danger.[9]

Duty to Light Platform.—A shipper going upon a railway depot platform at night to protect live stock shipped by him from injury by hoodlums, is not a trespasser, and the company is liable for injuries to him caused by its neglect to properly light the platform.[10]

Throwing Objects from Car onto Platform.—Where employees of a railroadroad company, in unloading a box car, without giving warning of danger, throw out a stick of timber, knocking down and injuring one who is lawfully passing along the passenger platform to the depot to ascertain the time of departure of a certain train, the company is liable for the injury.[11] It is immaterial whether a person injured by the negligence of an employee of a railroad company in unloading baggage at a depot was a licensee or a passenger.[12]

§ 3030. Operation of Trains.—The care and caution required of railroad companies in running their trains and commensurate with the danger to persons and property incident to that mode of conveyance; and in running in the vicinity of railroad stations, they must exercise care and caution commensurate with the risks of accidents at such places.[13] To run a train at a high speed past a depot on a track across which passengers for a train of another railroad company have to go is negligence;[14] and for a railroad company to allow its employees to make flying switches at its depot grounds, to the injury of a licensee in crossing a track, is negligence.[15] To start an engine while a volunteer is about to cross the track may constitute negligence.[16] An employee of a railroad company seeing a person standing on a depot platform out of danger from all ordinary trains is bound to recognize the danger to such persons, and guard against it, of an extraordinary projection of the sidebrakes of his train and is guilty of negligence where such person is injured.[17]

§§ 3031-3041. Duty Owed to Particular Classes of Persons—§ 3031. Duty Owed to Public at Large.—To the public at large, a railroad company

form looking for the agent, is liable in damages for such injuries. Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, 16 Am. Rep. 618.

9. Hole in floor negligently permitted, though danger not known.—Louisville, etc., R. Co. *v.* Wolfe, 80 Ky. 82, 3 Ky. L. Rep. 576.

10. Duty to light platform.—Smith *v.* Texas, etc., R. Co., 2 Posey 329.

11. Throwing objects from car.—Toledo, etc., R. Co. *v.* Maine, 67 Ill. 298.

12. Negligence in handling baggage—Immaterial whether injured person, licensee or passenger.—Holcombe *v.* Southern R. Co., 66 S. C. 6, 44 S. E. 68.

13. Operation of trains.—Hicks *v.* Pacific R. Co., 64 Mo. 430.

Want of efficient lookout or warning of approach.—Where a carrier places coaches for the reception of passengers on a side track adjacent to a main track intervening between it and the depot, and with the company's acquiescence passengers are passing to and fro from the station to the coaches, it is negligence to back an engine at a rapid speed along the main track, without any efficient lookout or warning of its approach. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

It is negligence in a railroad company to propel a hand car past a station at the rate of fifteen miles an hour, on a downgrade, without a bell or other notice of approach at an hour when passengers are about to gather to take a train. Conklin *v.* New York, etc., R. Co., 63 Hun 628, 17 N. Y. S. 651, 43 N. Y. St. Rep. 414.

14. Running train on track between train and platform.—Chicago, etc., R. Co. *v.* Ryan, 62 Ill. App. 264, affirmed in 165 Ill. 88, 46 N. E. 208, judgment 80 Ill. App. 675, affirmed in Chicago, etc., R. Co. *v.* Kelly, 182 Ill. 267, 54 N. E. 979.

15. Making flying switches.—Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

16. Starting train while volunteer crossing track.—A boy of fourteen years went to a carrier's station to take passage, and at request of a brakeman took a pail and went along the track toward a hydrant to get water, and had to pass on a plank walk, used by employees, near an engine. The engineer saw him one hundred feet away, but not again, and started up the engine, injuring the boy while he was crossing the track toward the hydrant. Held to be sufficient evidence of the carrier's negligence to take the case to the jury. Corcoran *v.* New York, etc., R. Co. (N. Y.), 19 Hun 368.

17. Injury from projecting brake.—Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239, 30 Am. & Eng. R. Cas. 168.

owes "nothing beyond observances of the duties of good neighborhood," which includes "the universal duty of doing no willful or wanton injury, and of not erecting or continuing, on or near its platform or approaches, to which the public may be expected to go, any nuisance trap, or pitfall, from which personal injury is likely to ensue." [18]

§ 3032. Duty Owed to Trespassers, Spectators, Loiterers and Bare Licensees.—A carrier owes no duty to a mere licensee other than to refrain from wilfully or wantonly injuring him.[19]

Duty as to Safety of Premises.—A railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it.[20] It is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where at the time of receiving the injury such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road.[21] One who, without an invitation, visits, for the purpose of paying a friendly call on the operator, a telegraph office owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, though occasional messages are sent therefrom and received thereat for outside parties for pay, visits the office as a mere licensee, and the company is under no duty to keep the premises in safe and suitable condition for him, and it is only liable for such willful or wanton injury to him as may be caused by the gross negligence of its agents or employees.[22]

Duty as to Station Platform.—The platform of a railroad company at its station is not a public highway. It is a structure erected expressly for the accommodation of passengers arriving and departing in the trains of the company. Other persons are usually allowed to walk over it, but they have no right, as against the company, to do so.[23] One who is permitted by the passive acquiescence of a railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad company, is a bare licensee, who, though relieved from the responsibility of a trespasser, takes upon himself all the ordinary risks attached to the place, and the business carried on there. The company does not owe him the same duty which it owes to one who is there in the discharge of business with the company, or as a passenger, and the same presumptions will not be made as in case of passengers, or of persons lawfully upon the premises for the purpose of transacting business with the company.[24] If a person goes upon a platform at a railway station merely from curiosity, or for his own convenience or for the transaction of business in no way connected with the railroad company, no relation exists between him and the company which imposes upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his use, and it is not liable for his injury.[25]

18. Duty owed to public at large.—Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

19. Duty owed to mere licensee.—Strong *v.* North Chicago St. R. Co., 116 Ill. App. 246.

20. Persons unlawfully on premises.—Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

21. Safety of station.—Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364.

22. Person paying friendly call.—Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271.

23. Right as to platform.—Gillis *v.* Pennsylvania R. Co., 59 Pa. 129, 98 Am. Dec. 317.

24. Assumption of risks by licensee.—Norfolk, etc., R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846.

If spectators come upon a platform in such numbers that it breaks down with their weight, and they are injured, the company is not liable. Gillis *v.* Pennsylvania R. Co., 59 Pa. 129, 98 Am. Dec. 317.

25. Ordinary care not required.—Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364; Gillis *v.* Pennsylvania R. Co., 59 Pa. 129, 98 Am. Dec. 317; Kansas, etc., R. Co. *v.* Kirksey, 48 Ark. 366, 3 S. W. 190;

Who Are Trespassers.—Persons resorting to railroad depots and station houses and grounds connected with them are not trespassers, like persons walking along the track between stations, for the public are invited to visit these places.[26] A person who, being temporarily in town, goes to the depot for a time table, to see if there are any changes therein, is not a trespasser on the company's walk leading to the platform.[27] Where a passenger on going to the depot finds it locked, she is not a trespasser where she enters the room, which is opened and lighted by one not an agent of the company.[28]

Child Loitering on Platform.—Where a child is upon the platform of a station, not as a passenger or upon any business connected with the company, but merely loitering there for his own purposes or for personal enjoyment, the company owes him no duty. Hence, if he be injured by a passing train he can not recover against the company, upon the theory that they have failed to discharge toward him a legal duty and hence have been guilty of negligence.[29] It has been held in one instance the liability of the railroad company in such a case is not restricted to those injuries which are wanton, but embrace all such as result from want of ordinary care, even conceding the child to be a trespasser.[30]

Liability to Spectator for Gross Negligence of Servants.—A railway company is liable for injuries to a spectator on its depot platform, caused by the gross negligence of its servants.[31]

§ 3033. Persons Having Business with Express Company or Other Carrier.—Persons Having Business with Express Company.—A person going to a depot on business connected with an express company is not a trespasser so as to relieve the railroad company from liability for an injury occurring to such person by reason of a defect in the platform,[32] or from failure to properly light the premises.[33] A railroad company owes to the employees of

St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, 4 S. W. 50.

There were platforms on the several sides of a depot. The one on the south side was used exclusively for freight, and the flooring had been taken up for repairs. There was a lamp north of the depot which threw a light along the platforms intended for passengers. The plaintiff was at the depot as a mere spectator. She went on the south side platform, fell through the opening, and was injured. Held, that the opening was not in the nature of a trap, and that the railroad company was not guilty of gross negligence equivalent to intentional mischief, and was not liable. Burbank *v.* Illinois Cent. R. Co., 42 La. Ann. 1156, 8 So. 580, 11 L. R. A. 720.

26. Persons resorting to station as trespassers.—Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224; Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347.

In suit against a railroad company for injuries to a child, it appeared that at a station where the accident occurred, by direction of his father the boy was in the habit of driving stock from the track before the arrival of trains, and would then seat himself on the platform of the station, and was accustomed to get on freight trains on their arrival, and ride to the switch; that the platform had been built by the company for the accommodation of passengers and persons having business with the road, and that the lad had been frequently told to keep off the platform; that while standing there he was struck and injured by a timber projecting from the freight car: Held, that the direction was under the circumstances merely admonitory and not imperative in such sense as to make him, by reason of the order, a trespasser. Hicks *v.* Pacific R. Co., 64 Mo. 430.

27. Person going to depot for time-table.—Bradford *v.* Boston, etc., Railroad, 160 Mass. 392, 35 N. E. 1131.

28. Passenger entering station opened and lighted by stranger.—Chicago, etc., R. Co. *v.* Walker, 217 Ill. 605, 75 N. E. 520.

29. Child loitering on platform.—Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. 258, 8 Am. & Eng. R. Cas. 544, 47 Am. Rep. 706; Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545, 21 Am. & Eng. R. Cas., N. S., 316.

30. Hicks *v.* Pacific R. Co., 64 Mo. 430.

31. Liability to spectator for gross negligence.—Illinois Cent. R. Co., *v.* Wall, 53 Ill. App. 588.

32. Person having business with express company.—Rule applied where the only office of an express company at a certain town was at the depot of a railroad company, and the express company was under the control of the railroad company. Smith *v.* Texas, etc., R. Co., 2 Posey 329.

33. Failure to light platform.—Complainant, having delivered an animal to

an express company delivering freight at the train the duty to furnish a reasonably safe passageway from the depot to the train.[34]

Passenger of Other Carrier Using Same Depot.—The fact that the person injured was a passsenger of one of the other railroad companies who maintained the defective walk approaching the depot used in common by several companies and not of defendant, will not relieve it from liability for the injury.[35]

Steward of Vessel Lying at Pier of Railroad Company.—A railroad company owning a pier is liable to the steward of a vessel lying at the pier by permission of the company for an injury caused by a defect in the stairway leading from the pier, the right of transit being implied by the arrangement between the railroad company and the vessel.[36]

§ 3034. Persons Posting Mail or Receiving Mail.—It is the duty of a railroad company, which carries the mail under a contract with the United States, and by whose regulations postal clerks on mail trains are required to receive, at the cars stamped letters and sell stamps, to furnish a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of mailing letters; and a failure to provide such passage is actionable negligence.[37] A person who goes to a station to mail letters at a mail car of a passing train is not a trespasser, so as to bar recovery for injuries received while crossing a track intervening between the platform and the mail car by the negligence of the railroad company in operating a train on such intervening track.[38] It is negligence to run a train between a station and a train opposite it, engaged in discharging and receiving passengers, express, and mail, it being necessary for passengers and persons whose business it is to receive the express and mail to cross the intervening track,[39] although it has been held not to be negligence as to a mail carrier who was about to leave the station with the mail to run an express train on a track which it was necessary for him to cross.[40]

Statement Requiring Same Care as for Intended Passengers.—One who is on the station grounds of a railroad company for the purpose of receiving mail and express from a train is entitled to the same protection as one intending to take passage on the train.[41]

§ 3035. Persons Having Business with Passengers.—One traversing a railway platform merely to deliver an article sold by him to persons on a train is entitled to no higher degree of care on the part of the railroad company with respect to keeping its platform in good condition than is due from a municipality to the public in respect to its streets, and hence it is not liable for injury resulting from mere slipperiness due to sleet and snow recently fallen.[42] A

an express company for transportation, being advised that certain boys were annoying it while waiting for shipment, went to the express office to inform the agent of it. It was dark about the company's platform, and no lights were had, and complainant, while walking as a prudent man would, fell off an upper platform to a lower one, sustaining injury for which he sought to recover damages. Held, that the complaint stated a cause of action, as the complainant was not a trespasser on the premises. Smith *v.* Texas, etc., R. Co., 2 Posey 329.

34. Duty owed to employee of express company.—Harvey *v.* Louisiana Western R. Co., 114 La. 1065, 38 So. 859.

35. Passenger of other carrier.—Gulf, etc., R. Co. *v.* Glenk, 9 Tex. Civ. App. 589, 30 S. W. 278.

36. Steward of vessel lying at pier of railroad company.—Baltimore, etc., R. Co. *v.* Rose, 65 Md. 485, 4 Atl. 899, 27 Am. & Eng. R. Cas. 125.

37. Safe passage to mail train.—Hale *v.* Grand Trunk R. Co., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187.

38. Person mailing letters as trespasser.—Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

39. Running train on entervening track.—Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320.

40. Percy *v.* Fitchburg R. Co., 27 N. Y. S. 1040, 57 N. Y. St. Rep. 467, judgment affirmed in 144 N. Y. 719, 39 N. E. 858.

41. Statement requiring same care as for passenger.—Tubbs *v.* Michigan Cent. R. Co., 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320.

42. Persons having business with passengers.—Clark *v.* Howard, 88 Fed. 199, 31 C. C. A. 454, 13 Am. & Eng. R. Cas., N. S., 743.

railroad company is under no obligation to keep the platform about its depot in safe condition as against a boarding-house keeper, who goes to the depot to meet an incoming train for the purpose of securing a boarder.[43] It has been held that a railroad company is liable to one on its premises to meet an incoming passenger for the purpose of continuing a business negotiation between them for injuries due to the defective condition of the station platform.[44]

§ 3036. Hackman.—A railroad company is liable to a hackman for injuries received, without negligence on his part, while carrying a passenger to its depot for transportation, from a defective platform, which it permitted to remain in an unsafe condition, though the platform was erected and maintained by it within the limits of the highway.[45]

§ 3037. Person Patronizing Restaurant on Premises of Railroad Company.—Where a person owns and keeps a lunch stand at a railroad station, by authority of the company, which can be approached only over the company's platform, the company is responsible for its condition to persons passing over it to make purchases at the lunch stand,[46] although it is not liable for an injury not resulting from the negligence of the railroad company.[47]

§ 3038. Policeman.—An express company is liable for negligently running a truck on a depot platform against a policeman, whose habit it was to visit the station at train time.[48]

§ 3039. Person Crossing Station Grounds.—While persons not passengers crossing the station grounds and platforms of a railroad company with its passive assent are not trespassers,[49] neither are they invitees,[50] but are mere licensees.[51] Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass can not be made a trespasser for so passing, although the wharf or plat-

43. Person meeting train to secure boarders.—Post *v.* Texas, etc., R. Co. (Tex. Civ. App.), 23 S. W. 708.

44. Person meeting passenger to continue business negotiation.—Atchison, etc., R. Co. *v.* Cogswell, 23 Okla. 181, 99 Pac. 923, 20 L. R. A., N. S., 837.

45. Injuries to hackman.—Tobin *v.* Portland, etc., R. Co., 59 Me. 183, 8 Am. Rep. 415.

46. Person patronizing restaurants on premises of railroad company.—Dillingham *v.* Teeling (Tex. Civ. App.), 24 S. W. 1094.

47. Injury not resulting from negligence of company.—Plaintiff went to a railroad depot to take a meal at a restaurant therein. He was not, and did not intend to become, a passenger. As he left, he stepped on a banana on the steps, slipper, and was injured. In the depot, nearly opposite the door where he departed, was a large electric light, and outside were two more. Plaintiff and his wife, in passing through the door, intercepted the light so that the steps were in darkness. The railroad company was not responsible for placing the banana there. Held not to show negligence on the part of the railroad company. Hauk *v.* New York, etc., R. Co., 54 N. Y. S. 248, 34 App. Div. 434.

48. Policeman.—Ingalls *v.* Adams Exp. Co., 44 Minn. 128, 46 N. W. 325.

49. Person crossing station grounds.—Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. 1133, 31 Am. St. Rep. 520, 14 L. R. A. 276.

50. As invitees.—At a transfer station of surface and elevated lines, the surface lines connected with opposite sides of the platform, which was intersected by the elevated track, which was depressed; the car platforms being at the level of the platform. The company provided a subway under this track for surface car patrons, and signs directed them; but many people crossed on the elevated car platforms, and they were not interfered with. Although servants of the company were instructed not to permit this, it appeared they could not distinguish between these and regular elevated passengers, and the order was not enforced. Held, that these people were not invited to cross; passive acquiescence not being an invitation, and it being impracticable to prevent such passage without interference with defendant's business in the use of the premises. Hillman *v.* Boston Elev. R. Co., 93 N. E. 653, 207 Mass. 478, 32 L. R. A., N. S., 198.

51. As mere licensees.—Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. 1133, 31 Am. St. Rep. 520, 14 L. R. A. 276

form is now no longer used for the purpose of passage.[52] Where a person crossing a railroad station grounds and platforms is injured by falling through a trapdoor after dark, and the door is not a concealed peril, designedly laid, the railroad company is not liable therefor.[53]

§ 3040. Persons Deviating from Passageways.—A person coming on a carrier's premises to transact business has no implied invitation to deviate from passageways which the premises themselves show were prepared by the owner for that special use, and were intended to mark out the only way by which the place of business might be approached,[54] the same rule applies to passengers.[55]

§ 3041. Persons Meeting Incoming or Speeding Departing Passengers.—See post, "Persons at Station to Assist or Take Leave of Departing Passengers, or to Meet Incoming Passengers," §§ 3042-3056.

§§ 3042-3056. Persons at Station to Assist or Take Leave of Departing Passengers, or to Meet Incoming Passengers—§ 3042. Right to Enter Premises.—Not only passengers, but protectors and friends attendant on

52. Necessity for notice of changed character of place.—Railroad Co. *v.* Hanning (U. S.), 15 Wall. 649, 21 L. Ed. 220.

53. Injuries from perils not concealed.—Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. 1133, 31 Am. St. Rep. 520, 14 L. R. A. 276.

54. Deviation from passageways.—Chase *v.* Atchison, etc., R. Co., 114 S. W. 1141, 134 Mo. App. 655.

Defendant had set apart a place connecting with a public thoroughfare for the use of persons who had business at its depot building. Its platform extended some distance beyond the depot building, terminating within a few feet of a water tank, between its "house" and main tracks, and in a part of its grounds obviously designed and used for its own business. At the end of the platform were steps, designed for the use of its trainmen and other employees. For their own convenience, and to shorten the way, some of the patrons of the defendant went over this part of the yard and upon these steps when going to or returning from the depot building. Plaintiff, in going upon this part of the yard at night, after having been at the depot building on business, fell upon ice which had accumulated on the ground near the steps, and was injured. Held, that he had no cause of action. De Blois *v.* Great Northern R. Co., 71 Minn. 45, 73 N. W. 637.

Person using freight elevator without consent of railroad company.—In an action against a railroad company for the death of plaintiff's intestate, it was shown that defendant had constructed, at the termination of its track on Black river, an elevator, which was used in lowering and raising freight, on an incline track extending from its depot, on the bank, to the water's edge; and the intestate, having prepared for shipment a small cargo of fish, and placed same on the platform of the elevator, undertook to ride thereon, without defendant's consent and contrary to its orders, up to the station, when the wire ropes by means of which the car was operated suddenly broke, while the car was ascending, and caused the injury and death of deceased. Held, that plaintiff can not recover, because the deceased was not a passenger, and no contractual relations existed between him and the defendant; he being a mere stranger or trespasser on the company's property. Snyder *v.* Natchez, etc., R. Co., 42 La. Ann. 302, 7 So. 582.

55. Deviation by passenger leaving station.—A passenger alighted from the train at a depot at night, and for purposes of his own passed along an open space on the right of way used by the public by permission in passing from one street to another. He left the right of way, and went into an open door in the depot building twelve feet away, and fell down a stairway and was injured. Held, that he was a licensee, and the railroad did not owe him the duty to keep the depot doors closed, but only of keeping the way free from dangers. Quantz *v.* Southern R. Co., 137 N. C. 136, 49 S. E. 79.

Passenger stopping over as trespasser by deviation on return to station.—A woman bought a railroad ticket which did not forbid stopping over, rode thereon a few miles, stepped over at a station, went to meet her son, attempted to walk back to the station by crossing the track at a point other than the highway crossing, and was struck by an engine. Held, that not being on the premises as a passenger, but as a trespasser, she could not, without proving that the negligence of the company was willful, recover for the consequent injury; and this, although the station platforms extended between two highways crossing the track, and people had been accustomed to pass from the station at that point to a station on another railroad without objection by the railroad company. Johnson *v.* Boston, etc., R. Co., 125 Mass. 75.

their departure, or awaiting their arrival, are embraced in that class of persons who have business with the railroad and as such are invited, or can claim the right to enter the station premises.[56]

Premises of Terminal Corporation.—Where a corporation holds itself out as giving passengers terminal facilities, and providing a union station for the various railways centering in its city, its invitation to persons to come upon its premises extends, not only to actual travelers, but to those coming either to assist or greet the incoming passengers.[57]

§§ 3043-3047. Degree of Care Required—§ 3043. In General.—A railroad company is bound to exercise ordinary care for the safety of a person upon it premises for the purpose of meeting an incoming passenger,[58] or one who goes to a station for the purpose of escorting an outgoing passenger,[59] or one who goes to a railway station to meet a friend expected on the train, and to get on the train in case his friend is aboard,[60] such persons not being trespassers.[61] Where there is a custom to allow persons to accompany passengers to trains, they are on the premises by the carrier's implied invitation, and the carrier is bound to exercise ordinary care for their safety.[62] It has been held that all persons having duties to perform incidental to the departure and arrival of passengers, are entitled to the same protection as passengers, or intended passengers, while there.[63] A person going to a train to receive a passenger need not wait until the train actually arrives before going to the platform in order to avail himself of the rule that requires a carrier to exercise ordinary care for his safety.[64] A boy sent to a station to meet a relative is not necessarily a trespasser because he fails to immediately leave the platform after the arrival of the train, and take the shortest route home.[65]

§§ 3044-3047. As to Station, Approaches, Platforms, etc.—§ 3044. Duty in General.—As to persons at a station to meet and assist incoming, or to aid outgoing, passengers for their convenience, comfort, and safety, a carrier must exercise ordinary care to keep its waiting room in a reasonably safe con-

56. Right to enter premises.—Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

57. Premises of terminal corporation.—Union, etc., R. Co. *v.* Londoner, 50 Colo. 22, 114 Pac. 316, 33 L. R. A., N. S., 433.

58. Persons meeting passengers—Ordinary care necessary.—Atchison, etc., R. Co. *v.* Cogswell, 23 Okla. 181, 99 Pac. 923, 20 L. R. A., N. S., 837; Winscott *v.* Chicago, etc., R. Co., 151 Mo. App. 378, 131 S. W. 749.

A common carrier is liable for injury, through its negligence, to one on its premises to meet a friend. Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

59. Person escorting outgoing passenger.—Winscott *v.* Chicago, etc., R. Co., 151 Mo. App. 378, 131 S. W. 749.

60. Person intending to take train if friend is on it.—Texas, etc., R. Co. *v.* Best, 18 S. W. 224, 66 Tex. 116.

61. Arkansas, etc., R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A., N. S., 910; Winscott *v.* Chicago, etc., R. Co., 151 Mo. App. 378, 131 S. W. 749; Texas, etc., R. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224.

A person who goes on the platform of a railway company at its station to meet a passenger is not a trespasser. Hence the company must exercise due diligence to secure his safety. Gulf, etc., R. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653.

A party, who was on the grounds of the defendant railway company to meet his wife and daughter, who were passengers on an incoming train, was not a trespasser or a passenger, but a licensee, towards whom the company was bound to exercise ordinary care. Izlar *v.* Manchester, etc., R. Co., 35 S. E. 583, 57 S. C. 332.

62. Custom to allow persons to accompany passengers to trains.—Fortune *v.* Southern R. Co., 150 N. C. 695, 64 S. E. 759.

63. Care same as required for passengers.—Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468.

64. Going on platform before train actually arrives.—Louisville, etc., R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

65. Failure to leave immediately after departure of train.—New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

dition,[66] and to avoid injuring them by defective stational facilities or approaches thereto.[67]

Person at Station to Bid Adieu.—A person who goes to a depot merely as an acquaintance of and to say good-by to a departing passenger, and not as an attendant or to assist her, is not there on an implied invitation of the carrier, but as a mere licensee, to whom it owes no duty to keep the waiting room and its approaches in a safe condition.[68]

Unsafe Condition of Road between Depot and Ferry Landing.—A railroad company is liable for injuries to one who goes from its depot to its ferry landing to meet his family expected on its ferryboat, when caused by the unsafe condition of its road intended for the use of passengers and persons having business at the landing.[69]

§ 3045. Defects in Platform.—A railroad company owes the duty, in relation to the platform accommodations, of ordinary prudence to a licensee coming to the depot for the purpose of meeting his daughter on a train.[70] To persons who come upon a platform to meet or part with passengers, or who stand in such relation to a railroad company as requires care, the company is bound to have the structure strong enough to bear all who could stand upon it.[71] A railroad company is liable for injuries due to the defective condition of a station platform to persons coming to the station to meet passengers[72] or to assist departing passengers.[73]

Hole in Wharf.—A steamboat company is liable for negligence in leaving a hole in a wharf, causing injuries to one who accompanied a passenger, such portion of the wharf being customarily used for passengers.[74]

Person Visiting Station at Improper Time.—Where a woman visited a station during the evening to find her husband, after the regular trains had left and the depot was closed, and the lights had been turned out, and stepped into a hole on the platform and was injured, though the railroad company may have been guilty of negligence as to the condition of the platform, she can not recover, inasmuch as it owed her no duty and she went on the premises at her peril.[75]

§ 3046. Failure to Sufficiently Light Premises.—A railroad company is under obligation to protectors and friends, attendant on the departure of passengers or awaiting their arrival, to keep the depot and platform well lighted

66. Waiting room.—St. Louis, etc., R. Co. *v.* Grimsley, 90 Ark. 64, 117 S. W. 1064.

67. Stational facilities and approaches.—Chesapeake, etc., R. Co. *v.* Paris, 107 Va. 408, 59 S. E. 398.

68. Person at depot merely to say good-by.—Judgment, 107 S. W. 882, reversed in Galveston, etc., R. Co. *v.* Matzdorf, 102 Tex. 42, 112 S. W. 1036, 20 L. R. A., N. S., 833.

69. Unsafe condition of road between depot and ferry landing.—Chesapeake, etc., R. Co. *v.* Meyer (Ky.), 119 S. W. 183.

70. Platform accomodations.—Smoak *v.* Savannah, etc., R. Co., 65 S. C. 299, 43 S. E. 662.

71. Strength of platforms.—Gillis *v.* Pennsylvania R. Co., 59 Pa. 129, 98 Am. Dec. 317.

72. Rotten railing around platform.—Where plaintiff went to the station of the defendant to meet his son, and while in conversation on the outside of the platform he leaned or brushed against what appeared to be a heavy railing, but which in fact was so rotten that it give way and caused him to fall and sustain injuries, the defective condition of the railing having existed for a long time, and the defendant being aware of it, defendant was liable, for such a railing is not entirely to mark the boundaries of the station, but to make a place for persons to stand in fair weather. Winscott *v.* Chicago, etc., R. Co., 151 Mo. App. 378, 131 S. W. 749.

73. Person assisting passenger to board train.—A person going on a railroad platform to assist an aged friend to board a train may recover for injuries occassioned by defects in the platform. Hamilton *v.* Texas, etc., R. Co., 64 Tex. 251, 53 Am. Rep. 756.

74. Hutchins *v.* Penobscot Bay, etc., Steamboat Co., 110 Me. 369, 86 Atl. 250.

75. Person visiting station at improper time.—Sullivan *v.* Minneapolis, etc., R. Co., 90 Minn. 390, 97 N. W. 114, 101 Am. St. Rep. 414.

at night,[76] and is liable for injuries to one who comes to the depot to meet friends, caused by failure to keep the station platform in a reasonably safe condition and reasonably well lighted,[77] although the fact that the platform is not sufficiently lighted furnishes no ground of recovery where it is not the proximate cause of the injury.[78]

Persons at Station at Unusual Hour.—The duty of a railroad to have its station platforms guarded and lighted so as to protect persons coming to the station to bid farewell to friends intending to leave on regular passenger trains does not extend to persons coming at an unusual hour with one who intends leaving on a freight in charge of stock, and who, although allowed the use of the waiting room, and allowed to load at the platform instead of in the yards, is not a passenger except in a very limited sense.[79]

§ 3047. Negligence in Handling Baggage.—A railroad company owes to one who comes to a passenger station to receive a friend, on arrival, ordinary care for his safety, and is liable for an injury from the negligence of an employee in handling the baggage.[80]

§ 3048. Entering Train or Cars.—Right to Enter, and Care Owed.—A person may enter a train to assist a passenger to board it, in conformity with a practice acquiesced in by the carrier[81] or when such assistance is needed and is not furnished by the company,[82] and such person is not a trespasser,[83] but a

76. Keeping premises lighted.—Montgomery, etc., R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

77. Failure to keep platform sufficiently lighted.—New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

78. Proximate cause of injury.—Where plaintiff went into a car for the purpose of seating his wife, and was injured in attempting to leave the car after it was in motion, the fact that the platform was not sufficiently lighted furnishes no ground of recovery; that not being proximate cause of the injury. Berry *v.* Louisville, etc., R. Co., 109 Ky. 727, 22 Ky. L. Rep. 1410, 60 S. W. 699.

79. Person at station at unusual hour.—Dowd *v.* Chicago, etc., R. Co., 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917.

80. Negligence in handling baggage.—Atlantic, etc., R. Co. *v.* Owens, 123 Ga. 393, 51 S. E. 404.

A railroad is liable for injuries to one who comes to its depot to meet a relative expected on an incoming train, when caused by the negligence of its employees in placing a baggage truck on a narrow space used for receiving and discharging passengers. Denver, etc., R. Co. *v.* Spencer, 61 Pac. 606, 27 Colo. 313, 51 L. R. A. 121.

81. Acquiescence of carrier.—Cooper *v.* Atlantic, etc., R. Co., 78 S. C. 562, 59 S. E. 704; Chesapeake, etc., R. Co. *v.* Paris, 107 Va. 408, 59 S. E. 398.

The absence of any rule prohibiting it, and of objection on the part of those in charge, operates as a consent on the part of a railroad company that a person, not a passenger, may enter one of its cars for the purpose of assisting a passenger to a seat. Missouri, etc., R. Co. *v.* Miller, 15 Tex. Civ. App. 428, 39 S. W. 583.

82. Failure of carrier to furnish assistance.—St. Louis, etc., R. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407.

A person holding a ticket entitling him or her to transportation as a passenger on a railroad train, if feeble, or encumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and if it is not afforded by the railway officials or servants, the escort of such person may render the necessary assistance, and is entitled to enter the train for such purpose. Johnson *v.* Southern R. Co., 53 S. C. 303, 31 S. E. 212, 69 Am. St. Rep. 849.

Plaintiff boarded defendant's train in order to show his wife a seat, but before he succeeded the train started, and he was injured in getting off. The wife was accompanied by two children, one three years old and the other five, the younger of which she was carrying. She also had a hand satchel, while plaintiff was carrying her valise in one hand and a lunch basket in the other. Plaintiff notified the conductor of his purpose in getting on the train. Held sufficient to justify a finding that plaintiff was properly on the train. Texas, etc., R. Co. *v.* Funderburk, 68 S. W. 1006, 30 Tex. Civ. App. 22.

83. Persons assisting passengers on train not trespassers.—Arkansas, etc., R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A., N. S., 910; Morrow *v.* Atlanta, etc., R. Co., 134 N. C. 92, 46 S. E. 12; Whitley *v.* Southern R. Co., 122 N. C. 987, 29 S. E. 783.

Those who go upon cars at a railway station for the purpose of meeting and as-

licensee,[84] and while not entitled to that high degree of care that the railroad company owes a passenger,[85] the railroad company is charged with the duty of exercising ordinary care for his safety.[86] It has been held that a person accompanying passengers to assist them in entering a train is not a bare licensee, but has at least a tacit invitation from the carrier by virtue of the relation between it and the passenger, and is entitled to at least ordinary care.[87] It has also been held that where one assists a passenger, with the knowledge of the agent of the carrier, whose duty it is to assist passengers on or off the trains, it is presumed that such assistance is rendered with the carrier's approval, so that it must exercise the same degree of care toward such person as toward a passenger.[88]

A person boarding an electric car to see relatives and friends off and assist them if necessary in accordance with a common custom is a licensee to whom the carrier is bound to exercise ordinary care.[89]

§§ 3049-3056. Affording Opportunity to Leave Train or Cars—§ 3049. In General.—There is no obligation upon a railroad to hold its train until every person not a passenger leaves the same, irrespective of the time of the stop made at the station.[90] Where one enters a train for the purpose of

sisting the incoming or outgoing passengers in such "friendly offices as may be reasonably necessary for their convenience, comfort, and safety" are not trespassers, and to them the company owes the duty of exercising reasonable care. Arkansas, etc., R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A., N. S., 910.

84. Licensees.—Southern R. Co. *v.* Parham, 10 Ga. App. 531, 73 S. E. 763; Houston, etc., R. Co. *v.* Phillio, 69 S. W. 994, 59 L. R. A. 392, 96 Tex. 18, 97 Am. St. Rep. 868.

Plaintiff assisted his infirm sister on a passenger train, which started while he was seating his sister, and he was injured in getting off while it was moving. Held, that plaintiff was on the train as an implied license, and the company was bound to exercise ordinary care to protect him from injury. Huchingson *v.* Texas Cent. R. Co., 55 Tex. Civ. App. 229, 118 S. W. 1123.

85. Not entitled to care required of passengers.—Flaherty *v.* Boston, etc., Railroad, 186 Mass. 567, 72 N. E. 66; Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228; Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

In an action against an electric railroad company for injuries to a licensee by the sudden starting of a car as she was standing on the lower step, rules adopted by the carrier for the guidance of its servants, requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others, imposed a higher degree of care than was imposed by law and were therefore inapplicable. Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

86. Ordinary care necessary.—Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406; Missouri, etc., R. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228.

The obligation of a railroad to one accompanying a passenger into a car is not that due a passenger, but, if it suffers him to enter its car, it owes him ordinary care from the time he enters until he leaves the same. Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

87. Tacit invitation.—Chesapeake, etc., R. Co. *v.* Paris, 107 Va. 408, 59 S. E. 398.

Where plaintiff went to defendant's station to accompany his wife and children, who intended to become passengers on defendant's train, and plaintiff was injured by the premature starting of the train while he was endeavoring to place his wife's baggage aboard, plaintiff was on defendant's premises by its implied invitation, and defendant was therefore bound to exercise ordinary care for his safety. Chesapeake, etc., R. Co. *v.* Fortune, 107 Va. 412, 59 S. E. 1095.

88. Same degree of care as for passenger.—McElvane *v.* Central, etc., R. Co., 170 Ala. 525, 54 So. 489, 34 L. R. A., N. S., 715.

Person assisting sick passenger.—If a railroad company agrees to receive upon its train a passenger who is so sick and feeble as to render it necessary for him to be carried into the car, and the conductor has knowledge of the fact that a person entered the car as an assistant in carrying the passenger into it, the company owes such person the same duty, while he is rendering assistance to the passenger and while he is leaving the car, that it owes to any of its passengers for hire. Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, 41 Am. & Eng. R. Cas. 158.

89. Person boarding electric car.—Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

90. Duty as governed by time of stop.—Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

assisting a passenger in entering or leaving a train, but whose purpose is not known and there are no circumstances to put the carrier upon notice, the carrier is not bound to hold the train until he has had time to alight.[91] It is not negligence for a carrier to start its train at a station before a person who has assisted a passenger on board has had time to get off, unless it has notice of his intention to get off,[92] though such person was rightfully on the train by customary invitation and the trainmen owed him the duty of ordinary care,[93] and the carrier is not liable in such case for injuries resulting from attempting to alight from the train after it was in motion.[94] The same rule applies to a passenger who left her train, and boarded another, at a meeting point, to converse with her sister, and who sustained injuries in leaving the latter train, in the absence of proof that the employee operating such train knew of her presence, and that it was only temporary.[95]

Ignorance of Plaintiff's Position as Displacing Duty of Ordinary Care.—Where a person assisting passengers on an electric car was thrown therefrom and injured by the sudden starting thereof, the fact that the carrier's servants did not know of such person's perilous situation or have such reason-

91. Holding train in absence of knowledge of purpose in boarding train.—*Georgia.*—Seaboard Air Line R. Co. *v.* Bradley, 125 Ga. 193, 54 S. E. 69, 114 Am. St. Rep. 196.

Kentucky.—Berry *v.* Louisville, etc., R. Co., 109 Ky. 727, 22 Ky. L. Rep. 1410, 60 S. W. 699.

Missouri.—Yarnell *v.* Kansas, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

Texas.—International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401; Bullock *v.* Houston, etc., R. Co. (Tex. Civ. App.), 55 S. W. 184.

Virginia.—Chesapeake, etc., R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398.

A. went to the depot to meet his wife at about half past four o'clock on a dark and foggy morning. When the train arrived he went into the first sleeper and asked the porter if there was a lady to get off, and was told she might be in the next car. He walked rapidly out of the car and as he reached the platform of the car the train suddenly started and he was thrown off and injured. His wife had left the train before he got on, and her baggage had been put off. All other passengers for that station had gotten off, and those waiting for the train had taken passage, and the mail, express matter, and baggage had been put off also. None of the employees of the railroad company had any knowledge that plaintiff had gone on the train, or expected to board it at that time, and a brakeman knew that his wife had gotten off, and did not need A.'s assistance. How long the train stopped, and whether any signal of starting was given, were matters in dispute. Held, that it was not the absolute duty of the company to keep the train standing until he got off; that its duty was relative, and that the company was not liable for the injury. Griswold *v.* Chicago, etc., R. Co., 64 Wis. 652, 26 N. W. 101.

92. Not negligence to start train before attendant has alighted.—Yarnell *v.* Kansas, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Saxton *v.* Missouri Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717; Oxsher *v.* Houston, etc., R. Co., 67 S. W. 550, 29 Tex. Civ. App. 420.

93. Immaterial that person on train rightfully.— Wickert *v.* Wisconsin Cent. R. Co., 142 Wis. 375, 125 N. W. 943, 20 Am. & Eng. Ann. Cas. 452.

94. Injuries in alighting.—*Georgia.*—Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498, 40 Am. & Eng. R. Cas. 690.

Indiana.—Louisville, etc., R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186.

Kentucky.—Berry *v.* Louisville, etc., R. Co., 60 S. W. 699, 109 Ky. 727, 22 Ky. L. Rep. 1410.

Oklahoma.—Midland Valley R. Co. *v.* Bailey, 34 Okla. 193, 124 Pac. 987.

Texas.—International, etc., R. Co. *v.* Satterwhite, 47 S. W. 41, 19 Tex. Civ. App. 170.

Virginia.—Chesapeake, etc., R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398.

Where a railroad company allowed persons to go on its cars at the station to assist passengers and gave signals before the starting of the train that they might safely alight, it is not liable for the death of one who boarded its train for such purpose, and who involuntarily attempting to alight after the train had started without the usual signals, was by a sudden jerk thrown under it and killed, where none of the employees knew of his purpose in boarding the train or his intention to alight therefrom. Hill *v.* Louisville, etc., R. Co., 52 S. E. 651, 124 Ga. 243, 3 L. R. A., N. S., 432.

95. Passenger boarding train at junction point to converse with sister.—Bullock *v.* Houston,, etc., R. Co. (Tex. Civ. App.), 55 S. W. 184.

able ground to know as to be chargeable therewith, did not displace the duty to use ordinary care for such person's safety which the carrier owed to such person.[96]

§ 3050. Duty to Give Notice of Starting.—Where a person enters a train for the purpose of assisting a passenger in leaving or entering, the carrier is not bound to notify such person before the train starts where it has no notice of such person's intention in entering the train,[97] although it has been held that it is not ordinary care as to such a person to fail to give the usual starting signals.[98]

§ 3051. Assumption That Persons Boarding Train Are Passengers.—Since a railway company is not bound to use ordinary diligence to ascertain the purpose of a person boarding its cars,[99] trainmen may presume that all persons boarding a train at a station for the reception of passengers are passengers,[1] although it has been otherwise held.[2] But a carrier is not excusable for suddenly starting a car while a person was in a dangerous position on the steps of the car thereon because defendant's servant had no reason to anticipate that she did not do so as a passenger, since if she had been a passenger the sudden starting of the car while she was so circumstanced would have indicated actionable negligence.[3]

§ 3052. Duty as Affected by Knowledge of Intention of Person Boarding Train.—In the absence of any rule prohibiting a person from going on a train to assist a passenger to board it, a conductor having notice of a person going on the train for such purpose must detain it a reasonable length of time to enable the person to render the necessary assistance and to leave it in safety,[4] it being the duty of the conductor to ascertain whether such person has left the train before starting it;[5] and if the train is started before a reason-

96. Ignorance of plaintiff's position as affecting duty of ordinary care.—Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

97. Duty to notice of departure.—Berry *v.* Louisville, etc., R. Co., 109 Ky. 727, 22 Ky. L. Rep. 1410, 60 S. W. 699; Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406; Chesapeake, etc., R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398.

Where plaintiff went on board defendant's train at a station to assist his daughter and her infant children in securing seats as passengers, and the train, after stopping the usual time, started before plaintiff got off, and without having given any notice to him, he could not recover for injuries received in alighting from the train while in motion, in the absence of evidence that defendant's agents knew that he had come aboard, or of any usage or custom to give notice in such cases. Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498, 40 Am. & Eng. R. Cas. 690.

98. Giving usual starting signal.—Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371, criticising Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406.

99. Ascertaining purpose of person boarding train.—Seaboard Air Line R. Co. *v.* Bradley, 125 Ga. 193, 54 S. E. 69, 114 Am. St. Rep. 196.

1. Presumption that persons boarding train are passengers.—Wickert *v.* Wisconsin Cent. R. Co., 142 Wis. 375, 125 N. W. 943, 20 Am. & Eng. Ann. Cas. 452; Parks *v.* Kentucky Cent. R. Co., 3 Ky. L. Rep. 691.

Unless so notified, a railway company is not charged with knowledge that a person intends to leave its train as soon as he has bidden good-by to a passenger. Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

2. When a steamboat lands at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who goes on board does so as a passenger, unless he notifies an officer of the boat to the contrary, so as to relieve the officers from the duty of giving to such as do not come aboard as passengers, proper time and facilities for getting ashore. Keokuk Packet Co. *v.* Henry, 50 Ill. 264.

3. Acting on assumption that person in perilous position is not passenger.—Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

4. Reasonable time—notice to carrier.—Morrow *v.* Atlanta, etc., R. Co., 46 S. E. 12, 134 N. C. 92; Johnson *v.* Southern R. Co., 53 S. C. 303, 31 S. E. 212, 69 Am. St. Rep. 849; Cooper *v.* Atlantic, etc., R. Co., 78 S. C. 562, 59 S. E. 704; Chesapeake, etc., R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398.

5. Ascertaining departure of assistants.—Bishop *v.* Illinois Cent. R. Co., 25 Ky. L. Rep. 1363, 77 S. W. 1099.

able time has elapsed, and the assistant attempts to leave the car while in motion but while the motion was slow and a person of ordinary caution and prudence would apprehend no danger in leaving, and if, when he was in the act of stepping from the car to the station platform, the motion of the train is suddenly increased by the fault or negligence of the company's employees and such person is thereby thrown down and injured, he is entitled to recover.[6] It has been held that where a passenger was in an enfeebled condition, so as to require the assistance of others to carry him upon the train and place him in a seat, the carrier's employees having knowledge of his condition, and observing others whose services in that behalf were accepted by the passenger N., carrying him into the car, the company owed him the same duty in allowing such persons a reasonable time to leave the train as it would had they been passengers upon the train, though they voluntarily offered their services.[7]

Intention to Get Off Not Discovered until after Starting of Train.—Though a conductor does not, till after the starting of the train, know of the desire to get off the train of one who has entered the train to assist a passenger, it is his duty to stop the train for him where the stop at the station was not long enough to allow him to alight, instead of inviting him to jump off the moving train,[7a] but such a person can not complain of the conductor's failure to

6. Injuries while alighting after train started.—Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, 41 Am. & Eng. R. Cas. 158; Johnson *v.* Southern R. Co., 53 S. C. 303, 31 S. E. 212, 69 Am. St. Rep. 849.

Where one boards a train solely for the purpose of assisting an old lady, nearly blind, at her request, to take passage on it, before doing so having approached the conductor, and told him of her condition and need of assistance, and been requested by him to render such assistance, so that the conductor is bound to know of his intention to alight before the train starts, it is the duty of the conductor to give him a reasonable time to alight before starting the train; and not having done so, and such person having in consequence been injured in alighting, without any contributory negligence, after the starting of the train, the carrier is liable therefor. Southern R. Co. *v.* Patterson, 148 Ala. 77, 41 So. 964.

When defendant's passenger train stopped at a station, the plaintiff, with notice to its conductor, and without objection, assisted his daughter and her children to board the train, and at once started to return. When he reached the door the train was moving, and when he stepped on the top step it gave a sudden jerk, which caused him to lose his equilibrum; and he had to jump to keep himself from falling, thereby breaking his leg. The daughter's evidence was that, just after plaintiff left her, the train gave two jerks. One very violent. Held, the evidence was sufficient, to go to the jury on the question of defendant's negligence. Whitley *v.* Southern R. Co., 122 N. C. 987, 29 S. E. 783.

A petition, in an action for personal injuries, stating that plaintiff had assisted his sister on to the train with knowledge of the conductor, and that the conductor signaled the train to start before he had time to alight, and because of a violent jerk plaintiff was thrown from the cars and injured, states a cause of action. Seaboard Air Line R. Co. *v.* Bradley, 54 S. E. 69, 125 Ga. 193, 114 Am. St. Rep. 196.

In an action against a street railroad company for injuries, there was evidence that plaintiff accompanied her daughter into defendant's car; that the daughter told the conductor, who was on the platform, that plaintiff was not a passenger; that plaintiff turned, and proceeded to leave the car, and, as she was stepping off the platform, the conductor rang the bell, and the car started, throwing plaintiff upon the street. Held, that the case should have been submitted to the jury. Rott *v.* Forty Second St., etc., R. Co., 56 N. Y. Super. Ct. 151, 1 N. Y. S. 518.

7. Assistance to enfeebled passenger.—Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443, 41 Am. & Eng. R. Cas. 158.

Where a bystander at a railroad station was directed by a conductor to assist another in putting an invalid on the train it became the conductor's duty, if he knew or had reason to believe that such bystander had gone on the train for the purpose stated, to delay the train a reasonable time to permit him to get off. Bishop *v.* Illinois Cent. R. Co., 77 S. W. 1099, 25 Ky. L. Rep. 1363.

7a. Duty to stop train.—Though a conductor did not, till after the starting of the train, know of the desire to get off the train of one who had given his wife, a passenger, needed assistance in boarding the train, he should, instead of telling him to jump, have stopped the train for him; the stop at the station not having been long enough to allow him to alight, and he being an old man. Johnson *v.* Southern R. Co., 31 S. E. 212, 53 S. C. 303, 69 Am. St. Rep. 849.

Plaintiff boarded a caboose on defend-

admonish him not to get off when his purpose to get off was not discovered until he was in the act of so doing.[7b]

§ 3053. Right to Assume That Train Will Stop for Usual Length of Time.—Where a railroad company or its servants consent to the custom of allowing persons to board its train to assist other passengers, a person who boards a train for that purpose may assume that the train will remain at the station for the usual time and allow passengers to get off, and need not inform those in charge of the train that it is his intention to get off, and if the train does not remain the customary time, and he is injured in making an exit, he may hold the carrier for its negligence.[8]

§§ 3054-3055. Notice of Purpose in Boarding Train—§ 3054. Necessity.—A person who boards a train merely to assist another to a seat must give notice of his intention to get off, to hold the company liable for not giving him time therefor, where the train stops the usual time for passengers to get on and off,[9] since it is the duty of the person boarding a train to assist a passenger to take notice of the usual length of time allowed for persons to board and alight.[10]

§ 3055. Sufficiency of Notice.—It seems that notice given to any of the employees in charge of the train of the purpose in boarding a train by a person assisting passengers is sufficient.[11] Since it is no part of the duty of a brake-

ant's freight train to make inquiries from the conductor concerning his wife, having expected her on that train, and while he was still in the caboose, and waiting for the conductor, the train started. When the conductor came, he demanded that plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out onto the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the sudden lurching of the caboose, after having attempted to re-enter. Held wrongful conduct on the part of the conductor, for which the company was liable if it was the proximate cause of the injury. Great Northern R. Co. *v.* Bruyere, 114 Fed. 540, 51 C. C. A. 574.

In an action against a railroad company for personal injuries, the evidence showed that plaintiff went upon the train to accompany his wife and child; that when the conductor called, "All aboard," he started to leave the train, but found the door of the vestibule locked; that the brakeman first told him he could not get off, and that it would break his neck, but afterwards said to him, "You get off," and opened the door, which he shut again as soon as plaintiff had passed through it to the platform steps. Plaintiff jumped from the train, and was injured; the train then being in rapid motion. Held, that the evidence justified a verdict for plaintiff. Galloway *v.* Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447.

7b. Failure to abmonish person not to get off.—Where a plaintiff, who was a salesman and accustomed to railroad travel, went into a car to seat his wife, and in attempting to leave the car while in motion, on a dark night, was injured, in an action to recover for his injuries he can not complain of the conductor's failure to admonish him not to get off, when the conductor did not know of his purpose to get off until he was in the act of so doing, and then exclaimed to him, "Steady! Be careful!" Berry *v.* Louisville, etc., R. Co., 60 S. W. 699, 22 Ky. L. Rep. 1410, 109 Ky. 727.

8. Assumption that train will make usual stop.—Texas Cent. R. Co. *v.* Hutchingson (Tex. Civ. App.), 132 S. W. 509.

9. Duty to give notice of purpose in boarding train.—Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203; Chesapeake, etc., R. Co. *v.* Paris, 107 Va. 408, 59 S. E. 398.

A father who assisted his daughter aboard a train, without giving to the train crew any indication of his desire to get off again, can not recover for injuries ensuing on his attempt to alight from the train while in motion, and without his having requested the conductor to stop. Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498, 40 Am. & Eng. R. Cas. 690.

10. Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401; Texas, etc., R. Co. *v.* McGilvary (Tex. Civ. App.), 29 S. W. 67; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 21 Am. Rep. 371.

11. Sufficiency of notification to any of carrier's employees.—Texas, etc., R. Co. *v.* Funderburk, 68 S. W. 1006, 30 Tex. Civ. App. 22.

Conductor acting upon statement of porter or brakeman having notice.—Where a person entering a car with a

man to listen to conversations between persons about to get on the train, the occurrence of the conversation does not make it the carrier's duty to hold the train for the one wishing to get off, where he has not heard such conversation, and understood therefrom that one of them was to assist the other on the train, and then get off.[12] The mere fact that a person in charge of children to be placed on a train does not buy a ticket for herself when securing theirs, and that she states that she is sending them to their mother, is not notice that she intends to accompany them into the train and return, so as to require the railroad company to give her notice before starting the train after she has entered it.[13] The fact that a passenger needs assistance does not charge the carrier with notice of the purpose of a person accompanying such passenger on the train to leave the train after rendering the necessary assistance,[14] although under certain circumstances it may do so.[15] The fact that servants of a railroad see a person who accompanied a passenger onto the train walking in the aisle of the car, or coming out on the platform, does not require them to forbear from giving the signal that the train could proceed;[16] and a railroad is not required, as a matter of law, to have a servant stationed at the foot of the steps to hold a train until a person not a passenger can leave the same, when that person only signifies his intention of leaving by his act of alighting.[17] The mere fact that one who accompanied a passenger onto a railroad train descends onto the step of the car was not sufficient to render the conduct of the railroad's servants in starting the train negligence.[18]

§ 3056. Right to Rely on Information by Employee as to Time of Stop.—The practice of passengers and licensees accompanying them of seeking information from the employee placed at the car steps to assist passengers off and on as to the length of the train's stop, which practice is well known to the public and acquiesced in by the carrier, renders the carrier responsible for the information imparted.[19]

passenger states to a porter or brakeman in attendance that he desires to get off, and the conductor, in starting the train, acts upon a statement of such porter or brakeman that it is "all right," the company is chargeable with notice that the person desired to leave the train. Missouri, etc., R. Co. *v.* Miller, 15 Tex. Civ. App. 428, 39 S. W. 583.

12. Notice from conversation.—Gulf, etc., R. Co. *v.* Guess (Tex. Civ. App.), 154 S. W. 1060.

13. Statements made to agent when purchasing ticket.—Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 846, 30 Ky. L. Rep. 1055, 100 S. W. 290, 8 L. R. A., N. S., 1020.

14. Accompanying Passenger as Notice.—Where a train stopped its usual length of time at a station, during which plaintiff, with baggage in her hand and without explaining her purpose, got on the train to assist her grand-children, who were with her and were to be passengers, there was no notice to the trainmen that she did not intend to remain on the train. Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 846, 100 S. W. 290, 30 Ky. L. Rep. 1055, 8 L. R. A., N. S., 1020.

15. Facts held to affect employees with notice of intention.—Where a man boarded a train at four a. m. with an aged lady, leaving another lady who had approached the train with them standing alone beside the track, such facts tend to affect trainmen who observed them together with notice that the man intended to leave the train after assisting the lady aboard. International, etc., R. Co. *v.* Satterwhite, 47 S. W. 41, 19 Tex. Civ. App. 170.

16. Person going on platform.—Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

17. Person descending steps.—Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

18. Person descending steps.—Dunne *v.* New York, etc., R. Co., 91 N. Y. S. 145, 99 App. Div. 571.

19. Right to rely on information by employee as to time of stop.—St. Louis, etc., R. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407.

Where a bystander at a railroad station was directed by a conductor to assist another in putting an invalid on the train, he had a right to rely on the assurance of the conductor that plenty of time would be allowed for the performance of that duty, and to believe that he would, at least, be notified in time to alight from the train in safety. Bishop *v.* Illinois Cent. R. Co., 25 Ky. L. Rep. 1363, 77 S. W. 1099.

§§ 3057-3063. Duties and Liabilities as to Persons on Trains, Cars, Etc.—§§ 3057-3058. Trespassers—§ 3057. Duty Owed In General.—Degree of Care.—A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, as it is in guarding against injuries to passengers.[22] A carrier owes no duty to one who wrongfully intrudes himself into one of its trains except to prevent its servants, while acting within the scope of their employment, from willfully, wantonly, or intentionally injuring such trespassers,[23] the duty to the trespassers resting merely upon grounds of general humanity and respect for the rights of others.[24] The duty owed by a carrier to a passenger on its trains has been expressed as requiring ordinary care and no more.[25]

Liability for Negligence.—A carrier is not liable for injuries arising from negligence merely to a trespasser on its cars.[26] Where deceased was a trespasser on a train, and his presence was not known to the employees, and he had no invitation, express or implied, to be on the train, the railroad company is not liable for his death, though it occurred through the gross negligence of the com-

22. Duty in general.—Fretwell *v.* Seaboard, etc., Railway, 5 Ga. App. 523, 63 S. E. 637; Chicago, etc., R. Co. *v.* Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17; S. C., 44 Ill. App. 124; Highley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

A railroad company is not required to use extraordinary diligence for the safety of one who boards a train at a regular station without having made any effort to procure a ticket, and who, after entering the car, does not inform any of the carrier's servants as to the point to which he desires to be carried, and neither offers to pay his fare nor in any other way calls the attention of the conductor or any other servant of the carrier in charge of the train to his presence, and who only intends to ride to a street crossing in the city in which he entered the train, at which crossing the particular train is not accustomed to stop, and who, without notifying any of the train crew of his intention to leave the train and without asking that it be slowed, attempts to alight therefrom at such a street crossing. Fretwell *v.* Seaboard Air Line Railway, 5 Ga. App. 532, 63 S. E. 637.

23. No duty owed except not to wantonly injure.—Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Morgan *v.* Oregon, etc., R. Co., 27 Utah 92, 74 Pac. 523.

Person hiding on car.—Where a person intentionally hid himself on a car, knowing that he would not be permitted to ride if his presence was discovered, the railroad company owed him no duty of care by reason of any special relation assumed or existing between him and the company, save that it would not willfully or recklessly injure him after discovering him on the train. Farber *v.* Missouri Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350.

Failure to tender fare.—A young lady and her brother, neither of whom had tickets, boarded a railroad train to ride to a station which was not a regular stop for trains, but what is called a flag stop. Before reaching the station the conductor passed through the car and called for tickets, but neither the lady nor her brother tendered tickets nor paid any fare or in any way indicated that they desired to stop at the particular station. Upon arriving at the station the rain stopped, the conductor going to the telegraph office, and the young lady alighted from the train, and as she did so the train started and she fell and sustained injuries thereby. It was held, that the railroad company was not liable as the lady was a mere trespasser on the train, and the company had no notice that she desired to stop at that particular station, and therefore was liable only for misconduct towards her on the part of its employees and agents. See Railroad Co. *v.* Smith, 110 Tenn. 197, 75 S. W. 711.

Riding on brake beam.—Plaintiff's intestate was killed while stealing a ride on the brake underneath defendant's passenger car. Two witnesses testified that, as the train pulled out of the station, they saw him under the car, and that a porter on the train stood on the car steps and appeared to be watching him. The accident occurred before the train had gone 350 yards from the station. Held insufficient to show any ground of liability for the injury sustained. Handley *v.* Missouri Pac. R. Co., 59 Pac. 271, 61 Kan. 237.

24. Upon what duty to trespassers based.—Chicago, etc., R. Co. *v.* Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17.

25. Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

26. Liability for negligence.—Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81; Citizens' St. R. Co. *v.* Merl, 26 Ind. App. 284, 59 N. E. 491.

Where deceased, when killed in a collision, was a trespasser on defendant's train, and the collision was the result of careless conduct of the engineer on one

pany's employees.[27] A common carrier owes a trespasser only reasonable care to avoid injuring him when his presence and his own inability to avoid injury are known to it.[28] A railroad company is liable for gross negligence resulting in injury to a person whose presence on the train is known [29] or should have been known.[30]

Assumption of Risk by Trespasser.—When a trespasser boards a passenger train to steal a ride, he assumes all the risks incident to his undertaking.[31]

Duty as to Persons on Cars Left Standing Near Depot.—Where a railroad company allows passenger cars to remain on a side track near its depot and along a public street, the doors of the cars being open, it is negligence to back other cars against them, for the purpose of coupling, without seeking to ascertain whether there are any persons in the cars, though no person had a right to be in such cars.[32]

Duty to Give Statutory Signals on Starting.—A railroad company owes no duty to give the statutory signals before starting a train standing at a crossing as a person who enters the train for the purpose of making purchase from the fruit vendor thereon, and who is injured in jumping from the train after it has started.[33]

Duty of Street Railway Company.—A street railway company owes no duty to a trespasser on a car, except to refrain from willfully, wantonly, or recklessly exposing him to danger;[34] certainly it owes no more than ordinary dili-

of the trains, defendant is not liable for negligently causing the death, since such engineer violated no duty owing deceased. Feeback *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965.

27. Liability for gross negligence.—Crawleigh *v.* Galveston, etc., R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140.

28. Reasonable care to avoid injury to trespasser in dangerous place.—Citizens' St. R. Co. *v.* Merl, 26 Ind. App. 284, 59 N. E. 491; Southerland *v.* Texas, etc., R. Co. (Tex. Civ. App.), 40 S. W. 193.

Where, in an action against a railroad for the death of a trespasser killed while riding on the steps of a passenger car by being struck by a portion of a viaduct structure, it appeared that the use of the emergency brake is dangerous to passengers, and that after the operatives were informed of the trespasser's presence they took steps to admit him to the car, and that it was as expenditious a means of rescue as to stop the train by means of the emergency brake, the operatives were not negligent in failing to use the brakes. Graham *v.* Chicago, etc., R. Co., 131 Iowa 741, 107 N. W. 595, 7 L. R. A., N. S., 603, 117 Am. St. Rep. 445.

Where one who intended to take a train boarded it while in motion and was obliged to ride on the steps, owing to the vestibule doors being locked being a trespasser, the operatives of the train owed him no duty until his position of danger was made known to them, and their duty then was only to act with reasonable promptness in adopting such means as were available and appropriate to accomplish his rescue. Graham *v.* Chicago, etc., R. Co., 107 N. W. 595, 131 Iowa 741, 7 L. R. A., N. S., 603, 117 Am. St. Rep. 445.

29. Gross negligence after knowledge of trespassers presence.—Where plaintiff was injured through the gross negligence of defendant's trainmen, who had knowledge that he was on the train, defendant is liable for the injury, even if the plaintiff was a trespasser. Everett *v.* Oregon, etc., R. Co., 9 Utah 340, 34 Pac. 289.

30. Plaintiff's intestate, wrongfully, and without the knowledge of the defendant's employees, using a pass belonging to another person, was in a caboose attached to defendant's train. Other cars were backed against the train with such force as to throw deceased against a platform. In a suit for damages charging gross negligence on the part of defendant's servants, the court instructed the jury that if the trainmen knew, or had reason to know, that the caboose was occupied, and yet moved it recklessly or negligently, and in such a manner as that injury to persons who might be in the caboose might reasonably be expected as the direct consequence, and deceased was injured thereby, defendant was liable. Held correct. Way *v.* Chicago, etc., R. Co., 73 Iowa 463, 35 N. W. 525.

31. Assumption of risk.—Morgan *v.* Oregon, etc., R. Co., 27 Utah 92, 74 Pac. 523; Rickert *v.* Southern R. Co., 123 N. C. 255, 31 S. E. 497.

32. Duty as to persons on cars left standing near depot.—Louisville, etc., R. Co. *v.* Popp, 96 Ky. 99, 16 Ky. L. Rep. 369, 27 S. W. 992.

33. Duty to give statutory signals on starting.—Carter *v.* Charleston, etc., R. Co., 64 S. C. 316, 42 S. E. 161.

34. Duty owed by street railway company.—Massell *v.* Boston, etc., R. Co., 78 N. E. 108, 191 Mass. 491; Hagestrom *v.* West Chicago St. R. Co., 78 Ill. App. 574.

gence to a trespasser.[35] It is no part of the duty of a street railway company to prevent a passenger from leaving the car while in motion, still less to prevent a trespasser from so doing.[36]

§ 3058. Trespassing Children.[37]—Where a boy boards a street car and secretes himself with an intention of stealing a ride, he is a trespasser, unless he is discovered, and his presence assented to, either directly or by implication; and an assent by implication does not arise from the fact that the driver sees him and makes no demand for fare, when the driver is neither required nor authorized to collect fares.[38] Employees of a street railway company owe no duty to boys endeavoring to ride without permission and paying fare, save not to injure them wantonly.[39] Employees of a street railway company are under no obligation to keep a lookout to prevent boys, endeavoring to ride without permission and paying fare, from entering its cars while in motion;[40] and a street car company is not liable to children injured in jumping on a moving street car where the servants in charge thereof have no knowledge of the child's actions.[41]

35. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

36. Duty to prevent trespasser from leaving train while in motion.—Brightman *v.* Union St. R. Co., 167 Mass. 113, 44 N. E. 1091.

37. See, also, post, "Children Entering Train, Cars, etc.," § 3061.

38. Boys stealing ride as trespasser.—Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

39. No duty save not to injure wantonly.—Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

Where deceased, a boy over eleven years of age, got on the front platform, and, after riding a short distance on the platform or the steps, let go or fell, and was run over, there is no liability, in the absence of evidence of any conversation between deceased and the driver or of any negligence on the part of the latter. Chave *v.* New York, etc., R. Co., 48 Hun 620, 1 N. Y. S. 264, 15 N. Y. St. Rep. 966.

The evidence in an action for injuries alleged to have been sustained through defendant's negligence showed that plaintiff, a boy ten years old, was carrying water for some third person when defendant's car passed; that, on hearing some one say that the driver wanted him, plaintiff went over to the car, where some man took his bucket, and put it and the boy on the front platform of the car; that the driver repeatedly ordered him off, and at one time put him off; that he got on again, and, after the car had started, jumped off, or was crowded off by passengers, and was thrown under the car and injured. It further appeared that soon after the accident plaintiff said that it was his own fault, and not the driver's. There was nothing to show that the driver knew that plaintiff was still on the car when the accident occurred. Held, that defendant was not guilty of negligence. Wrasse *v.* Citizens' Tract. Co., 146 Pa. 417, 23 Atl. 345.

Newsboys.—A newsboy jumping on an open street car on the side of the car where an adjustable bar is in place, to sell newspapers is a trespasser, to whom the servants in charge of the car owe no other duty than to refrain from willfully or recklessly and wantonly exposing him to injury. Lebov *v.* Consolidated R. Co., 89 N. E. 546, 203 Mass. 380, 26 L. R. A., N. S., 265.

40. Duty to prevent boys from entering cars in motion.—Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

It is not negligence for a railroad company operating small cars on streets by a dummy not to so guard the cars as to prevent a trespassing child under seven years old from getting on and off the cars while being operated, or from falling or being thrown from such cars. Jefferson *v.* Birmingham R., etc., Co., 116 Ala. 294, 22 So. 546, 38 L. R. A. 458, 67 Am. St. Rep. 116.

The driver of a street car, who is in front of a boy when the latter attempts to get on the front platform, is not guilty of negligence in failing to see the boy, since the duty of the driver is to look ahead for obstacles on the track, and attend to his horses. Pitcher *v.* People's St. R. Co., 154 Pa. 560, 26 Atl. 559.

Two street cars were being drawn by a single horse, in charge of a driver on the front platform, from the stables to the repair shops, when the plaintiff, a lad six years old, in play jumped on the rear platform, and fell off or jumped off, sustaining injury. The driver knew nothing of it. Held, that there was no negligence on the part of the railroad company. Bishop *v.* Union R. Co., 14 R. I. 314, 51 Am. Rep. 386.

41. Injury to child while jumping on car.—A street railway company held not to be liable for injury of a child six years old, in attempting to get upon the front platform, while the driver, who was also conductor, was on the rear platform, trying to prevent another boy from hanging on in a dangerous position. Hestonville Passenger R. Co. *v.* Connell, 88 Pa. 520, 32 Am. Rep. 472.

Injury by sudden acceleration of speed.—A street railway company is not liable

Acts Done with Knowledge of Child's Presence Making Carrier Liable.—The duty resting upon the company to employ the proper precautions to avoid injury to children entering its cars would comprehend the exercise of reasonable diligence to guard and shield from danger a child not of age or discretion to understand and appreciate the peril of riding in an unsafe and exposed position.[42] The fact that a boy is a trespasser on defendant's car will not preclude a recovery for his injuries, if the driver, who knew of his presence on the car, did not exercise ordinary care to avoid injuring him.[43] Where a street car conductor, by a sudden gesture and ejaculation, frightens a boy of ten years, who is stealing a ride on the platform, and thereby causes him to fall from the car while it is in motion, the company is liable for the boy's injury.[44] Where a boy riding on a car was willfully and wantonly struck by the driver, and thereby thrown off the car, the car wheel passing over him, the car owners are liable for negligently driving over him.[45]

§§ 3059-3063. Invitees and Licensees—§ 3059. In General.—One whose presence on a railway train is not wrongful may recover for injuries caused by the negligence of the carrier, although he was not a passenger in the ordinary sense of the term.[46] But a railroad company does not owe to a per-

for the death of a boy who is killed in attempting to jump on the rear end of the grip car, by reason of being thrown between the cars by a sudden acceleration of speed, in the absence of evidence that the gripman saw his signal to stop. West Chicago St. R. Co. *v.* Binder, 51 Ill. App. 420.

42. Child riding in dangerous place.—Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

It would generally be negligence to allow such a child to ride upon the steps of the front platform, when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to note his peril palpable neglect and inattention to duty on the part of those having the control and management of the car. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Kelly *v.* Railway Co., 39 Leg. Int. 168.

43. Failure to exercise ordinary care.—Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679.

44. Frightening boy so as to cause him to fall off.—Ansteth *v.* Buffalo R. Co., 9 Misc. Rep. 419, 30 N. Y. S. 197, 61 N. Y. St. Rep. 702, judgment affirmed in 145 N. Y. 210, 39 N. E. 708, 45 Am. St. Rep. 607.

45. Driving over boy thrown from car.—Pittsburg, etc., R. Co. *v.* Donahue, 70 Pa. 119.

46. Duty to person not wrongfully on train.—Gradin *v.* St. Paul, etc., R. Co., 30 Minn. 217, 14 N. W. 881.

Person on train with consent of conductor.—A person riding on a train, not a passenger train, with the consent of the conductor, is not to be deemed a trespasser, and therefore barred of a recovery by his own wrong, at least in the absence of proof that the conductor had not authority to give such permission. Gradin *v.* St. Paul, etc., R. Co., 30 Minn. 217, 14 N. W. 881.

Stockholder on engine by invitation of president.—A person who, while lawfully riding on an engine of a railroad company on their road, is injured by a collision with another engine of theirs, the collision and the injury being occasioned by the gross negligence of the engineer of the other engine, may recover damages of the company for such injury, although the plaintiff is a stockholder in the company, riding by invitation of the president and paying no fare, and although the engineer, whose negligence occasioned the collision, had been expressly forbidden to run his engine over the road at that time. Philadelphia, etc., R. Co. *v.* Derby (U. S.), 14 How. 468, 14 L. Ed. 502.

Person on engine by invitation of brakeman and knowledge of engineer.—Where plaintiff was injured by being thrown from an engine where he had been directed to ride by a brakeman to whom he had paid a sum less than the fare for such privilege, and claimed that the engineer had invited him to climb over the tender into the cab, and that he was thrown by reason of the engineer's negligent act in causing a jerk of the engine, the engineer was bound, if he saw plaintiff, and knew his perilous position, to use ordinary care to avoid doing any act which would probably result in injury to plaintiff, though such act was usual in the proper operation of the train. Claiborne *v.* Missouri, etc., R. Co., 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336.

Injuries from derailment due to negligence.—Defendant's train while going down a grade of sixty feet to the mile, with engine and tender reversed, left the track, and deceased, who was on the train was killed. The roadbed was old, but had not been used till two months before the accident, when it had been covered with six inches of fresh dirt. The

son riding on one of its trains without payment of any fare, merely by sufferance of the conductor in charge of the train, that high and extraordinary degree of care for his personal safety that is due to an ordinary passenger paying the customary fare, it being liable only in such case for injuries occasioned by the ordinary negligence of its employees.[47] A railroad company is liable for negligently injuring persons lawfully on or around its cars, even after its liability as a carrier to them as passengers has ceased, a reasonable time having elapsed for them to leave the train after arriving at its destination.[48] It is not within the scope of the employment of a baggage master connected with a railway train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter and ride on a coach of such train. Permission given under such circumstances can not create the relation of carrier and passenger between the company and the person thus riding on such cars. The company is not liable to such persons for injuries which they may receive, unless for negligence or tortious acts on the part of the company.[49]

Person Having Business on Train.—A railroad owes a duty of care and prudence to a person entering its train for the purpose of tranacting business with the conductor,[50] or to a person accompanying stock, if prudent attention to the stock renders his presence proper.[51]

testimony of several railroad men was that there was no curve within a quarter of a mile, and they were supported by the map of the route. Others testified that within 500 yards there was a curve of two feet, and that there was an extra curve of six inches where the train went off. The testimony as to the danger of running with tender reversed, and also as to the effect of the road being new, was conflicting. The rate of speed testified to was from twelve to fifteen miles an hour, and the highest rate at which, under the circumstances, the train could safely run, was set at from ten to fifteen miles an hour. The actual cause of the accident was not shown. Held, that there was evidence to support a finding of negligence on the part of defendant in operating the train. Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 329.

47. Duty not same as owed to passenger.—Kansas, etc., R. Co. *v.* Berry, 53 Kan. 112, 36 Pac. 53, 42 Am. St. Rep. 278.

Liability for injuries from collision.—It is not within the apparent scope of the employment of a conductor on a train used exclusively for transporting freight to invite persons to ride on his train; and one who accepts such an invitation, with no intention to pay fare, is not a passenger; and the railroad company is not liable to him for an injury sustained by him in a collision while so riding on the train. Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446.

48. Persons on train after relation of carrier and passenger has terminated.—Imhoff *v.* Chicago, etc., R. Co., 22 Wis. 649.

49. Person on train by invitation of baggage master.—Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497.

50. Person transacting business with conductor.—Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

K., to pay twenty-five cents, his fare as passenger on a freight train, handed a $5 bill to the conductor, who promised to return him the balance at the next station, K's destination. K, there left the train, and, seeing the conductor very busy, waited on the platform nearly half an hour without demanding the change, got aboard the caboose car as it was moving off, received the same bill, was told to pay at some future time, jumped off while the train was moving nearly five miles an hour, and was thereby injured. In an action therefor, held, that, at the time of so getting aboard and jumping off while the train was moving, the relation to passenger and carrier did not exist between K. and the company; the obligations of the company towards him were such as existed in his favor, as one of the general public, growing out of the failure of the conductor to return him his money. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

51. Person accompanying stock.—At Minnesota transfer plaintiff delivered to defendant a car in which was his horse, some furniture, and other property, to be transported over its line of road to Sauk Rapids, under a contract by which he agreed to load, unload, and reload, and to feed, water, and attend the stock, at his own expense and risk, while at the company's stock yards or on the cars; and he assumed the duty of securely placing the stock in the cars, and keeping the same securely locked and fastened, so as to prevent the escape of stock. The car arrived at Sauk Rapids in the night. The plaintiff left the car for a few minutes, and, on its being placed on a side track, returned to it, and laid down. Soon after,

Licensees and Invitees on Street Cars.—The only duty owed by a street railroad company to a licensee on one of its cars is not to wantonly or intentionally injure him, or to exercise due care to avert injury after his danger becomes apparent.[52] If a person riding with due care on the platform of a horse car, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the company, is injured through the driver's negligence, the company is liable.[53] A person knowing that a street car sometimes made an extra trip for extra pay, who hails the car on its last trip for the day, and boards it, after it has stopped, for the purpose of negotiating with the car men for an extra trip, is not a trespasser, but is there on the implied invitation of the car men to contract for an extra trip, and hence they are bound to exercise ordinary care and diligence for his safety while on the car.[54]

Duty to Give Warning before Starting Car.—Where is was dangerous to start a car while a person who had boarded it for the purpose of negotiating with the car men for an extra trip was standing on its platform, it was the duty of the car men to give him warning of the intention to start the car, and a reasonable time to get into the car or alight.[55]

§ 3060. Persons on Train in Violation of Rules of Carrier.—A rule of the company, forbidding the carrying of passengers on freight trains, is infringed by the carrying of one from whom no fare is expected or collected.[56] A conductor in charge of a train designed exclusively for the carriage of freight, and operating under rules which forbid the carriage of passengers thereon, can not, by consenting that a person may ride on such train, impose upon the company the duty of exercising towards him the care which it owes to a passenger.[57] And where such person knows he is on the train in violation of the rules of the road, he assumes the risk of accidents.[58] A person entering a train, such as a through freight train, which he knows or has reason to believe is not intended to carry passengers, and on which the rules of the company forbid passengers to ride, can not recover damages for injuries received while on the train, unless they were willfully or wantonly inflicted by the carrier's servants.[59] It has been held that if a person is upon the cars with the knowledge and permission of the company, and by reason of the latter's negligence an injury is occasioned, it

he was injured by an engine running against the car. Held that, although not then a passenger, yet, if prudent attention to his horse rendered it proper for him to be in the car (and of that the jury is to judge), he was rightfully there, and defendant owed him a duty of care to avoid injuring him. Orcutt *v.* Northern Pac. R. Co., 45 Minn. 368, 47 N. W. 1068.

52. Duty owed to licensee on cars.—Birmingham R., etc., Co. *v.* Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A., N. S., 717.

53. Injury to invitee by negligence.—Wilton *v.* Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11.

54. Person boarding car for purpose of negotiating for extra trip.—Brock *v.* St. Louis Trans. Co., 107 Mo. App. 109, 81 S. W. 219.

55. Brock *v.* St. Louis Trans. Co., 107 Mo. App. 109, 81 S. W. 219.

56. Persons on freight train in violation of rules.—Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446.

57. Consent of conductor as imposing on carrier duty owed to passenger.—Baltimore, etc., R. Co. *v.* Cox, 66 O. St. 276, 64 N. E. 119, 90 Am. St. Rep. 583. See, however, Cincinnati, etc., R. Co. *v.* Morley, 4 O. C. C. 559, 2 O. C. D. 706.

Custom to carry old employees not sufficiently shown.—The fact that a person injured in a collision while riding on a freight train in violation of the rules of the company was an old employee of the railroad company, and that some of the conductors had permitted old employees to ride on their freight trains, is not sufficient to establish a custom which would make the company liable to him as a passenger, in the absence of evidence showing that the general officials of the road had notice of the action of the conductors, or that such action had so long continued as to give rise to a presumption of knowledge by these officials, and the railroad company is not liable even if the injured person was a licensee on the train. Powers *v.* Boston, etc., R. Co., 153 Mass. 188, 26 N. E. 446.

58. Assumption of risk of accident.—Railroad *v.* Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549; Railroad *v.* Meacham, 91 Tenn. 428, 19 S. W. 232.

59. No recovery except for injuries wilfully and wantonly inflicted.—Kruse *v.* St. Louis, etc., R. Co., 97 Ark. 137, 133 S. W. 841.

would be estopped from saying that the permission was not granted in pursuance of the lawful rules and regulations of the company.[60] It has also been held that the act of a conductor of a freight train, who is forbidden to carry passengers on his train, in allowing a boy to ride on the train without payment of fare, is within the scope of the conductor's employment, and the railroad company is liable for an injury resulting to the boy from the lack of ordinary care on the part of its servant.[61]

Persons on Hand Car.—A railroad company is not liable for injuries received by one not an employee while riding on its hand car, on which the foreman in charge was forbidden to take any one but an employee.[62] Where a person is on a hand car by invitation of an employee having authority to carry persons in that manner in violation of the rules of the railroad company,[63] the railroad company is liable for an injury caused by failure to use ordinary care.[64] But as to a person so carried, the carrier and its servants are bound to exercise no greater degree of care than is required in carrying passengers for hire on regular trains.[65] While the conductor of a delayed passenger train may provide a hand car—to transport the passengers upon the train under his charge to the place of destination—he is not authorized to receive, transport and discharge other persons than those upon the delayed train, and if he does so and they are

60. Estoppel to deny permission was granted in pursuance of rules.—Lammert *v.* Chicago, etc., R. Co., 9 Ill. App. 388.

61. Permission of conductor within scope of employment—Liability for negligence.—Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410.

Injuries from collision resulting from negligence.—A boy permitted by the conductor of a freight train to ride in a caboose, was asleep when the train parted, and the caboose came to a standstill at the foot of a grade. The train employees failed to give him any warning of approach of a freight train which was flagged only a quarter of a mile from the caboose. A collision occurred, and the boy was injured. Held, that the evidence showed negligence on the part of the train men. Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410.

62. Person riding on hand car.—Houston, etc., R. Co. *v.* Bolling, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 190, 43 Am. St. Rep. 38.

63. Authority of trainmaster to permit person to be carried on hand car.—In an action against a railroad company for personal injury, it appeared that plaintiff was injured while being carried by the company's servants on one of its handcars, by order of the trainmaster. The rules of the company forbade such use of handcars, but it was not shown that plaintiff knew of this rule. The trainmaster had exclusive control of that section of the road, there being no division superintendent; but he himself testified that he had no authority to allow plaintiff to be carried on a handcar. Held, that the evidence justified the jury in finding that the trainmaster had authority to have plaintiff carried on the hand car. International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

In an action to recover damages for personal injuries suffered by plaintiff by being thrown from a handcar of defendant, the evidence showed that plaintiff was riding in the handcar as a passenger by invitation of defendant's trainmaster, and dispatcher, who had charge of all freight and passenger trains, but it was disputed whether handcars and their crews were under his control or that of the general roadmaster. The court instructed the jury that, "according to the undisputed evidence, the plaintiff was on defendant's car, either at the invitation or with the consent of the servants authorized by the general trainmaster of the defendant company," that he was lawfully on the car, and that defendant would be liable for any injury sustained by reason of the negligence of its servants. Held, that it should have been left to the jury to say whether the trainmaster had any authority to give the defendant's consent for plaintiff to ride on the car. International, etc., R. Co. *v.* Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

64. International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

Defective footrest.—Evidence that, while the handcar was running unusually fast, a temporary footrest, improvised for the occasion, gave away, causing plaintiff to fall from the car and be injured, is sufficient to justify a finding that the accident was caused by the failure of the company's servants to use ordinary care. International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

65. No greater care required than for passengers on ordinary train.—International, etc., R. Co. *v.* Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

injured, the railroad company will not be liable.[66]

Persons on Construction Trains.—A person on a construction train with knowledge of a rule prohibiting the carrying of passengers, and who pays no fare, is not a passenger, although the conductor has passively assented to his presence,[67] but the railroad company owes such person at least ordinary care.[68] Where it is customary to carry passengers upon the construction trains, persons having no notice of a contrary rule of the company have a right to assume that the conductor has authority to carry persons on such trains, and that the granting of permission by him falls within his general authority as manager of the train.[69]

§ 3061. Children Entering Trains, Cars, etc.[70]—In an action against a railroad company for injuries to a child on its cars as a licensee, a defendant's liability to the child is not the same as it would be to its employees in and about the same cars.[71] Mere permission or acquiescence of a railway company or its servants a child's presence on a car creates no duty on the part of the railway except to refrain from acts willfully or knowingly injurious to him; and to impose this duty it is necessary for the servants doing the act from which it is claimed the injury resulted to know or have reasonably anticipated that the child was in a position from which the injury caused by the act might flow as a natural consequence.[72]

66. Authority of conductor.—Cincinnati, etc., R. Co. *v.* Morley, 4 O. C. C. 559, 2 O. C. D. 706.

67. Person with knowledge of rule forbiding presence as passenger.—Deceased, on a Sunday, took a seat in a caboose of a construction train on which the conductor had no authority to take passengers. It was made up as the regular weekday trains, there being no other car for passengers, and was manned by the same crew. The advertisement in the papers only mentioned trains on week days, and was silent as to trains on Sundays, but it was not shown that deceased had ever seen the advertisement. The roadmaster testified that on the preceding Saturday one of the deceased, for himself and the others, who lived with him, asked permission of him to go on the Sunday train, but was told that passengers were prohibited on it. It was not shown that this refusal was communicated to the others. The conductor made no objection to the presence of deceased or others in the caboose, but when the train broke down, and it was necessary to drop the caboose, and go on with the flat and box cars only, he told them to get off, as there would be no way for them to get back; but, on their saying that they would take the chances of returning, he said no more; but at a station further on he told them that if they were back in twenty minutes they would not be left. No fare was tendered or asked. Held, that the evidence would not support a finding that they were passengers. Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

68. Duty of ordinary care.—Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

69. Custom to carry passengers on construction trains.—St. Joseph, etc., R. Co. *v.* Wheeler, 35 Kan. 185, 10 Pac. 461.

70. See, also, ante, "Trespassing Children," § 3058.

71. Duty not same as owed to employees.—Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

72. Knowledge of perilous position.—Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

Plaintiff, a boy of seventeen years of age, of reasonable intelligence, being on a freight train by invitation of the fireman, without the payment of fare, was a mere licensee, if not a trespasser, and the defendant railroad company owed him no duty until his danger was discovered; and it was therefore error to instruct the jury to find for plaintiff if the servants in charge of the train saw, "or had reasonable grounds to believe," that plaintiff was about to jump from the moving train, in time to prevent the injury to him, and the company owed plaintiff no duty to stop the train to enable him to get off. Louisville, etc., R. Co. *v.* Thornton, 22 Ky. L. Rep. 778, 58 S. W. 796.

In an action against a railroad company by the parents of A., a boy six years of age, to recover damages, for his death, it appeared from the evidence that A. was standing at the back door of his father's house about ninety feet from the railroad; that a coal train approached, upon the last car of which two small boys were riding by permission of the brakeman; that these boys motioned to A. to join them, whereupon he ran from the house, ascended a flight of eight steps leading up the railroad embankment, and climbed on the said last car; that immediately afterwards his hat fell off, and in his endeavor to re-

Children Entering Street Cars.—See, also, ante, "Trespassers," §§ 3057-3058. It is the duty of street-railway companies to prevent children from entering into their cars, except under proper safeguards.[73] If a child enters a street car upon invitation of the servants in charge, and is injured by the negligence of such servants, the railway company is liable.[74] Where a minor is injured while attempting to alight from the front platform of a moving street car, it is not actionable negligence on the part of the street car company to permit plaintiff to ride on the car, as distinguished from a place on the car which was especially dangerous.[75]

Allowing Child to Ride in Dangerous Place.—As a general rule it is negligence to allow a young child to ride on the steps of the front platform, when his presence in a situation thus exposed to danger is actually known, or the circumstances are such as would make failure to note his peril palpable neglect of duty on the part of those having the control of the car.[76] The parent of a child which was injured while riding by invitation of the driver on the front platform of a horse car, but not for hire, may recover for the loss of the child's services.[77]

Newsboys.—A street railroad company is not liable for damages sustained by a newsboy who is allowed free access to their cars, merely because the injury

cover it he fell under the car and was fatally injured. The brakeman was at the time on the forward bumper of the rear car, and there was no evidence that he saw A. It further appeared that A.'s mother left him in charge of his older sister and told him not to go out, and that while his sister was in a pantry getting something for his breakfast, he went out the back door. Held, that there was no evidence of such negligence on the part of the company's servants as to warrant the submission of the case to the jury, and therefore that a nonsuit was properly granted, although there was nothing in the testimony to warrant the court in holding, as a matter of law, the child was a trespasser in the sense that one of maturer years might have been under the circumstances. Woodbridge *v.* Delaware, etc., R. Co., 105 Pa. 460.

73. Duty to provide proper safeguards.—New Jersey Tract. Co. *v.* Danbech, 57 N. J. L. 463, 31 Atl. 1038.

74. Liability for negligence.—A boy of ten years old entered a car upon the invitation of its conductor, and was thrown from the platform by the carelessness of the driver. Held, that the company was liable. New Jersey Tract. Co. *v.* Danbech, 57 N. J. L. 463, 31 Atl. 1038.

A street railway company is liable for injuries sustained by plaintiff, who got on the front platform at the driver's request to bring him a drink of water, and who was injured while getting off, in consequence of the driver's refusal to slacken speed for him, on the ground that the conduct of the driver was wrongful and within the scope of his employment. Day *v.* Brooklyn City R. Co., 12 Hun 435.

A boy six years old was invited on a street car by the conductor, and in alighting was injured because of the negligence of the latter. Held, that the company was liable in damages for such negligence, though the boy paid no fare. Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090, affirmed in 46 Mo. App. 555.

A street car of the defendant was being driven by a boy, who invited several other boys to get on the car, which they did, riding on the front platform. The driver, who was also conductor of the car, was inside at the time, cautioned the boys to be careful, and afterwards twice ordered them to leave the car. He finally came toward the platform in a threatening manner, and ordered the boys to get off. The boy who was driving, attempting to tighten the brake, was pushed away by the driver. The brake was loosened, and the speed of the car increased, just as one of the boys, becoming frightened, either jumped or fell off the car, and was instantly killed. Held, that the defendant was liable to the parents of the boy, his death being caused by its employee's negligence. Biddle *v.* Hestonville, etc., R. Co., 112 Pa. 551, 4 Atl. 485.

75. Permitting minor to ride as negligence.—Judgment, 79 S. W. 320, reversed in Denison, etc., R. Co. *v.* Carter, 98 Tex. 196, 82 S. W. 782, 107 Am. St. Rep. 626.

76. Permitting child to ride on platform.—Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

It is negligence for the street railway company to permit a child of seven years of age to ride on an uninclosed front platform of a car, whether the child rode as a passenger or gratuitously by permission of the conductor. Kelly *v.* Railway Co., 39 Leg. Int. 168.

Where a child four years old was allowed to ride on the platform of a street car, and stepped or fell off the car while it was in motion, and was injured, the company was liable. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503.

77. Recovery for loss of child's services.—Wilton *v.* Middlesex R. Co., 125 Mass. 130.

might have been prevented by the attention of their servants.[78] Where a newsboy, while clinging to the front platform of a street car, is injured by the derailment of the car, he can not recover damages, in the absence of proof of gross negligence on the part of the railroad company.[79]

Child on Tug Boat.—It is negligence to permit a child aboard a tug boat where there is danger of its being drowned, without taking adequate precautions to avoid all accidents. If the crew of such tug boat permitted a child to come on board without the consent of the child's parents, the fact that it was against the orders of the company owing the boat, and without the knowledge of the officer in charge of the boat, is not sufficient to relieve the company from liability.[80]

§ 3062. Traffic Policeman.—A police officer charged with the duty of regulating movements of street cars and vehicles at a street corner may, to perform his duty, get on a part of a street car where he may expose himself to dangers, and where passengers are not invited or expected to ride.[81]

§ 3063. Volunteer.[82]—A person who performs a service at the request of a railway employee not having authority to make such employment is a volunteer to whom the railway company owes no duty as an employee, passenger, or traveller upon a highway crossed by the railroad.[83]

§§ 3064-3068. Acts and Omissions of Servants and Third Persons for Which Carriers Liable—§§ 3064-3066. Acts of Employees.—See, also, post, "Ejection," §§ 3069-3072.

§ 3064. Lessee of Privilege as Servant.—A lessee or licensee of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers.[84]

§ 3065. Proximate Cause of Injury.—Where a person who was on his way to deposit letters in a railway postoffice on a train, which was then approaching on one track, was called back by the station agent, and requested to deliver railroad letters to the baggage master on the same train at a time when a train was approaching on another track, which such person was required to cross in order to reach the postal car, the act of the station agent did not render the railway company an insurer of such person's safety, but the company is liable for injury to such person while returning, from his errand by the train on the intervening track only if the act of the agent was the proximate cause of the injury.[85]

78. Injuries which might have been avoided by attention of servants.—Fleming *v.* Brooklyn City R. Co., 1 Abb. N. C. 433, affirmed in 74 N. Y. 618.

79. Injury by derailment.—North Chicago St. R. Co. *v.* Thurston, 43 Ill. App. 587.

80. Child on tug boat against rules of company.—Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

81. Traffic policeman.—Ahern *v.* Boston Elev. R. Co., 210 Mass. 506, 97 N. E. 72.

82. See, also, post, "Scope of Employment," § 3066.

83. Volunteer.—Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567.

Shipper of stock performing service.—Where a shipper of stock over defendant's road at the request of the conductor voluntarily goes upon the top of a freight car to help signal, and is injured by a sudden motion of the train, defendant is not liable therefor. Atchison, etc., R. Co. *v.* Lindley, 42 Kan. 714, 22 Pac. 703, 16 Am. St. Rep. 515, 6 L. R. A. 646.

84. Lessee of privilege as servant.—Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328, 38 Am. & Eng. R. Cas. 379.

85. Proximate cause of injury.—Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

§ 3066. Scope of Employment.—A railroad company is not liable to persons not passengers for the acts of its servants not within the real or apparent scope of their duty.[86] Neither is it liable for an assault committed by its servants or agent on a person not a passenger, and having no relation with the carrier, nor in any way encroaching on its rights, unless committed by its authority and under its direction;[87] but a railroad company is liable for assaults made by a conductor while engaged in the business of the railroad company,[88] or for an assault made by a baggage agent upon one while at the depot and engaged in having his baggage checked.[89]

Directing Performance of Service.—If a railroad employee without authority directs a person on the train to perform a service and negligently leads him into danger, such negligence is the employee's and can not be imputed to the railroad company.[90]

§§ 3067-3068. Acts of Third Persons—§ 3067. In General.—A railroad company must exercise reasonable care to prevent danger to an invitee at its station to meet a passenger from vicious practices of third parties of which it

86. Liability for act of engineer and fireman not within scope of duty.—Cooper was allowed to enter and occupy the cab in a freight train. He was not a passenger. The fireman inserted the end of a hose in Cooper's pocket, without his knowledge. The engineer, for amusement, turned hot water into the hose, thinking it was cold water, scalding him. Held, that the acts of the engineer and the fireman were not in the real or apparent scope of their duty, and that the company was not liable for the injury to Cooper. International, etc., R. Co. *v.* Cooper, 88 Tex. 607, 32 S. W. 517, reversing 30 S. W. 470.

87. Assault upon one having no relation with carrier.—Birmingham R., etc., Co. *v.* Mason, 34 So. 207, 137 Ala. 342.

88. Assault by conductor engaged in business of company.—A conductor in charge of a train made up to go to the aid of a wrecked passenger train, who insults and assaults plaintiff, who had come upon the train to ask permission to ride to the wrecked train in order to assist his mother, who was on that train, is engaged in the business of the railroad company, and the company will be responsible for his assault. Yazoo, etc., R. Co. *v.* Shelby, 95 Miss. 155, 48 So. 403.

89. Assault upon one at depot to have baggage checked.—Where one who purchased a ticket, intending to take a train about to arrive, failed to take the train because he did not get his baggage checked in time to be placed thereon, and left the depot premises, intending to take a train the next morning, and afterwards, on the same day, returned to the station to arrange for the checking of his baggage, though he was not at that time a passenger, he could recover of the company for an unlawful assault made upon him by the baggage agent while engaged in such business. Georgia R., etc., Co. *v.* Richmond, 25 S. E. 565, 98 Ga. 495.

90. Directing performance of service.—Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

An infant rode upon a freight car in a freight train, without the consent of his parents, and without the knowledge of the conductor at first, though he afterwards discovered him, and allowed him to remain, without paying fare. A brakeman, without authority, set him at a dangerous service on the car, in trying to perform which he was injured. Held that, conceding that the infant was a passenger, the company was not liable. Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

At a station where defendants' train of cars had stopped, the engine, tender and one car ran down to the watertank in charge of the fireman, who asked a boy ten years old, standing there, to put in the hose and turn on the water. While the boy was climbing upon the tender to comply with the request, some detached cars belonging to the train came down with ordinary force, and struck the car next to the tender, whereby the boy was thrown down and crushed to death. In an action by the parents of the boy, held, that the defendants were not liable. Flower *v.* Pennsylvania R. Co., 69 Pa. 210, 8 Am. Rep. 251.

Service performed under threats of conductor.—The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars. The boy refused, but on being threatened by the conductor, uncoupled the cars, and in doing so was injured. Held, that the railroad company was not liable. New Orleans, etc., R. Co. *v.* Harrison, 48 Mass. 112, 12 Am. Rep. 356.

knows or should know,[91] although it has been held otherwise.[92] A railroad employee's acquiescence in a witness' remark that a certain person was a dangerous character can not charge the railroad company with knowledge of such person's disposition, so as to render it liable for a subsequent assault upon one at a railroad station waiting for an arriving passenger.[93]

§ 3068. Acts of Postal Employees in Throwing Mail Bags from Train.—While a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice, of which it has notice, which is liable to cause injury to passengers and others lawfully on its premises,[94] and where such railroad company knowingly or habitually suffers mail bags thrown upon its passenger platform from rapidly moving trains, it is liable to a person who may be injured thereby, while rightfully on such platform,[95] although the custom had been to throw the bags from the train at a different point on the platform.[96] If the practice is one from which such injury might be reasonably anticipated, it is not necessary, in order to charge the company with this duty, that on some former occasion a like injury had occurred.[97]

§§ 3069-3072. Ejection—§ 3069. In General.—The dominion of a railroad corporation over its trains, tracks, and "right of way" is no less complete or exclusive than that which every owner has over his own property. Hence, the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business.[98] A mere implied license, no matter how long enjoyed, to transact such business, for which no consideration has been paid, is revocable at any time, and such revocation results from notice not to prosecute the business in the future.[99] One who persists in using the li-

91. Acts of third persons—Knowledge of habits.—Blaisdell *v.* Long Island R. Co., 136 N. Y. S. 768, 152 App. Div. 218, reversing order 131 N. Y. S. 14.

Where a railroad company did not take such measure as a reasonably prudent man would have taken to prevent one known to be insane and quarrelsome from coming into its station, it is liable for an assault made by the insane person upon one waiting in the station to meet an incoming passenger. Blaisdell *v.* Long Island R. Co. (Sup.), 131 N. Y. S. 14.

92. Where a husband went to defendant's station with his wife to assist her in boarding defendant's train, but without any intention of himself becoming a passenger, he was only entitled to the rights of a licensee, and was not entitled to recover against the company for an assault or indignity sustained by him at the hands of a disorderly person permitted to remain in the station. Judgment, 67 S. W. 915, reversed in Houston, etc., R. Co. *v.* Phillio, 69 S. W. 994, 59 L. R. A. 392, 96 Tex. 18, 97 Am. St. Rep. 868.

93. Facts charging company with notice.—Blaisdell *v.* Long Island R. Co., 136 N. Y. S. 768, 152 App. Div. 218, reversing order 131 N. Y. S. 14.

94. Duty as to preventing practice of throwing mail bags from moving train.—Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468.

95. Liability for injury.—Williams *v.* Louisville, etc., R. Co., 98 Ky. 247, 32 S. W. 934.

96. Effect of custom to throw off mail bags at different place on platform.—Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346, 94 N. W. 862.

97. Necessity for previous similar injury.—Galloway *v.* Chicago, etc., R. Co. 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468.

98. Right of railroad corporation to exclude persons coming on its premises to transact their private business.—Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 38 Am. & Eng. R. Cas. 379, 2 L. R. A. 843, 12 Am. St. Rep. 328.

This applies to persons selling lunches to passengers, or soliciting orders from passengers for the sale of lunches. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 38 Am. & Eng. R. Cas. 379, 2 L. R. A. 843, 12 Am. St. Rep. 328.

99. Implied license to transact business revocable at any time.—Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 38 Am. & Eng. R. Cas. 379, 2 L. R. A. 843, 12 Am. St. Rep. 328.

While it is doubtless true that a railroad company, by erecting station houses and opening them to the public, impliedly licenses all persons to enter, it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business

cense, after notice of its termination, may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his ex-expulsion from the premises.[1]

§ 3070. From Railroad Stations.—A railroad company may exclude persons from its station, except within a reasonable time before, during, and after the arrival and departure of trains, but may not exercise this right so as to imperil the life or limb of persons in the station.[2] A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers, or interrupt the officers and servants of the corporation in the discharge of their duties.[3] But a railroad company and its station agent are liable for the act of the agent in compelling an intoxicated person to leave the station, if the agent knew that he was in such condition that he would be unable to take care of himself.[4]

§ 3071. From Railroad Trains.—Right of Carrier to Eject in General.—A railroad company may eject from its train a person who is not entitled to be thereon,[5] but is bound to use care in doing so.[6] But in removing a tres-

connected with the road, or with its servants or agents. Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364, following in Cincinnati, etc., R. Co. *v.* Aller, 64 O. St. 183, 60 N. E. 205.

1. One using license after notice of its termination may be forcibly expelled.—Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 38 Am. & Eng. R. Cas. 379, 2 L. R. A. 843, 12 Am. St. Rep. 328.

2. Right of railroad company to exclude persons from its station.—Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. N. W. 21.

3. Authority of superintendent of depot to exclude persons therefrom.—Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

Where the entrance of innkeepers or their servants into a railroad depot, to solicit passengers to go to their inns, is an annoyance to passengers, or a hindrance and interruption to the railroad officers in the performance of their duties, the superintendent of the depot may make a regulation to prevent persons from going into the depot for such purpose; and if they, after notice of such regulation, attempt to violate it, and, after notice to leave the depot, refuse so to do, he and his assistants may forcibly remove them, using no more force than is necessary for that purpose. Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

If a person in the waiting room of a railway station, not for the purpose of waiting for a train, is noisy, drunken, and profane, or otherwise disorderly, it is the right and duty of the railway company's station agent, upon his refusal to leave the room, to remove him, using no more force than is reasonably necessary for that purpose. Johnson *v.* Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543.

In Massachusetts it has been held that the superintendent of a railroad depot has not a right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the railroad corporation, or had conducted himself offensively towards the superintendent. Hall *v.* Power (Mass.), 12 Metc. 482, 46 Am. Dec. 698.

But in Iowa it has been held that the waiting room in a railroad station is for the accommodation of incoming and outgoing passengers, and not a place of resort for the general public, and, though one entering it not as a passenger or on business with the company is not to be regarded as a trespasser, yet, upon a request to leave, it is his duty to do so, whether disorderly or not, and upon his refusal to go it is the right of the station agent to eject him, using such force as is reasonably necessary. Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

4. Ejection of intoxicated person from station.—Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

In an action for the ejection of an intoxicated person from a railroad station under such circumstances as to endanger his life or limb, proof that the station agent offered to take him home with him does not excuse the company or the agent, where, to the knowledge of the agent, the other was in such a condition that he did not understand the offer. Adams *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 21.

5. Railroad company may eject from train one not entitled to be thereon.—Higgins *v.* Southern R. Co., 98 Ga. 751, 25 S. E. 837; Georgia R. Co. *v.* Baldoni, 115 Ga. 1013, 42 S. E. 364; Brunswick, etc., R. Co. *v.* Bostwick, 100 Ga. 96, 27 S. E. 725; Wenz *v.* Savannah, etc., R. Co., 108 Ga. 290, 33 S. E. 970.

6. Care must be used in ejection.—Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37.

passer from a train, the employees in charge thereof may use such force as appears reasonably necessary to effect their purpose.[7]

Who Are Trespassers Liable to Ejection.—A person on a railroad train who has no valid ticket, and who refuses to pay his fare, is a trespasser, and may be ejected in a proper manner.[8] Where certain persons attempt to procure passage in a stock car, some of whom have transportation and others not, those holding transportation and refusing to show the same when demanded by the conductor, and those refusing to pay fare when demanded, become trespassers and subject themselves to ejection.[9]

Right of Carrier to Call Police to Eject Trespassers.—Where the ordinary agents of a carrier at one station have failed to eject certain trespassers from a stock car, and there is reason to expect the same and as effective opposition at the succeeding station, resulting either in delaying the train or compelling the car to be set out for daylight, the carrier is entitled to call the local police to eject the trespassers from the car.[10] Where a carrier's train dispatcher, having authority to eject trespassers from trains, calls the local police of a city to assist in so doing, the police act as agents of the carrier, which is liable for any excesses.[11]

Authority to Employees and Liability of Carrier for Their Acts.—As a general rule the conductor of a railroad train has the general control and management of his train, and it is necessary, as well for the protection of the interests of the railroad company as for the security of the persons and property intrusted to his care, that he should have authority to eject trespassers from the cars under his control. Therefore, he has an implied authority to do so.[12] It

7. Employees may use such force as appears reasonably necessary.—Clark *v.* Great Northern R. Co., 79 Pac. 1108, 37 Wash. 537.

The holder of a thousand mile railroad commutation ticket, expressed to be "good for six months only," after that period had elapsed, having first obtained legal advice that the ticket was good till the thousand miles were traveled, and before the ticket was exhausted, took his seat in the baggage car of a train, refused payment of fare otherwise than by offering his ticket, and was forcibly ejected from the train. Held, that upon entering the car he did not become a passenger, but was a trespasser, and, upon his refusal to get off might be ejected, with the use of any force necessary to that end. Lillis *v.* St. Louis, etc., R. Co., 64 Mo. 464, 27 Am. Rep. 255.

8. Who are trespassers liable to ejection.—Texas, etc., R. Co. *v.* McDonald, 2 Texas App. Civ. Cas., § 163; St. Louis, etc., R. Co. *v.* Fussell (Tex. Civ. App.), 97 S. W. 332; Texas, etc., R. Co. *v.* Casey, 52 Tex. 112; Gulf, etc., R. Co. *v.* Bunn, 41 Tex. Civ. App. 503, 95 S. W. 640; Daley *v.* Chicago, etc., R. Co., 145 Wis. 249, 129 N. W. 1062, 32 L. R. A., N. S., 1164.

Plaintiff, having been ejected from defendant's train in a proper manner on refusal to pay fare, passed to the rear of the train, and as it started from the station plaintiff climbed up on the steps of the rear coach under the drop cover, which was then down, and rode for some time, when a brakeman discovered him, raised the cover, and ordered him to come up onto the platform, as the brakeman testified, or pushed him off the platform, as plaintiff testified. Held that, after plaintiff had been ejected, he was a trespasser to whom the railroad company owed no duty except to protect him from injury after his presence was discovered. Cincinnati, etc., R. Co. *v.* Brandenburg, 135 S. W. 296, 142 Ky. 814.

9. Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

Where B. was permitted to ride in a stock car of a fast freight line to the first division point on his promise he would there buy a ticket, and he failed to do so, but attempted to continue his transportation in the car without right, he was a trespasser, though he was the owner of some of the horses being shipped in the car under contract between the carrier and another, and was therefore subject to ejection. Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

10. Circumstances entitling carrier to call police to eject trespassers.—Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

11. Carrier liable for excesses of police.—Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

12. Conductor has implied authority to eject trespassers.—Marion *v.* Chicago, etc., R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687; Hoffman *v.* New York, etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337, affirming 46 N. Y. Super. Ct. 526; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; Hamil-

follows that if his mode of ejection is wrongful, or he is guilty of excesses, the railroad company will be liable therefor.[13] But it has been held that a railroad company is not liable for the act of a conductor in ejecting a trespasser from a train if the conductor acts maliciously.[14] The authority of a conductor to eject a passenger refusing to produce a ticket or pass, or pay fare, conferred on him by a rule of the carrier, includes authority to eject a trespasser refusing to produce a ticket or pass, or pay fare.[15] If assistants employed by the conductor of a railroad train to expel a trespasser from the car strike such person unjustifiably in expelling him, the railroad company is liable, though the blows were struck against the conductor's orders.[16] A brakeman has implied authority to remove from his train, in a lawful manner, a trespasser found on a car platform;[17] and where he uses unnecessary force,[18] or where he wantonly and recklessly pushes the trespasser from the train while it is going at a dangerous rate of speed, the carrier is liable for the injury.[19] The fact that a brakeman had no instruction from the conductor to beat a trespasser does not free the railroad company from liability for a willful injury inflicted by the brakeman in the attempted discharge of his duty of ejecting the trespasser from the train.[20] But it has been held that where a brakeman, who has authority to remove trespassers from a train only upon orders of the conductor, does so without such orders, the act is not in the scope of his employment, and consequently the railroad company is not liable for the injury caused thereby.[21] If a brakeman kicks a person who

ton *v.* Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594; Daley *v.* Chicago, etc., R. Co., 145 Wis. 249, 129 N. W. 1062, 32 L. R. A., N. S., 1164.

13. Railroad company liable for wrongful acts of conductor.—A railroad company is liable for a wrongful expulsion of a trespasser on the platform of a car by a conductor, where he did not exercise his authority to accomplish a purpose of his own, though his act was reckless, illegal, and a breach of duty. Hoffman *v.* New York, etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337, affirming 46 N. Y. Super. Ct. 526.

Where the conductor of a railroad train, acting in the line of his duty, ejects from the platform of a car a person who has no right thereon, the company is liable if he has done it in a careless, negligent or reckless manner. Pennsylvania Co. *v.* Toomey, 91 Pa. 256.

Plaintiff, who was confessedly a trespasser on a passenger train, had been twice ejected. He again climbed to the rear steps of the last coach, when the conductor, coming from inside the vestibule door, seized him by the collar, and slapped and beat him with his hand. The train was again stopped, and plaintiff ejected. Held, that the beating administered by the conductor was within the scope of his authority as agent of the railroad company, so as to render it liable therefor. Hamilton *v.* Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594.

14. Railroad company not liable if conductor acts maliciously.—Pennsylvania Co. *v.* Toomey, 91 Pa. 256.

15. Rule of carrier authorizing conductor to eject trespasser refusing to produce ticket or pay fare.—Daley *v.* Chicago, etc., R. Co., 129 N. W. 1062, 145 Wis. 249, 32 L. R. A., N. S., 1164.

16. Liability of railroad company for acts of assistants employed by conductor.—Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

17. Brakeman has implied authority to eject trespasser found on car platform.—Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72; McKeon *v.* New York, etc., R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437; Hoffman *v.* New York, etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337, affirming 46 N. Y. Super. Ct. 526.

18. Carrier liable if brakeman uses unnecessary force.—Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72.

If a brakeman kicks a person who is illegally attempting to board a train, the railroad corporation is responsible. Molloy *v.* New York, etc., R. Co. (N. Y.), 10 Daly 453.

19. Liability of carrier where brakeman pushes trespasser from train.—McKeon *v.* New York, etc., R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437.

Though one is a trespasser, a carrier is liable for an injury sustained by the malicious and willful act of its brakeman in expelling him from a train. St. Louis, etc., R. Co. *v.* Kilpatrick, 54 S. W. 971, 67 Ark. 47.

20. Liability of carrier where brakeman beats trespasser without instruction from conductor to do so.—Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

21. Ejection of trespassers by brakeman who has authority to act only upon orders of conductor.—Marion *v.* Chicago, etc., R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687.

Rule of carrier construed not to au-

is not on a train, and not attempting to board it, the carrier is not liable for the injury.[22] Where the rules of a railroad company conferred on the conductor the authority to eject trespassers, and required the baggageman to inform the conductor of trespassers on the train, and to aid in ejecting trespassers when called on by the conductor, the jury can find that the baggageman, who, without calling on the conductor, or waiting for his orders, expelled a trespasser and used excessive force, acted within the scope of his employment, though outside the express authority conferred on him, so as to hold the company liable for his wrongful act.[23] Where a baggage man collusively agreed to carry a person who had no intentions of paying his fare, the company is not liable for injuries caused by the baggage man forcing him to jump from the moving train.[24] Where a flagman, whose duty it is, on discovering a trespasser on a train, to take him to the conductor, and then, if so directed, to stop the train, and put him off, ejects a trespasser on his own responsibility while the train is in motion, the company is liable for the resulting injury.[25]

Degree of Care Required in Ejecting Trespasser.—In expelling a trespasser, the carrier, through his servants, is bound to exercise reasonable care to avoid unnecessary injury to the person expelled; and, for an injury which arises from failure to use such care, the carrier will be liable in damages.[26]

Liability of Carrier Where Ejection Is Made in a Reckless and Wanton Manner.—Though a person riding on a train is a trespasser, the railroad com-

thorize brakemen to eject trespassers generally.—A rule of a railroad company, reciting that brakemen are under the immediate orders of the conductor or yard master, with whom they serve, and must give him their assistance in the performance of his duty, and that they are to ask and receive from him all instructions necessary as to their duties, and that in general they are the servants and guardians of the train to do all the work required during its trip and to protect it from danger, does not authorize freight brakemen to eject trespassers generally. Lake Shore, etc., R. Co. *v.* Peterson, 42 N. E. 480, 43 N. E. 1, 144 Ind. 214.

Ejection of trespassers by brakemen held a violation of regulations of carrier.—Where the regulations of a railroad company required its brakeman to report trespasses on trains to the conductors, and it appeared that, when the conductor was acting as freight conductor on another division of the company's road, the brakemen were in the habit of expelling trespassers from the train without orders from him, and it was done in his sight and hearing, and with his approbation, the jury should be instructed that if they believe that the brakemen on the train run by such conductor were in the habit of expelling trespassers from the trains without orders from the conductor, or in his sight or hearing, and with his approval and consent at the time, such expulsions must be construed as a violation of the rules and regulations of the company requiring its brakemen to report such trespassers to its conductors. Chesapeake, etc., R. Co. *v.* Anderson, 25 S. E. 947, 93 Va. 650.

22. Assault by brakeman on one who is not on train, nor attempting to board it. Molloy *v.* New York, etc., R. Co. (N. Y.), 10 Daly 453.

23. Liability of carrier for acts of baggageman in ejecting trespassers.—Daley *v.* Chicago, etc., R. Co., 129 N. W. 1062, 145 Wis. 249, 32 L. R. A., N. S., 1164.

24. Yazoo, etc., R. Co. *v.* Anderson, 25 So. 865, 77 Miss. 28.

25. Liability of carrier where flagman ejects trespasser from moving train.—Southern R. Co. *v.* Hunter, 21 So. 304, 74 Miss. 444.

26. Carrier bound to exercise reasonable care to avoid unnecessary injury.—Klenk *v.* Oregon, etc., R. Co., 76 Pac. 214, 27 Utah 428.

The degree of care required of a railway company in ejecting a trespasser from its train is such as considerations of humanity would demand, and the authorities do not place the degree of care upon a lower plane than that of reasonable and ordinary care. Houston, etc., R. Co. *v.* Grigsby, 13 Tex. Civ. App. 639, 35 S. W. 815, 36 S. W. 496, affirmed in 93 Tex. 710, no op.

In ejecting from a railway car a trespasser, care must be taken that it be not done in such manner as to endanger his life or limbs. Where such care is not taken, it is negligence, for which the company is answerable. Biddle *v.* Hestonville, etc., R. Co., 112 Pa. 551, 4 Atl. 485.

But in Illinois it has been held that a railroad company is liable to a trespasser for injuries sustained by his ejection only when such injuries result from the wanton or willful act of its servants; and that a charge authorizing recovery if the carrier's servants failed to exercise due care in such ejection is erroneous. Judgment, 78 Ill. App. 236, reversed in Wabash R. Co. *v.* Kingsley, 52 N. E. 931, 177 Ill. 558.

pany has no right recklessly and wantonly to inflict injuries on him,[27] and if the servants of the company acting within the scope of their authority eject a trespasser from the train in a reckless and wanton manner, the company will be liable in damages for the resulting injury.[28]

Liability of Carrier Where Unnecessary Force Is Used.—If a carrier, through the medium of a servant acting within the scope of his authority, uses unnecessary force to remove a trespasser from a train it will be liable for the resulting injuries.[29] But in such case the jury should not weigh with too much nicety the degree of force used.[30]

Liability of Carrier Where Trespasser Is Ejected from a Moving Train.—A carrier, before ejecting from its train one who has no right to be there, must so reduce the speed of the train as to insure his safety, or must take him to the next stopping place.[31] If the servants of a carrier, acting within the scope of their authority, ejects a trespasser from a train while it is moving at such a rate of speed as to endanger the life or limb of the person ejected, the carrier will be liable for the resulting injury.[32] In such case the use of actual force in the

27. Liability of carrier where ejection is made in a reckless and wanton manner.—Planz *v.* Boston, etc., R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

28. Southern R. Co. *v.* Wideman, 119 Ala. 565, 24 So. 764; Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Wabash R. Co. *v.* Kingsley, 177 Ill. 558, 52 N. E. 931, reversing 78 Ill. App. 236; McKeon *v.* New York, etc., R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep 437.

Plaintiff boarded a caboose on defendant's freight train make inquiries from the conductor concerning his wife, having expected her on that train, and while he was still in the caboose, and waiting for the conductor, the train started. When the conductor came, he demanded that plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out onto the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the sudden lurching of the caboose, after having attempted to re-enter. Held wrongful conduct on the part of the conductor, for which the company was liable if it was the proximate cause of the injury. Great Northern R. Co. *v.* Bruyere, 114 Fed. 540, 51 C. C. A. 574.

29. Liability of carrier where unnecessary force is used.—Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72; Pledger *v.* Chicago, etc., R. Co., 69 Neb. 456, 95 N. W. 1057; Texas, etc., R. Co. *v.* Mother, 5 Tex. Civ. App. 87, 24 S. W. 79, affirmed in 93 Tex. 674, no op.

A railroad company is liable for damages for kicking or throwing a trespasser off a train, or for using more force than is reasonable or apparently necessary to eject him. Louisville, etc., R. Co. *v.* Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871.

Where a trespasser riding on top of a freight car was assaulted by the conductor while attempting to get off in obedience to the conductor's order, and there was no evidence showing that he was trying to break into the car, it was not error of which defendant could complain to instruct that though plaintiff was on the car without right and attempting to break into it, yet if the conductor used more force than was necessary to eject him and keep him from breaking into the car, the defendant company would be responsible for the damages resulting to plaintiff from the assault. Southern Pac. Co. *v.* Bender, 24 Tex. Civ. App. 133, 57 S. W. 574, affirmed in 94 Tex. 707, no op.

30. Clark *v.* Great Northern R. Co., 79 Pac. 1108, 37 Wash. 537.

31. Duty of carrier before ejecting trespasser from train.—Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

32. Liability of carrier where trespasser is ejected from moving train.—If a carrier expels a trespasser from a train while it is moving at a dangerous rate of speed, it will be liable for the resulting injuries. Pledger *v.* Chicago, etc., R. Co., 95 N. W. 1057, 69 Neb. 456.

A railroad company is liable to a trespasser for injuries received by being wantonly and willfully thrown from a moving train by its servants acting within the scope of their employment. Southern R. Co. *v.* Wideman, 119 Ala. 565, 24 So. 764. See, also, Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28.

The forcible ejection by a conductor of a trespasser from a rapidly moving train is a tort, and the railroad company is liable for resulting injuries. Williams *v.* Louisiana R., etc., Co., 46 So. 528, 121 La. 438.

A railroad company is liable for the act of its conductor in requiring a boy sixteen years of age, with show of force, to leap from a car while the train was going at a rate of speed rendering it unsafe for him to leave the car, although the latter had entered the car wrongfully and as a trespasser for the purpose of riding with-

ejection is not essential to render the carrier liable. If the carrier's servant, acting within the scope of his employment, by peremptory order and threats, causes the trespasses to get off the moving train when it is dangerous to do so, the carrier will be liable.[33]

Drunkenness of Trespasser No Defense.—Where a trespasser is ejected from a train at a place where it is dangerous for him to alight, it is no defense that the trespasser was drunk, and thus contributed to his injury; as that made it the more incumbent on the servants of the railroad company to see that he had a safe place to leave the train.[34]

Where Trespasser May Be Ejected.—A trespasser may be ejected from a train, after it has stopped, at a place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but in such an ejection the railroad company is not required to have consideration for the mere convenience of the wrongdoers.[35] But a trespasser on a railroad train should not be ejected at night at a perilous place for alighting.[36]

out paying his fare. Kline *v.* Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

A brakeman on a passenger train has authority to remove from the platform one who is stealing a ride, so that, if he wantonly and recklessly pushed him from from the train while it was going at a dangerous rate of speed, the carrier is liable for the injury. McKeon *v.* New York, etc., R. Co., 67 N. E. 329, 183 Mass. 271, 97 Am. St. Rep. 437.

A railroad company is liable for an injury resulting from the act of a brakeman on a freight train in forcibly putting a trespasser off the train while it was in motion, the act being within the scope of his authority. Louisville, etc., R. Co. *v.* Moss, 13 Ky. L. Rep. 684.

Where a brakeman, in removing a trespasser, kicks him from the train while it is in rapid motion, the company is liable for injuries caused thereby, the act being within the scope of the brakeman's employment. Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72.

Plaintiff, a boy eight years old jumped upon defendant's passenger car to catch a ride and was kicked from the car by the conductor or a brakeman, while the train was running ten miles an hour, and was injured. Held, that a verdict for plaintiff was warranted. Hoffman *v.* New York, etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337.

Where a boy of fourteen, even though he be trespassing, is forcibly ejected from a moving railroad train by a person for whose actions the company is responsible, and thereby loses an arm, the company will be held liable in damages. Jackson *v.* St. Louis, etc., R. Co., 28 So. 241, 52 La. Ann. 1706.

33. Use of actual force not essential to render carrier liable.—In an action for damages for injuries sustained by a forcible ejection from a railroad car, while in motion, proof that the conductor ordered the plaintiff to get off, and accompanied such order with a show of force sufficient to impress him with the belief that it would be employed, thereby compelling him to jump from the car, is equivalent to proof of the employment of actual force. Kline *v.* Central Pac. R. Co., 39 Cal. 587.

Plaintiff was sitting on a box car, which was standing in defendant's yard. An engine was attached to the car without his observing it, and the train was moved away. A person came to plaintiff, and ordered him to leave the train, using violent and threatening language, in consequence of which plaintiff leaped from the car while it was in rapid motion, and was injured. Held, that it was proper to charge that if defendant's servant, within the scope of his employment, by peremptory order and threats, caused plaintiff to get off the car when it was dangerous to do so, defendant was liable. Gulf, etc., R. Co. *v.* Kirkbride, 79 Tex. 457, 15 S. W. 495.

34. Drunkenness of trespasser no defense.—Louisville, etc., R. Co. *v.* Gatewood, 14 Ky. L. Rep. 108.

35. Where trespasser may be ejected.—Atchison, etc., R. Co. *v.* Gants, 17 Pac. 54, 38 Kan. 608, 5 Am. St. Rep. 780.

The lawful expulsion of a person entering a train without having purchased a ticket, and persistently refusing to pay his reasonable fare, may be at a place other than a railroad depot, or usual stopping place, provided care is taken not to expose him to serious injury or danger. Railroad Co. *v.* Skillman, 39 O. St. 444; New York, etc., R. Co. *v.* Willing, 14-24 O. C. D. 474, 5 O. C. C., N. S., 137; Guy *v.* P., C., C. & St. L. R. Co., 6 N. P. 3, 9 O. Dec. 23. And see Railway Co. *v.* Valleley, 32 O. St. 345, 30 Am. Rep. 601.

A trespasser on a freight train may be put off by the railroad company at any point on its road, if no unnecessary violence is used. Louisville, etc., R. Co. *v.* Moss, 13 Ky. L. Rep. 684.

36. Young *v.* Texas, etc., R. Co., 25 So. 69, 51 La. Ann. 295.

§ 3072. From Street Cars.—Who Are Trespassers Liable to Ejection.—One who boards a street car with no intention to pay fare, and who does not pay fare when requested, and who refuses to leave the car on demand, is a trespasser, and the carrier owes to him only the duty of not unnecessarily and intentionally injuring him.[37] Where a passenger boards an electric car going in the direction he desires to travel, but not to his destination, owing to his own mistake in taking the wrong car, he is required to leave the car on the conductor's request that he do so at the end of its journey, notwithstanding the conductor's refusal to give him a transfer to another car on which he may complete his journey for the same fare, and, on his refusal to do so, he becomes a trespasser subject to ejection.[38] As to whether newsboys boarding street cars are trespassers, see post, this section.

Authority of Employees and Liability of Carrier for Their Acts.—A motorman in charge of a street car has the right to eject from the car a trespasser, provided he uses proper care in doing so.[39] But the motorman of a street car, whose only duty is to operate the machinery, is not within the scope of his employment in ejecting a boy who is trying to ride on the running board of the car.[40] The act of the conductor of a street car, while collecting fares, in wrongfully ejecting a person therefrom, is within the general scope of his employment, and the carrier is liable for damages, though the act is wanton and malicious.[41] But when one not entitled to passage refuses to alight, insultingly challenges the conductor to put him off, and violently assaults the conductor upon his proceeding in a lawful manner to make the expulsion, and the latter thereupon resorts to great and unnecessary violence, the carrier will not be liable for personal injuries thus inflicted, provided the assault upon its servants was such as to excite his passions, and render him unfit for properly perfroming his duties.[42] Where a car greaser employed by an electric railroad company commits an assault on a passenger who has become a trespasser in endeavoring to eject him from a car, the greaser's act is not within the scope of his employment, so that the carrier is not responsible therefor, unless what is done is to assist the conductor, at his express or implied request.[43]

Degree of Care Required in Ejecting Trespassers.—A street car company in ejecting trespassers from its cars is required to act in a prudent manner, and with due regard for the safety of the trespassers, and if its employee, acting within the scope of his employment in ejecting a trespasser, fails to exercise such care and the trespasser is injured, the company will be liable therefor.[44]

Liability of Carrier Where Trespasser Is Ejected from Moving Car.—If an employee of a street railroad company, acting within the scope of his au-

37. **Who are trespassers liable to ejection.**—Garrett *v.* St. Louis Trans. Co., 118 S. W. 68, 219 Mo. 65, 16 Am. & Eng. Ann. Cas. 678.

38. Mills *v.* Seattle, etc., R. Co., 96 Pac. 520, 50 Wash. 20, 19 L. R. A., N. S., 704.

39. **Authority of motorman.**—Nussbaum *v.* Louisville R. Co., 57 S. W. 249, 22 Ky. L. Rep. 271.

40. Drölshagen *v.* Union Depot R. Co., 85 S. W. 344, 186 Mo. 258.

41. **Authority of conductor and liability of carrier for his acts.**—North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481, affirming 27 Ill. App. 518.

42. City Elect. R. Co. *v.* Shropshire, 28 S. E. 508, 101 Ga. 33.

43. **Authority of car greaser and liability of carrier for his acts.**—Mills *v.* Seattle, etc., R. Co., 96 Pac. 520, 50 Wash. 20, 19 L. R. A., N. S., 704.

44. **Degree of care required in ejecting trespassers.**—North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481, affirming 27 Ill. App. 518.

Even if one on a street car was a trespasser, the driver was not justified in removing her from the car with utter disregard of her personal safety. Barre *v.* Reading City Pass. R. Co., 155 Pa. 170, 26 Atl. 99.

But in New Jersey it has been held that where plaintiff attempted to board a street car when the "car full" sign was displayed, and was prevented from doing so by the negligent act of the conductor, plaintiff was a trespasser and could not recover, since the carrier did not owe plaintiff the duty to exercise reasonable care. Lerner *v.* Public Service R. Co., 83 N. J. L. 64, 84 Atl. 618.

thority, ejects from a car a trespasser, or one not entitled to ride on the car, or compels such person to get off, while the car is moving at such a rate of speed as to render it dangerous to get off, the company will be liable for any injury that results therefrom.[45] But where the driver of a feed car running on a street railroad allowed boys to ride free on the platform at his side, and upon their becoming troublesome, ordered them to get off, slackening the mule to a walk, but not touching or threatening them, and thereupon one pushed the other, an intelligent, active boy, eleven years old, and he fell under the car and was killed, it was held that the railroad company was not liable for the injury.[46]

Liability of Carrier for Ejection of Newsboys.—A newsboy jumping on and off a moving street car to sell his newspapers is in no sense a passenger, and the carrier is not under obligation to observe towards him the same degree of care that the law requires to be observed towards a person in the hands of the carrier to be transported.[47] But where, according to a general custom, newsboys are permitted to go on street cars to sell and deliver papers, a newsboy is not a trespasser while on a car selling a paper, unless his right to remain on the car has been terminated by reasonable notice.[48] It has been held, however, that a street railroad company, sued for injuries received by a newsboy ordered from a car by the motorman in charge thereof, is not bound by the acts of other conductors and motormen allowing the boy to get on the cars, in the absence of proof that the company knew the fact and acquiesced in the violation of its rules.[49] Where, after a car has started, the conductor orders a newsboy to leave the car while it is running at a hazardous speed, and under the influence of

45. Liability of carrier where trespasser, or person not entitled to ride, is ejected from moving car.—Where plaintiff boarded a running board of street car while the car was being switched from one track to the other, and was ordered by the conductor to jump from the car after it was in rapid motion, whereupon he jumped onto a pile of sand, which gave way and precipitated him under the car, by which he was injured, a verdict in favor of plaintiff was supported by the evidence. Richmond Tract. Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

While the driver and conductor of a "bob tail" car was inside collecting fares, a boy who was driving invited a party of boys, of whom deceased was one, to get on the car. The conductor thereafter shoved one of them off the car, and compelled the rest to get off while the car was in motion. Deceased, in attempting to do so, fell, and was killed. Held, that the company was liable, though deceased was a trespasser. Hestonville, etc., R. Co. *v.* Biddle (Pa.), 16 Atl. 488, 1 Monag. 553.

A boy ten years old, alone in the street after dark, who wrongfully gets upon the platform of a horse car and is not immediately expelled, may maintain an action against the railroad company to recover for injuries sustained by him by reason of leaving the car in obedience to an order of the driver, when it is moving at such a rate that the attempt to get off is dangerous, if he exercises reasonable care. Lovett *v.* Salem, etc., R. Co. (Mass.), 9 Allen 557. See, also, McCahill *v.* Detroit City Railway, 96 Mich. 156, 55 N. W. 668.

The evidence in an action for damages showed that plaintiff, a girl between eleven and twelve years old, jumped on the front platform of a street car of defendant, and that while holding the grab handles the driver, after whipping up his horses, hit her on the hands, and, failing to loosen her hold, violently pushed her off the step, and that she fell under the car and was run over. Held, that the court rightly charged that, if the injury occurred in that way, defendant was liable. Barre *v.* Reading City Pass. R. Co., 155 Pa. 170, 26 Atl. 99.

In an action to recover for personal injuries received through the wrongful acts of defendant's motorman, in increasing the speed of the car on which plaintiff was riding without permission, and then compelling him to jump off, instructions that, if plaintiff was a trespasser, he could not recover, were properly refused. Washington, etc., R. Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391.

46. Lott *v.* New Orleans, etc., R. Co., 37 La. Ann. 537, 55 Am. Rep. 500.

47. Newsboy not entitled to rights of a passenger.—Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

48. Effect of custom permitting newsboys to go on cars.—Indianapolis St. R. Co. *v.* Hockett, 67 N. E. 106, 161 Ind. 196.

A command given by a conductor to a newsboy on the car to get off, which he did not hear, would not operate to terminate his right to be on the car. Indianapolis St. R. Co. *v.* Hockett, 67 N. E. 106, 161 Ind. 196.

49. Carrier not bound by acts of employees allowing newsboy to get on cars.—Massell *v.* Boston, etc., R. Co., 78 N. E. 108, 191 Mass. 491.

fear, while attempting to comply with the order, the boy is injured without fault on his part, the railroad company is liable.[50] But where a newsboy sued a street railroad company for injuries caused by a gripman compelling him to leave the car while it was in motion, it was held that it was incumbent on plaintiff to allege and prove that the gripman's act were within the scope of his duties, and that in the absence of such allegation and proof, he could not recover.[51]

§§ 3073-3082. Contributory Negligence of Person Injured—§ 3073. In General.—Who Are Trespassers.—A person walking on the track of a railroad, at other points than a public crossing, is a trespasser.[52] Though one who is not a passenger and has no business at a railroad station has no right to go on the station platform in the strict sense of the word, but is there by sufferance, yet he is not a trespasser, and the fact that he had been in the habit of going to the station on the arrival of trains, and getting on freight trains for a ride on the switch, and he had been warned of the danger by the railroad company's employees and told by them to keep off the platform, does not make him a trespasser in going upon it.[53] The fact that one going upon a street car was a child about nine years old did not make him less a trespasser on the car, if the other facts compel the conclusion that he was wrongfully on the car.[54]

What Constitutes Contributory Negligence on Part of a Licensee.—That a licensee while boarding the lower tread of an electric car has both hands filled with bundles, and therefore can not help or save herself in case her equilibrium is disturbed by a motion of the car or otherwise, does not indicate that she is negligent as a matter of law.[55]

§ 3074. Of Postal Clerks.—Since a postal clerk is required by act of Congress to remain in the mail car while on duty, he is not prima facie guilty of contributory negligence precluding recovery for illness by remaining in the car knowing that it is so insufficiently heated as to be uncomfortable.[56]

§ 3075. Of Carrier's Employees.—Although an employee being transported by a railroad company to his place of work is not a passenger, the railroad company is bound to exercise ordinary care to refrain from injuring him, and he is bound to exercise the same degree of care to prevent injury to himself.[57] But if an employee, under such circumstances, is killed, a recovery for his death is not precluded on the ground of contributory negligence, if his conduct was not a proximate cause of the injury that caused it.[58] Where an employee of a railroad company, by invitation of the company, boards a train to receive his pay,

50. Liability of carrier where conductor compels newsboy to leave moving car.—Indianapolis St. R. Co. *v.* Hockett, 67 N. E. 106, 161 Ind. 196.

In such a case the expulsion from the car is the proximate cause of the injury. Indianapolis St. R. Co. *v.* Hockett, 67 N. E. 106, 161 Ind. 196.

51. Liability of carrier where gripman compels newsboy to leave moving car.—Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

52. Person walking on track, not at crossing, a trespasser.—Hicks *v.* Pacific R. Co., 64 Mo. 430.

53. Person going on station platform not a trespasser.—Hicks *v.* Pacific R. Co., 64 Mo. 430.

54. Person wrongfully on car a trespasser though only nine years old.—Udell *v.* Citizens' St. R. Co., 52 N. E. 799, 152 Ind. 507, 71 Am. St. Rep. 336.

55. Facts not constituting contributory negligence on part of a licensee.—Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

56. Postal clerk remaining in insufficiently heated car.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

57. Employee being transported to place of work must exercise ordinary care.—St. Louis, etc., R. Co. *v.* Wiggam, 98 Ark. 259, 135 S. W. 889.

58. Conduct of employee not a proximate cause of his injury.—While decedent was riding to his work for defendrailroad company in a passenger car, placed in violation of statute, in front of loaded freight cars, the train became derailed because of a defective switch, and the passenger coach was broken in two, crushed by the cars behind it, and partially set on fire. Decedent, who had just stepped onto the platform of the car, was thrown off and killed. Others in the car and on the platform were injured; some slightly, others seriously. Held, that an instruction that decedent was guilty of contrib-

and on invitation express or implied of the company's servants in charge of the train, attempts to alight from it while moving slowly, and is thereby injured, he is not guilty of such contributory negligence as will, per se, defeat a recovery for such injury, although he knew himself to be feeble and infirm.[59]

§ 3076. Of Former Passenger Boarding Train to Secure Return of Money Due Him.—Where a person who has ceased to be a passenger boards a train to secure the return of money which the conductor has been unable to change before the ending of such relation, the failure of the conductor to return him his money before leaving the station does not exempt him from the exercise of proper care and prudence in attempting to get on and off the train while in motion, and acting under no compulsion.[60]

§ 3077. Of Persons Going to Station or Train to Assist or Meet Passengers.—Crossing Tracks in Going to Train to Assist Passenger or in Returning after Seeing Passenger Aboard.—One passing over tracks between the platform of a station and a coach which is open to receive passengers, while engaged in assisting an embarking passenger, or in looking about and after the passenger's welfare, or in returning to the station after having seen the passenger aboard, is not a trespasser, and the rules that apply in a case where a trespasser is injured will not apply in such case.[61] One under such circumstances has a right to rely on an implied assurance that the way is clear,[62] and

utory negligence in standing on the platform was properly refused, as his conduct in so doing was not a proximate cause of the injury. Woods *v.* Southern Pac. Co., 9 Utah 146, 33 Pac. 628.

59. Facts not constituting contributory negligence in employee boarding train to receive pay.—Louisville, etc., R. Co. *v.* Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840.

60. Former passenger boarding train to secure return of money due him.—Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

The plaintiff took a seat in a railroad car, to be carried to the next station on defendant's road, but not having the usual fare for that point, twenty-five cents, handed the conductor a five-dollar bill, out of which to take the fare. Being unable to change the bill or to get it changed on the train, he promised plaintiff to get it changed when they arrived at the next station, and to return the balance, after deducting the fare, to which plaintiff assented. On arriving there, the plaintiff, being at the end of his journey, left the train, but waited on the platform while the train remained, some twenty or thirty minutes, expecting the conductor to return him his money, but did not demand it because he thought the conductor was busy, but seeing the train starting, and the conductor, who had forgotten or neglected his promise, get aboard as it moved away, he ran some distance beyond the platform and climbed upon the car as it was moving off with increasing speed, for the sole purpose of getting his money. The conductor, on demand for his change, handed him back the same bill, and, as plaintiff claims, told him to get off the train as quick as possible, and immediately he jumped from the train, voluntarily and without compulsion, while it was running at the rate of four or five miles per hour, and at a place not intended for passengers to alight. It did not appear that the remark of the conductor caused plaintiff to act differently from what he otherwise would have done, nor that he requested that the train be stopped or slacked up to enable him to get off in safety. It was held that when the plaintiff got upon the train after it had moved away from the station, for the exclusive purpose of getting from the conductor the money due him, and when he jumped off at a point beyond, not suitable for nor intended for passengers to alight, the relation of passenger and carrier did not subsist between him and the railroad company. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222, followed in Moorehouse *v.* Crangle, 36 O. St. 130, 38 Am. Rep. 564, followed in Himelright *v.* Johnson, 40 O. St. 40.

If the conductor ordered or directed the plaintiff to get off the train while it was in motion, at a place where it was prudent to make the attempt, such order or direction, without compulsion, did not warrant the plaintiff in doing a hazardous or imprudent act, and imputing the consequences to the company. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

61. Crossing tracks in going to train to assist passenger or in returning after seeing passenger aboard.—St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

62. St. Louis, etc., R. Co. *v.* Cleere, 76 Ark. 377, 88 S. W. 995.

he is not guilty of contributory negligence, as a matter of law, because he fails to look and listen for approaching trains before attempting to cross the track.[63] But one so situated is not exempted from the duty of exercising ordinary care, and he is not exercising such care if he puts himself in such a condition that he can not be warned of the approach of an engine on the track.[64] A person who, in assisting a passenger to a train in the nighttime, attempts to pass under a train of freight cars standing across the road with an engine attached, and while under the car is injured by the starting of the train, is guilty of contributory negligence.[65]

Crossing Track in Going to Train to Meet a Passenger.—A person going to a train then due to meet a friend, who exercised due care in passing from the depot to the train is not so negligent in undertaking to pass between cars three feet apart on an intervening track as to prevent his recovery for injuries by one of the cars suddenly closing the space, under the rule in Alabama that the failure to stop, look, and listen before crossing a track is such contributory negligence as will defeat a recovery, in the absence of evidence that the railroad company was guilty of reckless or wanton negligence.[66]

Standing on Station Platform after Seeing Passengers Aboard Train.—One who goes to a railroad station to assist passengers to get to the station, and upon a train about to depart, is not guilty of contributory negligence, as a matter of law, in afterwards standing on the platform to see the train start and bid the passengers farewell.[67]

63. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

"The rule that one should look and listen for approaching trains before attempting to pass a railway track is often applied in cases for injuries to travelers on highways at railway crossings. In such a case, where there is no invitation on the part of the company for the traveler to cross, the courts can say, as a matter of law, that he should look and listen for approaching trains, and, if he fails to do so, and by reason of such failure is injured, he can recover nothing by way of damages; for, even if the company be negligent, his own negligence contributes to his injury. But the case is different where the injured person comes on the track by the invitation of the railway company. In such a case he must still exercise ordinary care, but, as he has the right to rely to some extent upon an implied assurance of the company that the way is safe, the courts, not knowing to what extent his acts may be influenced by the conduct of the company, can not, in such a case, say, as a matter of law, that the mere failure to look and listen is such negligence as precludes a recovery." St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

64. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

Thus where one who had assisted a friend to take passage on a train, before returning across the tracks to the station, in order to keep off the rain which was falling at the time, enveloped his head in the cape of his coat, so that he could neither see nor hear an approaching engine, and was killed by such engine, which he must have heard or seen had his eyes and ears not been covered, it was held that he was guilty of such contributory negligence as would preclude a recovery for his death. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

In such case an instruction that, if intestate accompanied a departing friend needing assistance, or visited the coaches to look after his comfort, when they were ready for the reception of passengers, he was rightfully on the premises, under an implied assurance that no engine would be permitted to run on the intervening track, unless the company used ordinary care to give timely warning of the approach, and he had a right to lessen his own watchfulness, and it was not incumbent on him to be on the lookout for danger, if, under the circumstances, he had no reasonable ground to suspect that danger was to be apprehended, was held to be erroneous, as failing to fairly submit to the jury the question as to whether intestate was guilty of contributory negligence. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

65. Smith *v.* Chicago, etc., R. Co., 55 Iowa 33, 7 N. W. 398.

66. Crossing track in going to train to meet a passenger.—Louisville, etc., R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

67. Standing on platform after seeing passengers aboard train.—Where an old lady went to a railroad station to assist friends, who intended to remove from the country permanently, to get to the station, and upon a train then about to depart, and after bidding her friends goodbye, and after they had got upon the train, stood for about five minutes upon the station platform to see the train start, and to bid her friends a last farewell, held that,

Going on Station Platform to Meet a Friend.—Where injury to plaintiff's intestate while at a station to meet a friend was caused by the negligence of the carrier's employees in leaving a truck so near the edge of the platform that it was struck by the train and hurled against decedent, and the evidence showed that the presence and position of the truck did not suggest imminent danger to the minds of defendant's fireman and engineer whose train came in contact with the truck, it was held that decedent was not guilty of contributory negligence as a matter of law.[68]

Falling Off Station Platform after Seeing Passenger Aboard Train.—A railroad company is not liable to one who came to its station with a relative who intended to and did take passage on a train, and who, on leaving, walked to the end of the station platform, and fell off, where such person was familiar with the platform and the location of the steps, and took no reasonable precaution to avoid stepping off the platform, whether or not the company was guilty of negligence in not keeping the platform properly lighted.[69]

§ 3078. Of Persons Boarding Train, Car, or Boat to See or Assist Passengers.—Stepping on Lower Tread of Car While Encumbered with Luggage.—A person who goes to an electric car station to assist passengers with their luggage is not guilty of contributory negligence, as a matter of law, in stepping upon the first tread of the car which the passengers have boarded, while heavily encumbered with luggage, where the car, without any signal, is suddenly started with a jerk, precipitating such person to the ground.[70]

Alighting from Train at Place Other than Station.—Where a passenger train is temporarily stopped some distance from the depot for receiving and delivering passengers, one who boards such train in search of his wife and child, who are thereon as passengers, and who in attempting to move from one car to another by passing around an intervening car, steps off the platform into a culvert which he can not see on account of the darkess of the night, is guilty of contributory negligence as a matter of law, and can not recover for the injury sustained, even though the lights in some of the cars had been blown out by drunken and disorderly men.[71]

Alighting from Moving Train.—If a person boarding a train to see a passenger, or to assist passengers to enter it, attempts to leave the train while in motion, and is injured, and such attempt is the cause of or contributes to his injury there can be no recovery against the carrier.[72]

while so standing upon the platform, she was not, by reason thereof, guilty of such culpable contributory negligence as would prevent her from recovering for injuries received through the negligence of the railroad company; and further held, that no culpable contributory negligence in any respect was shown. Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

68. Going on platform to meet a friend.—Denver, etc., R. Co. *v.* Spencer, 61 Pac. 606, 27 Colo. 313, 51 L. R. A. 121.

69. Falling off platform after seeing passenger aboard train.—Emery *v.* Chicago, etc., R. Co., 80 N. W. 627, 77 Minn. 465.

70. Stepping on lower tread of car while encumbered with luggage.—Plaintiff accompanied her son and other members of a party to defendant's electric car station to assist them with their luggage. Plantiff carried a basket in one hand and some baby clothes in the other, and, after the rest had boarded the car, plaintiff stepped on the first tread to enable her to place the basket and clothes on the platform, and as she was doing so, the conductor not being present to assist her or in sight of her location, the car, without any signal, suddenly started with a jerk, precipitating her to the ground and breakng her arm. Held, that plaintiff in stepping on the lower tread of the car under such circumstances, was not negligent as a matter of law. Otto *v.* Milwaukee Northern R. Co., 148 Wis. 54, 134 N. W. 157.

71. Alighting from train at place other than station.—Stiles *v.* Atlanta, etc., Railroad, 65 Ga. 370.

72. Alighting from moving train.—Parks *v.* Kentucky Cent. R. Co., 3 Ky. L. Rep. 691; Louisville, etc., R. Co. *v.* Wilson, 124 Ky. 846, 30 Ky. L. Rep. 1055, 100 S. W. 290, 8 L. R. A., N. S., 1020;

Leaving Steamboat.—Where a person who has boarded a steamboat to assist a passenger is injured in leaving the boat, the injury being occasioned by a want of proper time and facilities for landing, although the boat was violating the law by racing with another boat, and by reason thereof its stoppage at the usual landing place was abridged, so that such person had not a reasonable time allowed him to leave the boat in the usual manner by the staging, such facts did not relieve him from the duty of exercising proper care and prudence in leaving the boat, and if he was guilty of negligence in doing so, he can not recover for

Flaherty *v.* Boston, etc., Railroad, 186 Mass. 567, 72 N. E. 66.

A person who, after boarding a train at a station to assist a passenger to board it, alights from the train while traveling at the rate of three to four miles an hour and with its speed steadily increasing, is guilty of contributory negligence as a matter of law, precluding a recovery for the injuries sustained. Morrow *v.* Atlanta, etc., R. Co., 46 S. E. 12, 134 N. C. 92.

One who entered a railway train as an escort for a woman, to find her seat, and who was injured in the endeavor to leave the train while it was under way, with some papers in his hands, held without remedy. Central R., etc., Co. *v.* Letcher, 69 Ala. 106, 44 Am. Rep. 505.

A person boarded the train, not as a passenger, but merely to see a friend, and, the train having begun to move, she sprang from it, and received injuries, for which she sued the railroad. Held, that the lumber company's employees had a right to presume the person to be a passenger, and hence she was negligent in jumping from the train instead of reporting the circumstances to the conductor. Parks *v.* Kentucky Cent. R. Co., 3 Ky. L. Rep. 691.

One entering cars of a passenger carrier, not as a passenger, but to accompany an infirm relative to a seat as a passenger, can not recover for injuries received in leaving the cars, if he attempted to leave the cars after the train was started, or finding the cars in motion as he was going out, persisted in making progress to get out, and if such attempt was the cause of or contributed to the accident, even though there was negligence in the carrier in moving the train and in a jerk occurring after the starting, which occurred in producing the injury. Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406.

A mother boarded a train at a station to assist her children to take the train. She gave no notice to any employee in charge that she did not intend to become a passenger. Before she left the interior of the car the usual preparation for starting had been made, and when she came to the door of the car its platform gates were closed, and a brakeman beckoned her to the next platform, and said, as he helped her down the steps, "It is all right, not going very fast; be careful." Held, that the circumstances which made it negligent on the part of the brakeman to act as he did were obvious, making it contributory negligence on her part to attempt to leave the train, precluding a recovery for injuries sustained. Flaherty *v.* Boston, etc., Railroad, 72 N. E. 66, 186 Mass. 567.

Where a person accompanying his daughter to a train, upon which she was a passenger, attempted to alight from it while in motion, though the carrier negligently started the train before he had time to alight, its negligence in such respect had ceased to operate when he attempted to alight from the moving train of his own accord, and his voluntary act in doing so was the proximate cause of his resultant injury, and the carrier was not liable therefor, though the brakeman in attempting to restrain his alighting may have unbalanced him and thereby contributed to his injury. Chesapeake, etc., R. Co. *v.* Paris, 111 Va. 41, 68 S. E. 398; S. C., 107 Va. 408, 59 S. E. 398.

In Georgia it has been held that an injury resulting to one assisting a departing passenger by reason of his attempting to alight from a moving train, going at a rate of speed which renders the attempt obviously unsafe will, as a general rule, afford no cause of action against the carrier, even though the train was started before the usual time as such person could have avoided the consequences of the carrier's fault in so doing by the exercise of ordinary care. McLarin *v.* Atlantic, etc., R. Co., 85 Ga. 504, 11 S. E. 840; Coleman *v.* Georgia R., etc., Co., 84 Ga. 1, 10 S. E. 498, 40 Am. & Eng. R. Cas. 690.

But in the same state it has been held that where a person assisting a passenger and her small children to board a train notifies the conductor of his so doing and the train starts without warning and without giving his sufficient time to leave, the question as to whether or not he was negligent in attempting to leave the train as it was moving slowly, is one for the jury; that it is error, in such case, to grant a nonsuit upon the ground that it was negligence as a matter of law for such person to attempt to alight and that in so doing he assumed the risk of injury. Suber *v.* Georgia, etc., R. Co., 96 Ga. 42, 23 S. E. 387; Turley *v.* Atlanta, etc., R. Co., 127 Ga. 594, 56 S. E. 748, 8 L. R. A., N. S., 695.

the injury, unless the steamboat company was guilty of negligence greatly in excess of his.[73]

§ 3079. Of Persons on Train or Car by Invitation or Permission of Carrier's Employees.—Riding upon Open Flat Car.—A person voluntarily on a carrier's train by the invitation of the conductor extended at his own request and not paying, or being expected to pay, fare and choosing of his own volition to ride upon an open flat car rather than in the passenger coach is entitled to look for only such security as that mode of conveyance is reasonably expected to afford and can not recover for injuries resulting from getting a cinder in his eye, even though the carrier was somewhat at fault, as he voluntarily incurred the injury, and by the exercsie of ordinary care could have avoided the consequence of the carrier's negligence.[74]

§ 3080. Of Persons Going to Railroad Depot on Business.—It is not contributory negligence in one going to a railroad depot on a proper errand to assume that it will be safe to go through an open passage left by the railroad company to give access to the depot, even though the track ends nearby and is not protected by snubbing posts.[75]

§ 3081. Of Persons on Station Platform Who Have No Business There.—Though a person going upon a platform at a railroad station, built for the accommodation of passengers and persons having business with the railroad company, is not a passenger and has no business with the company, yet he is not a trespasser, and if, while on the platform, he is injured through the negligence of the railroad company, the mere fact of his being on the platform does not constitute such contributory negligence, as a matter of law, as will preclude his recovery.[76]

§ 3082. Of Trespassers.—As between a railroad company and a trespasser, contributory negligence on the part of the latter renders the former liable only for gross or wanton or willful neglect.[77] A railroad company is not liable for injury to or the death of a trespasser, who in a state of panic or fear jumped off a train or car in motion, and was injured or killed thereby, in the absence of proof that such panic or fear was caused or inspired by word or act of an agent or employee of the company.[78] A boy seventeen years of age, who has the intelligence, experience, and judgment that boys of that age usually have, is guilty

73. Leaving steamboat.—Keokuk Packet Co. *v.* Henry, 50 Ill. 264.

74. Riding upon open flat car.—Higgins *v.* Cherokee Railroad, 73 Ga. 149.

75. Going to railroad depot on a proper errand.—Grand Rapids, etc., R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

76. Persons on station platform who have no business there.—Hicks *v.* Pacific R. Co., 64 Mo. 430.

77. Effect of contributory negligence of a trespasser.—Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

78. Trespasser jumping off train or car in motion.—Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. Rep. 497; Clutzbeher *v.* Union Passenger R. Co. (Pa.), 1 Atl. 597.

In an action for the death of plaintiff's intestate, a boy seven years old, it appeared that deceased jumped on one of defendant's street cars and was riding on the step of the rear platform as a trespasser; that the conductor saw him, but did not otherwise notice him; that while the car was in motion he attempted to get off, and was killed by falling on the cobblestones in the street. Held, that a verdict was properly directed for defendant. Brightman *v.* Union St. R. Co., 167 Mass. 113, 44 N. E. 1091.

In an action for personal injuries caused by being forced to jump from a moving train, it appeared that plaintiff was stealing a ride on defendant's freight train; that he knew he had no right thereon, and that he incurred peculiar risks in so riding; that he was first ordered off when the train was just starting, but he refused to get off; that he could have prevented jumping when he did, by passing to the car next ahead of the one on which he was riding. Held, that plaintiff was guilty of contributory negligence in getting on the train, in remaining after first ordered off, and in jumping when he did, and could not recover. Planz *v.* Boston, etc., R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

of inexcusable and illegal conduct in jumping on the platform of a moving street car, seizing the driver's whip, and whipping the mules, and there can be no recovery for his death caused by his falling off the car, which the driver, owing to the speed of the mules, was unable to stop in time to prevent his being run over.[79] The rule requiring locomotive engineers and street car drivers to exercise vigilance in looking out for dangers to passengers and persons on the track, and to use reasonable diligence to prevent injury to a person after his peril is discovered, has no application in such case, because decedent not only assumed the attitude of a trespasser, but illegally interfered with the movement of the car, and thereby caused his own death.[80]

§§ 3083-3091. Actions—§§ 3083-3085. Pleading—§ 3083. Petition.—Showing Nature of Right on Train.—A count, in a complaint against a carrier for injuries, which charges simple negligence and fails to show that plaintiff, was rightfully in the car, is insufficient, since, if plaintiff were a trespasser, defendant owed only the duty not to wantonly injure;[81] but an averment that plaintiff was upon the car with the knowledge of the servants of the company, and with the permission of the company, is sufficient;[82] where a person is permitted to ride in a caboose attached to a freight train by the consent of the agents in charge of the train, the petition need not allege that authority was given by the company to the agent in charge of it to carry passengers, since if there has been a known violation of the rules of the company by the plaintiff, that is a matter of defense.[83]

Averments in Action by Person Accompanying Passenger.—In an action for injuries to one who had entered defendant's train with a departing guest, an allegation that defendant caused its train to "jerk suddenly and quickly" is not sufficient, without an allegation that the jerk was extraordinary, or more than a usual and inevitable accident.[84]

Averments in Actions by Trespassers.—In an action for injuries by a trespasser the complaint must show actionable negligence or that the carrier's servants wilfully and intentionally caused plaintiff's injury.[85] Where a complaint

79. Trespasser falling off car.—Taylor *v.* South Covington, etc., R. Co., 14 Ky. L. Rep. 355, 20 S. W. 275.

The fact that the father of such boy had previously requested the driver to keep the boy off the car, did not excuse the boy's conduct in getting on the car without the knowledge or consent of the company, and needlessly and wantonly beating the mules. Taylor *v.* South Covington, etc., R. Co., 14 Ky. L. Rep. 355, 20 S. W. 275.

80. Taylor *v.* South Covington, etc., R. Co., 14 Ky. L. Rep. 355, 20 S. W. 275.

81. Showing right to be on train.—Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

82. Averment of presence on car with knowledge of servants.—Lammert *v.* Chicago, etc., R. Co., 9 Ill. App. 388.

83. No necessity for averment as to servant's authority.—Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410.

84. Sufficiency of averment as to jerks.—Saxton *v.* Missouri Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717.

85. Injuries to trespasser.—A count of a complaint alleged that defendant was operating a dummy line on certain streets; that plaintiff, a boy five years old, got on one of the cars of said dummy line, and defendant, through its servants or agents, recklessly and wantonly caused plaintiff to leave said car while same was in motion, and in consequence thereof plaintiff suffered the injuries set out. Held not to aver any actionable negligence, or that defendant's servants willfully or intentionally caused plaintiff's injury. Jefferson *v.* Birmingham R., etc., Co., 116 Ala. 294, 22 So. 546, 38 L. R. A. 458, 67 Am. St. Rep. 116.

Necessity for averment as to knowledge of dangerous position of trespasser.—The complaint in an action for injuries to plaintiff, who had boarded a train to see a passenger on business, that while plaintiff was alighting, and the train was moving at not more than two or three miles an hour, it made a violent start, and while within a few hundred feet of the depot began running at the unlawful speed of not less than fifteen miles an hour, by reason of which plaintiff was thrown from the step, and that the resulting injuries were the direct result of the engineer in beginning to run the train at an unlawful speed, did not allege such negligence as would make the company liable for injuries to plaintiff, a trespasser; it not showing that the engineer

alleges that defendant's conductor assaulted plaintiff, and forcibly ejected him from a car while the same was in motion, it is not necessary to allege defendant's negligence, even though it appears that plaintiff was a trespasser.[86]

Averment as to Scope of Employment.—Where the petition states that the plaintiff assisted his wife to enter a train of cars and then attempted to alight therefrom while the train was in motion, and while so attempting to alight, a servant of the company, whose duty it was to aid passengers to enter the cars, ran against plaintiff and negligently threw him upon the station platform and under the train, without fault on the part of the plaintiff, in absence of any averment showing that the servant at the time ran against the plaintiff was acting within the scope of his employment, the petition does not state facts sufficient to constitute a cause of action.[87]

Averments as to Contributory Negligence.—Where a complaint alleges that defendant's conductor assaulted plaintiff, and forcibly ejected him from a car while the same was in motion, it is not necessary to allege plaintiff's freedom from contributory negligence, even though it appears that plaintiff was a trespasser on the train.[88] A general allegation of want of negligence on plaintiff's part is sufficient without setting forth specific facts to show due care.[89] A complaint containing an averment to the effect that, as the car in which plaintiff had been at work was being hauled, he stepped to the door in the side of the car, and, while in that position, the sliding door of the car was caught by a plank projecting from a lumber pile near the track, and was suddenly and violently closed, striking plaintiff on the side of the head and body, and holding him there, is not objectionable, as showing contributory negligence on the part of plaintiff.[90]

Amendments to Petition.—Where a petition alleges that plaintiff accepted the invitation of a railroad company to visit its depot for purposes of transacting business with the company, an amendment alleging that plaintiff accepted the invitation of the railroad company to the depot to transact business with an express company which the railroad company permitted to carry on business there does not set forth a new cause of action.[91] Where a petition alleges that while plaintiff, who had assisted his wife in boarding a train, was proceeding to alight, and was standing on the step of the car expecting the train to be checked in speed,

knew that plaintiff was alighting when he increased the speed of the train. McElvane *v.* Central, etc., R. Co., 54 So. 489, 170 Ala. 525, 34 L. R. A., N. S., 715.

Petition held sufficient to raise liability to trespasser.—Petition for damages setting forth that plaintiff, having boarded baggage car of a moving train, a passenger, was compelled to jump therefrom to escape hot water turned upon him by engineer or fireman, and was injured, is sufficient, when not excepted to, to raise issue of defendant's liability for injury to trespasser. Missouri, etc., R. Co. *v.* Williams, 91 Tex. 255, 42 S. W. 855, reversing 40 S. W. 350.

86. Averment as to ejection from moving car.—Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

Where the complaint in an action against a railroad company for damages for injuries to a trespasser by being shoved from a moving freight train alleges that the plaintiff was wantonly and recklessly or intentionally injured by defendant through its servant or agent, it states a cause of action against defendant. Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 28 So. 28.

87. Averment as to scope of employment.—O'Neil *v.* Baltimore, etc., R. Co., 2 O. C. C. 504, 1 O. C. D. 610.

88. Necessity in case of forcible ejection from moving car.—Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

89. Sufficiency of allegation.—New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

In an action for the death of plaintiff's twelve year old son, who was injured at defendant's railroad depot, where he had been sent to meet his sister, the complaint having made a general allegation as to want of negligence on the part of the plaintiff, need not allege that the boy had sufficient discretion to be sent to the depot. New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

90. Petition not showing contributory negligence.—Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480.

91. Amendment as to nature of invitation.—Central, etc., R. Co. *v.* Hunter, 128 Ga. 600, 58 S. E. 154.

he was thrown to the ground by a violent jerk, an amendment alleging that the engineer, with knowledge of plaintiff's position and of his purpose to alight, increased the speed and so managed the engine as to give a violent jerk throwing plaintiff to the ground does not introduce a new cause of action.[92]

§ 3084. Answer or Plea.—Denial of Relationship of Carrier and Passenger.—In an action against a company owning a tug boat, where the petition alleges that defendant was a common carrier of passengers, and that the child of plaintiffs was killed while a passenger on the boat, an answer averring that the boat was not a passenger boat, an answer averring that the boat was not a passenger boat, and that employees of the company were forbidden to carry any one as a passenger, is sufficient.[93]

Plea of Justification for Forcible Ejection.—Where the complainant alleged an assault by kicking and striking the plaintiff, and then throwing him to the ground from a swiftly-moving car, a plea in justification, alleging that he was a trespasser stealing a ride, and was ejected by the use of only necessary force, is demurrable, unless it sets forth circumstances showing that defendant's acts were reasonably necessary.[94]

§ 3085. Variance.—Where, in an action by a child against a railroad company for personal injuries, plaintiff found his right to recover on the ground that he was upon its cars at the invitation and with the consent of defendant, he can not recover if he was an intruder.[95]

§§ 3086-3088. Evidence—§ 3086. Presumptions and Burden of Proof.—Where one is permitted to ride in a caboose attached to a freight train by the consent of the agent in charge of the train, he is presumed to be there of right.[96] The burden of proof where a person, not a passenger, is injured by a passenger carrier is upon such person to show that he exercised due care, and that the carrier was guilty of negligence, which was the cause of the injury.[97] In an action for injuries to a trespasser on a railroad train, the burden was on him to show, not only that he was in a perilous situation, but that such situation was discovered by defendant's employees, and that they failed, after that, to exercise ordinary care to avoid injuring him.[98]

§ 3087. Admissibility.—Extent of Use of Approach to Station.—Where a person in ascending the platform, at defendant's depot, had her foot injured by the falling of a plank on which she was walking, evidence as to how long and how much the plank had been used by the public was competent.[99]

Habit of Boys to Ride on Cars.—Evidence that boys had ridden on defendant's cars at different times, without permission, and at other times by invitation, and without paying fare, is incompetent, as not tending to prove that plaintiff, a boy ten years of age, was or was not entitled to ride on the car he attempted to board at the time he was injured.[1]

92. **Amendment as nature of jerk.**—Southern R. Co. *v.* Clay, 130 Ga. 563, 61 S. E. 226.

93. **Denial of relationship of carrier and passenger.**—Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

94. **Plea of justification for forcible ejection.**—Wright *v.* Union R. Co., 21 R. I. 554, 45 Atl. 548.

95. **Variance as to nature of presence on cars.**—Mexican Nat. R. Co. *v.* Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126.

96. **Presumptions from person's presence on caboose with consent of servants.**—Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410.

97. **Burden of proof as to plaintiff's exercise of care and carriers negligence.**—Lucas *v.* New Bedford, etc., R. Co. (Mass.), 6 Gray 64, 66 Am. Dec. 406.

98. **Failure to exercise ordinary care with knowledge of trespasser's perilous situation.**—Arkansas, etc., R. Co. *v.* Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A., N. S., 910.

99. **Extent of use of plank leading to platform.**—Collins *v.* Toledo, etc., R. Co., 80 Mich. 390, 45 N. W. 178.

1. **Habit of boys to ride on cars.**—Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

Evidence of Contributory Negligence.—In an action to recover for injuries received by plaintiff, who alighted from defendant's train while it was in motion, evidence that the conductor told him to get off the train as quickly as possible, without attempting to stop the train for that purpose, but that in jumping off plaintiff acted voluntarily and without compulsion, was admissible as bearing on the question of plaintiff's negligence.[2]

Evidence in Actions for Injuries to Persons on Train to Assist Passengers.—Testimony showing a custom of persons to attend passengers on the train, and notice to trainmen of such custom is admissible.[3] In an action for injuries sustained on jumping from a moving train, on which plaintiff had been to assist passengers, evidence is admissible to show that a train did not stop for a reasonable length of time at the station.[4] Where one was injured by a train while attempting to put his wife's baggage aboard, it is not error for him to testify that he believed the train would remain standing long enough for his wife to get in the car and for him to put her baggage upon the train.[5] Facts showing that the servants in charge of a train or car knew of the intention of a person entering such vehicle to get off are admissible,[6] but such notice can not be proved by declarations of employees made after the transaction.[7]

§ 3088. Weight and Sufficiency.—Where a person accompanied a passenger needing assistance to a coach placed on a side track adjacent to the main track and across from the station, and was killed on his return by an engine backing at a rapid rate on the main track, conflicting evidence as to whether such person had enveloped his head in his overcoat cape, so that he could neither see nor hear the approaching engine, or whether he merely held it so as to keep off the rain without obstructing his vision or hearing is sufficient to require the jury's determination as to whether intestate should have looked and listened

2. Contributory negligence—Act of conductor in telling plaintiff to get off.—Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

3. Custom to assist passengers.—It was not error to permit a witness to testify that he had attended his mother on the train that morning, and seated her at the same time plaintiff seated his wife, and that he had done the same thing before with other passengers, to show that such conduct was customary, and notice to the trainmen of such a custom. Texas, etc., R. Co. *v.* Crockett, 66 S. W. 114, 27 Tex. Civ. App. 463.

4. Testimony showing failure to stop for reasonable time.—In an action for injuries sustained on jumping from a moving train, on which plaintiff had been to seat his family, it is proper to permit witnesses to testify that a certain person was at the station just before the train started, and that he bought a ticket for the train, but that it started and left him before he could get on, to show that the train did not stop at the station for a reasonable length of time. Texas, etc., R. Co. *v.* Crockett, 66 S. W. 114, 27 Tex. Civ. App. 463.

5. Belief that sufficient time will be given.—Chesapeake, etc., R. Co. *v.* Fortune, 107 Va. 412, 59 S. E. 1095.

6. Notice of intention to get off.—In an action for injuries in getting off a moving train which plaintiff had boarded to assist a passenger, where the train moved at a brakeman's signal, evidence that the brakeman ordered plaintiff to get off is admissible to show that those in control of the train knew of his intention to get off. International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401.

Habit of person assisting child on car at same place.—Evidence that a person who attended a child in boarding a street car on a particular occasion, for the purpose of placing upon the car packages which the child was to have in charge, had frequently before done the same thing at the same place, when the same driver of the car was on duty, is admissible as tending to show that the person on this occasion intended to get off after depositing the packages, as she had done on the previous occasions, and did not intend to remain on board so as to justify the driver in starting the car suddenly while she was engaged in getting off. Houston *v.* Gate City St. R. Co., 89 Ga. 272, 15 S. E. 323.

7. Declaration of employees.—Statements of a conductor of one of two trains meeting at a station, made some time after an accident to a passenger on his train, which occurred while she was leaving the other train, which she had temporarily visited, with his consent, that he informed the conductor of the other train that he had a passenger on the train, to hold it for a minute, are inadmissible to prove notice to such conductor of the passenger's presence. Bullock *v.* Houston, etc., R. Co. (Tex. Civ. App.), 55 S. W. 184.

before going on the main track, and whether or not he was negligent.[8] Where the evidence showed that plaintiff assisted his invalid daughter onto a train and before he could leave it the train started, that he notified the conductor who pulled the cord, and, after waiting awhile, directed him to alight, which he did and was injured, the cars being still in motion, though he did not know it, the night being very dark, and that the conductor knew that some of the persons who assisted to seat plaintiff's daughter were not going on the train, it can not be said that there was no evidence to prove that plaintiff was not in fault.[9]

§ 3089. Questions for Jury.—Negligence.—When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established.[10]

Care as to Persons on Train.—The question of the failure on the part of a carrier to use ordinary care may be one for the jury where the person is injured by reason of the car suddenly starting while he was on the platform of the car,[11] or where a person is injured in getting off a moving train,[12] but where

8. Sufficiency of evidence as to negligence of plaintiff.—St. Louis, etc., R. Co. *v.* Tomlinson, 64 S. W. 347, 69 Ark. 489.

9. Evidence not showing contributory negligence.—Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303.

10. Negligence.—So held as to whether a railway company exercised ordinary care to prevent injury to a trespasser attempting to board a train after his presence was known. Louisville, etc., R. Co. *v.* Plunkett, 65 S. E. 695, 6 Ga. App. 684.

Placing of truck between two trains.—Plaintiff's intestate went to defendant's depot to meet a relative. The space used to receive and discharge passengers was between two tracks, one of which was occupied by a train. When both tracks were so occupied the space between the cars was five feet eight inches wide. A baggage truck, so constructed that it could be easily veered at either end, had been placed on this space by defendant's employees. Its width was such that, if placed equidistant between the two tracks, it would clear the train on either side by one foot seven inches. The engine and two cars cleared the truck, but the next car, though of the same width as the others, came in contact with it and hurled it against deceased, inflicting fatal injuries. Held, that the question whether the placing of the truck in the limited space provided was negligence, was for the jury. Denver, etc., R. Co. *v.* Spencer, 61 Pac. 606, 27 Colo. 313, 51 L. R. A. 121.

Running train at rapid speed into station.—Negligence is a question for the jury where a train was run at night at a great speed into an unlighted station, killing a person who was to meet a relative on the train, and who attempted to cross to the platform when the train was at such a distance that he could have crossed safely, had the train been moving at proper speed. Gulf, etc., R. Co. *v.* Wagley, 15 Tex. Civ. App. 308, 40 S. W. 538.

Starting up train while volunteer on track.—A boy of 14 years went to a carrier's station to take passage, and at request of a brakeman took a pail and went along the track towards a hydrant to get water, and had to pass on a plank walk used by employees near an engine. The engineer saw him 100 feet away, but not again, and started up the engine, injuring the boy while he was crossing the track towards the hydrant. Held to be sufficient evidence of the carrier's negligence to take the case to the jury. Corcoran *v.* New York El. R. Co., 19 Hun 368.

11. Starting car suddenly while person on platform.—So held as to person who boarded a street car for the purpose of negotiating with the carmen for an extra trip. Brock *v.* St. Louis Trans. Co., 107 Mo. App. 109, 81 S. W. 219.

It is for the jury to say whether it was the duty of a conductor of a passenger train to see that the platforms of the coaches of the train were clear of persons before moving the train from the station. Seaboard Air Line Ry. *v.* Bradley, 54 S. E. 69, 125 Ga. 193, 114 Am. St. Rep. 196.

12. Injury to person assisting passenger in getting off moving train.—Where in an action for injuries sustained by a person who assisted a passenger on the train in getting off a moving train the evidence tends to show that those in charge of the train knew of plaintiff's intention to get off, whether defendant used ordinary care in starting the train, and, if not, whether the injury was proximately caused by failure to do so, is for the jury. International, etc., R. Co. *v.* Satterwhite, 15 Tex. Civ. App. 102, 38 S. W. 401.

Plaintiff's husband, who was on a platform bidding friends farewell, was, with a number of others urged from the plat-

a person is injured while alighting from a moving train by reason of a jerk, and there is no evidence that such jerk was anything other than that usual in starting a train, the question of negligence is not for the jury.[13] Where there is evidence of notice to the carrier that a person entered a train for the purpose of assisting a passenger,[14] and of his intention to disembark,[15] its sufficiency to establish these facts are for the jury.

Injuries Inflicted in Course of and Liabliity for Manner of Ejection.—Whether proper care was used in ejection of persons from a moving train[16] or street car is for the jury.[17] Whether an injury to a trespasser sustained

form after the train started, and without having been given an opportunity to alight before it started. In an action to recover for his death resulting from his being pushed under the cars, held, that whether the train should have left on schedule time or have waited until the plaintiff alighted, or whether persons in the train not as passengers should alight from it before the time of departure fixed by the schedule, and what degree of diligence deceased should have employed to ascertain whether the train was starting or about to start, were questions for the jury. Harris *v.* Central R. R., 78 Ga. 525, 3 S. E. 355.

Jerk of train while alighting.—Plaintiff testified that, being about to seat his wife and children on defendant's train, he asked the conductor to hold the train until he got them on. Plaintiff seated them as quickly as possible, and went out as quickly as he could, when, before he could get off, the train started with a quick jerk, throwing him to the ground to his injury. Defendant offered no evidence. Held, that defendant's motion for nonsuit was properly denied. Davis *v.* Seaboard, etc., Railway, 43 S. E. 840, 132 N. C. 291.

When defendant's passenger train stopped at a station, the plaintiff, with notice to its conductor, and without objection, assisted his daughter and her children to board the train, and at once started to return. When he reached the door the train was moving, and when he stepped on the top step it gave a sudden jerk, which caused him to lose his equilibrium; and he had to jump to keep himself from falling, thereby breaking his leg. The daughter's evidence was that, just after plaintiff left her, the train gave two jerks, one very violent. Held, the evidence was sufficient to go to the jury on the question of defendant's negligence. Whitley *v.* Southern R. Co., 29 S. E. 783, 122 N. C. 987.

13. Jerk usual in starting train.—Plaintiff alleged that, while he was assisting his daughter on the train, defendant negligently started the train and when plaintiff reached the platform it was moving so slowly that he could without negligence leave it safely, and when he was on the lower step the train was negligently jerked with such violence that he was thrown off and injured. There was no evidence that the jerk of the train was other than usual in starting it under like circumstances, or attributable to anything other than the taking up of the slack. Held, that defendant was entitled to an instruction withdrawing the question of negligence as to such jerk of the train from the jury. Saxton *v.* Missouri Pac. R. Co., 72 S. W. 717, 98 Mo. App. 494.

14. Notice of intention in boarding train.—Morrow *v.* Atlanta, etc., R. Co., 134 N. C. 92, 46 S. E. 12.

Evidence held to raise a question for the jury as to whether the conductor knew or had reasonable means of knowing for what purpose plaintiff boarded the train, and whether he got off before it started. Bishop *v.* Illinois Cent. R. Co., 77 S. W. 1099, 25 Ky. L. Rep. 1363.

Whether one who stood near the steps of a coach as a person entered it merely for the purpose of assisting a passenger to board the coach was the conductor in charge of the train, or some other employee charged with the duty of providing for such person's safety while exercising the right of assisting a passenger, held, under the evidence, for the jury. Morrow *v.* Atlanta & C. Air Line Ry. Co., 46 S. E. 12, 134 N. C. 92.

15. Notice of intention to disembark.—In an action against a carrier by one entering a train to assist a passenger, for injuries sustained in leaving the moving train, evidence held sufficient to take to the jury the question whether the carrier had notice of plaintiff's intention to disembark. Cooper *v.* Atlantic, etc., R. Co., 59 S. E. 704, 78 S. C. 562.

16. Train running too fast.—Whether a train from which a trespasser was ejected was running too fast for his safe ejection is a question of fact for the jury. Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 43 Pac. 244.

Improper means of ejecting boys.—Where a boy was ejected from a train in motion, and received thereby injuries from which he died, it is for the jury to decide whether the railroad company is liable in damages for using improper means to clear its train of boys improperly on it. Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537.

17. Ejection from street car.—Whether a street car driver who attempts to remove a person from the car for nonpayment of fare, while the car is in motion,

by his being forced from a slowly moving street car was malicious or intentional, and therefore actionable, is for the jury.[18] Whether servants in charge of a street car act within the scope of their employment in ejecting a person from a moving street car may become a question for the jury.[19]

Proximate Cause.—The question of proximate cause is usually one for the jury.[20]

Question of Contributory Negligence.—Where a person leaving a ticket office, after being cautioned to "look out for the steps," crosses the platform obliquely, and falls to the side of them, the question of contributory negligence is for the jury.[21] Where a person, while coming out of a depot, where he had been on business, was struck by a train, and it is conceded that the railroad company was in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters, the court is not justified in refusing to submit to the jury the question whether the company is relieved from the liability incurred by it, by reason of acts of the plaintiff showing that, in some degree, he may not have been as careful as the most cautious and prudent man would have been.[22]

Capacity of Children to Avoid Danger.—Whether a child under fourteen years of age has sufficient capacity to perceive and avoid the dangers of an unsafe place is a question for the jury.[23]

is chargeable with want of proper care, is a question for the jury. Healey *v.* City Passenger R. Co., 28 O. St. 23.

Ordering boy from moving car.—The question of the negligence of a street car conductor in ordering a boy to get off a moving car is a matter peculiarly for the consideration of the jury. Chicago City R. Co. *v.* O'Donnell, 109 Ill. App. 616, judgment affirmed in 69 N. E. 882, 207 Ill. 478.

Where a boy nine years old jumped on the front platform of a horse car at the invitation of the driver, and after riding a square the driver made him get off while the car was in motion, and he fell and was injured, the question of negligence was for the jury. Hestonville Passenger R. Co. *v.* Grey (Pa.), 1 Walk. 513.

The question whether it was safe for a boy to alight from a car at the command of the conductor while it was running at a speed of some four to five miles an hour was question of fact for the jury. Indianapolis St. R. Co. *v.* Hockett, 67 N. E. 106, 161 Ind. 196.

18. Whether injury is intentional.—Lerner *v.* Public Service R. Co., 83 N. J. L. 64, 84 Atl. 618.

19. Scope of employment.—Whether a conductor, in kicking from the platform of a street car a boy who was stealing a ride, was acting through malice, and hence outside his authority, or through zeal in the performance of his duty, is a question for the jury. Hoffman *v.* New York, etc., R. Co., 44 N. Y. Super. Ct. 1, affirmed in 75 N. Y. 605; S. C., 46 N. Y. Super. Ct. 526, affirmed in 87 N. Y. 25, 41 Am. Rep. 337.

In an action for injuries sustained in being ejected from a moving street car, where it appeared that plaintiff boarded the car to sell papers without intention of becoming a passenger, and was ejected by the motorman, who lunged for him the moment he discovered him, without inquiring whether he was a passenger, or ordering him inside or off, it was a question of fact for the jury whether the motorman was acting within the scope of his authority; and, if he was not, the defendant was not liable. Barry *v.* Union R. Co., 94 N. Y. S. 449, 105 App. Div. 520.

20. Proximate cause.—Plaintiff boarded a caboose on defendant's freight train to make inquiries of the conductor concerning his wife, having expected her on that train, and while he was still in the caboose and waiting for the conductor the train started. When the conductor came he demanded that plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out on the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the sudden lurching of the caboose after having attempted to re-enter. Held, that the question whether the wrongful conduct of the conductor was the proximate cause of the injury was for the jury. Great Northern R. Co. *v.* Bruyere, 114 Fed. 540, 51 C. C. A. 574.

21. Disregarding warning.—Alabama, etc., R. Co. *v.* Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354.

22. Partial want of care of plaintiff—Conceded negligence of carrier.—Jones *v.* East Tennessee, etc., R. Co., 9 S. Ct. 118, 32 L. Ed. 478, 128 U. S. 443.

23. Capacity of child to avoid danger.—So held as to a child between thirteen and fourteen years of age, who was injured on board a tug boat Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

So held as to a boy eleven years of age riding in an unsafe and hazardous position on a street car. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Excuses for Contributory Negligence.—Whether it is necessary for a police officer charged with the duty of regulating the movements of street cars and vehicles at a street corner may, in performing his duty, to get on a part of a street car where he is exposed to danger and where passengers are not invited or expected to ride, is a question of fact under the particular circumstances.[24] The effect of acts of employees of a carrier as bearing on the injured person's conduct so as to excuse him from contributory negligence has been held a question for the jury.[25]

§ 3090. Instructions.—Instructions ought to be so framed as to be intelligible,[26] and must not disregard issues raised by the pleading.[27] The charge of

24. Necessity for traffic policeman exposing himself to danger.—Ahern *v.* Boston Elev. R. Co., 210 Mass. 506, 97 N. E. 72.

Where a police officer, while regulating the movements of cars and vehicles at a street corner, was compelled, by reason of the negligence of the operator of a street car, to take a position on the car step, and to remain there until the car collided with another car, and the motorman of the car disregarded the signals of the officer to open the vestibule door and permit him to take a place of safety, the court properly refused to rule that there could be no recovery as a matter of law. Ahern *v.* Boston Elevated Ry. Co., 97 N. E. 72, 210 Mass. 506.

25. Act of baggage man cursing boy.—Where the evidence showed that plaintiff, a boy of fifteen years old, when delivering railroad mail at the request of the station agent to the baggage master on a car, being rudely cursed by the baggage man, became confused, and stepped in front of an approaching engine on another track close by, and was injured, it was proper to refuse to direct a verdict for defendant, as it is for the jury to say whether the unwarranted act of the baggage man excused the plaintiff's want of care in stepping in front of the approaching train by depriving him for the time being of his capacity to act with ordinary prudence. Chicago, etc., R. Co. *v.* Parkinson, 56 Kan. 652, 44 Pac. 615.

Threatening act of conductor.—Plaintiff, a boy thirteen, stepped upon a downtown car which was standing upon a crossing, not intending to travel upon it, but to escape a truck which seemed to be coming down upon him. The conductor of the car stepped towards him in a threatening manner and kicked at him. To avoid the kick, plaintiff jumped from the platform. He did not see an up town car approaching, nor did he look for it. He alighted in the middle of the up town track and was run over. Held, that the questions of negligence and contributory negligence should have been sent to the jury. McCann *v.* Sixth Ave. R. Co., 117 N. Y. 505, 43 Am. & Eng. R. Cas. 297, 23 N. E. 164, 15 Am. St. Rep. 539.

Act of conductor in telling plaintiff to get off moving train.—In an action to recover for injuries received by plaintiff who alighted from defendant's train while it was in motion, it was the province of the jury to determine both the nature and effect of a remark of the conductor in telling plaintiff to get off the train as quickly as possible without attempting to stop the train for that purpose; whether it was intended and understood as an order to leave the train, or was by way of advice in furtherance of plaintiff's intention, and also whether such remark affected the action of the plaintiff, and caused him to act differently from what he otherwise would have done. Pittsburgh, etc., R. Co. *v.* Krouse, 30 O. St. 222.

26. Charge to be intelligible.—In an action against a railroad company for a personal injury received by plaintiff from a blow on the knee by a mail pouch thrown from defendant's passing train, plaintiff's theory was that the injury was caused by his heel being driven by the blow into a large hole in defendant's station platform, and there held so that his knee received the whole momentum of the pouch. Held that an instruction that plaintiff's knowledge of the existence of "holes in a platform" would not preclude him from recovery in this action, "unless his foot was knocked into the hole by reason of some carelessness, fault, or negligence of his own," was unintelligible, and should not have been given. James *v.* Missouri Pac. R. Co., 107 Mo. 480, 18 S. W. 31.

27. Disregarding allegation of negligence in permitting child on tug boat.—In an action against a company owning a tug boat for the death of a child while on the boat, the boat not being a passenger boat, where the petition alleges that the company was guilty of negligence in receiving the child on board of the boat without the consent of its parents, it is error to charge that plaintiffs can not recover unless the child was a passenger on defendant's boat. Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

Charge excluding defense of contributory negligence.—Where one of the defenses to an action against a street railway company was that the injury was due to plaintiff's own negligence, and not

the court must not infringe on the province of the jury,[28] and should not express or intimate an opinion on the facts of the case.[29] In an action for injuries sustained by one who was standing on a depot platform and was struck by defendant's train, it is error to charge that the jury may determine for themselves what precautions defendant was bound to take.[30]

Charge on Burden of Proof.—In an action for injuries to an intruder on being ejected from a car, it is error to refuse to instruct that the preponderence of the evidence is upon plaintiff.[31]

Instructions on Duty as to Person Accompanying Passenger.—Where plaintiff's decedent was killed by the collapse of defendant's railroad station while he was there for the purpose of meeting a passenger, an instruction that the law imposed the duty on one constructing a public building to make it reasonably safe against storms is not objectionable as imposing such duty with re-

to any negligence on the part of the defendant, and evidence was adduced to support this defense, and instructions were given upon it, an instruction that the only valid defense in the action was based on the theory that defendant's motorman had not invited plaintiff to ride, and for the jury to exclude from their consideration and decision the question whether, admitting the invitation to have been given, the plaintiff was guilty of such contributory negligence as would defeat his recovery, is highly prejudicial to the defendant. Little Rock Tract., etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

28. **Infringing on province of jury—Question of contributory negligence not fairly submitted.**—Coaches for the reception of passengers were placed on a side track adjacent to a main track intervening between it and the depot. Plaintiff's intestate was killed by an engine on the main track, either on his return from assisting a friend to the coaches, or from a second trip, on his own pleasure, to see him. There was evidence that on his return he pulled his overcoat cape over his head, covering his eyes and ears. The court instructed that, if intestate accompanied a departing friend needing assistance, or visited the coaches to look after his comfort, when they were ready for the reception of passengers, he was rightfully on the premises, under an implied assurance that no engine would be permitted to run on the intervening track, unless the company used ordinary care to give timely warning of the approach, and he had a right to lessen his own watchfulness, and it was not incumbent on him to be on the lookout for danger, if, under the circumstances, he had no reasonable ground to suspect that danger was to be apprehended. Held, that such instruction was erroneous, as failing to fairly submit to the jury the question as to whether intestate was guilty of contributory negligence. St. Louis, etc., R. Co. *v.* Tomlinson, 64 S. W. 347, 69 Ark. 489.

29. **Intimating opinion on facts of case.**—In an action by a person to recover for injuries caused by jumping from a moving train it is error to charge that "notwithstanding a man may be a trespasser on a train, and the agent of the company for the right to put him off, yet they must use ordinary diligence in doing so; and if they do not use ordinary diligence in putting him off," the company is liable for injuries caused thereby, as such a charge intimates an opinion on the part of the court, that the plaintiff had been ejected and warranted an inference that the court considered it a proved fact, although such was not disclosed by the facts. Southwestern R. Co. *v.* Singleton, 67 Ga. 306.

Assumption of negligence of carrier.—In an action against a railroad company for a personal injury received by plaintiff from a blow on the knee by a mail pouch thrown from defendant's passing train, plaintiff's theory was that the injury was caused by his heel being driven by the blow into a large hole in defendant's station platform, and there held so that his knee received the whole momentum of the pouch. Held, that an instruction which assumed that defendant was negligent in permitting the hole to remain in the platform was error; the question was for the jury. James *v.* Missouri Pac. R. Co., 107 Mo. 480, 18 S. W. 31.

Assumption of collusion between trespasser and employee.—Special instructions that if plaintiff paid to be carried, knowing it was against the rules for the freight train on which he was riding to carry persons situated as he was, then defendant was not liable for any willful assault made by the brakeman, were properly refused, as they assumed fraud and collusion between plaintiff and the brakeman to defraud defendant. Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 330.

30. **Submitting questions of law to jury.**—Archer *v.* New York, etc., R. Co. (N. Y.), 19 Wkly. Dig. 10.

31. **Charge on burden of proof.**—Miller *v.* Detroit United Railway, 144 Mich. 1, 107 N. W. 714.

gard to those who were in the building on their own risk as mere licensees.[32] A charge that it was the duty of the railroad company to stop its train a reasonably sufficient time to allow plaintiff to assist his wife to a seat and alight in safety, is not misleading as authorizing a recovery against the railroad company without regard to plaintiff's diligence, especially where the court charged that it was plaintiff's duty to use the proper dispatch in assisting his wife to a seat and alighting from the train.[33]

Instructions on Duty as to Trespassers.—An instruction that if a person, without the knowledge of employees in charge of a street car, boards the car at a place other than a proper stopping place, while the car is in motion, and that if the employees, on discovering him, immediately attempt to stop the car to prevent injury, by using the car required by law, then the company is not chargeable with negligence, is not erroneous, as requiring the company to exercise the highest degree of care towards a trespasser.[34] Special instructions that if plaintiff paid to be carried, knowing it was against the rules for the freight train on which he was riding to carry persons situated as he was, then defendant was not liable for willful assault made by the brakeman, are properly refused, as they place plaintiff beyond the protection of the law, regardless of whether the brakeman was acting in the master's interests or in the scope of his duties.[35]

Instructions on Contributory Negligence.—An instruction, which in effect holds that the failure of a person who is injured while attempting to cross an intervening reach to the depot, to look and listen is not necessarily negligence, but that if he obstructs his vision and hearing so as to put it beyond his power to see or hear, he is as a matter of law guilty of contributory negligence, is not erroneous.[36] In such case an instruction which allows the jury to find that intestate acted recklessly, and also to find for plaintiff if a man of ordinary prudence would have so acted under similar circumstances, is erroneous.[37] It is not error to refuse a charge on the contributory negligence of a person assisting a passenger in failing to get off when he had an opportunity to do so safely, since if such person had an opportunity to alight in safety, it was because

32. Instruction on safety of depot as to person meeting passenger.—Judgment, 54 N. Y. S. 1102, 33 App. Div. 641, affirmed in Godfrey *v.* New York, etc., R. Co., 161 N. Y. 565, 56 N. E. 77.

33. Instruction as to duty of allowing sufficient time for escort to leave train.—St. Louis, etc., R. Co. *v.* Cunningham, 106 S. W. 407, 48 Tex. Civ. App. 1.

34. Charge on duties as to trespassers.—Citizens' St. R. Co. *v.* Merl, 26 Ind. App. 284, 59 N. E. 491.

35. Texas, etc., R. Co. *v.* Black, 23 Tex. Civ. App. 119, 57 S. W. 330.

36. Charge on contributory negligence—Obstruction of sight and hearing by act of injured person.—Plaintiff's intestate accompanied a passenger needing assistance to a coach placed on a side track adjacent to the main track, and across from the station, and was killed on his return by an engine backing on the main track. The evidence was conflicting as to whether intestate had enveloped his head in his cape, so that he could neither see nor hear the approaching engine, or whether he merely held it so as to keep off the rain without obstructing his hearing or vision. The court instructed that the fact alone that plaintiff pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train, or both, and in that condition went in front of an approaching engine, did not necessarily render him guilty of contributory negligence, but that the question was whether he exercised ordinary care and prudence under the circumstances. The court also instructed that if deceased, in order to keep off rain, enveloped his head in his cape, so as to obstruct his vision or hearing, and so went in front of an engine, and was immediately killed, when he would have seen or heard it if his hearing or vision was not obstructed, he was guilty of contributory negligence. Held, that the first instruction was not erroneous. St. Louis, etc., R. Co. *v.* Cleere, 88 S. W. 995, 76 Ark. 377.

37. Where there was evidence that, before attempting to cross defendant's track, deceased, to protect himself from the rain, drew up the cape of his coat over his eyes and ears, so that he could see directly in front only, it was error to instruct the jury that if deceased, in attempting to protect himself from the rain, did only what a man of ordinary prudence would have done under similar circumstances, he was not guilty of negligence. St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

defendant had discharged its duty to hold the train long enough to enable him to do so, and was therefore not negligent nor liable for plaintiff's injuries, irrespective of plaintiff's negligence.[38]

Instructions on Proximate Cause.—Where a petition alleges that while plaintiff was assisting a passenger to a seat defendant negligently started the train, and when plaintiff reached the platform the train was moving so slowly that he could, without negligence, leave it safely, when, as he was on the lower step, the train was negligently jerked with such violence that he was thrown off and injured, the refusal to instruct that the starting of a train before plaintiff had alighted was not the proximate cause of the injury is error.[39]

§ 3091. Verdict.—Special Finding.—In an action against a railroad company for ejecting plaintiff from the train, a special finding as to the existence of a rule of the company relating to the duties of brakemen is the statement of fact upon which the court could determine as a question of law whether authority had been given a brakeman to eject trespassers on the train, and such determination does not infringe any prerogative of the jury; and in such case, if the finding had been that the brakeman had or had not authority to eject trespassers, such finding would have stated the limit of the issue both as a question of fact and one of law and would be objectionable.[40]

38. Instruction as to failure to alight when opportunity presented.—St. Louis, etc., R. Co. *v.* Cunningham, 106 S. W. 407, 48 Tex. Civ. App. 1.

39. Charge as proximate cause.—Saxton *v.* Missouri Pac. R. Co., 98 Mo. App. 494, 72 S. W. 717.

40. Special finding.—Lake Shore, etc., R. Co. *v.* Peterson, 42 N. E. 480, 43 N. E. 1, 144 Ind. 214.

CHAPTER XXVII.

Actions.

I. Scope of Chapter, § 3092.
II. Right of Action, § 3093.
III. Nature and Form of Action, § 3094.
VI. Parties, § 3095.
V. Pleading, §§ 3096-3143.
A. Declaration or Complaint, §§ 3096-3138.
a. In General, § 3096.
b. Actions for Failure to Perform Contract or Duty in General, §§ 3097-3103.
(1) Refusal to Receive and Carry, § 3097.
(2) Fraud, Mistake, or Negligence as to Ticket or Transfers, § 3098.
(3) Misinformation or Incorrect Informations, § 3099.
(4) Failure to Stop and Receive, § 3100.
(5) Putting Passenger on Wrong Train, § 3101.
(6) Separation of Passengers, § 3102.
(7) Failure to Set Down at Destination, § 3103.
c. Actions for Personal Injuries, §§ 3104-3129.
(1) Pleading in General, § 3104.
(2) Allegations as to Contract or Relation, § 3105.
(3) Allegations as to Time, Place and Vehicle, § 3106.
(4) Allegations as to Negligence and Cause of Injury, §§ 3107-3125.
(a) In General, § 3107.
(b) Specific Averment of Negligence, § 3108.
(c) General Averment of Negligence, § 3109.
(d) Restriction of General Averment by Other Averment, § 3110.
(e) Averment of Basis or Bases for Negligence, §§ 3111-3122.
aa. In General, § 3111.
bb. As to Stations and Stopping Places, § 3112.
cc. As to Roadbed and Track, § 3113.
dd. As to Vehicle, § 3114.
ee. Receiving and Discharging Passengers, § 3115.
ff. Accommodations and Duties in Transit, § 3116.
gg. Assisting Passenger, § 3117.
hh. Carriage beyond Destination, § 3118.
ii. Alighting at Intermediate Station, § 3119.
jj. Management of Conveyance, § 3120.
kk. Protection of Passenger, § 3121.
ll. Assaults and Insults by Servants, § 3122.
(f) Alleging Act to Be That of Carrier, § 3123.
(g) Allegations as to Agent or Servant at Fault, § 3124.
(h) Violation of Statute or Ordinance, § 3125.
(5) Connection between Negligence and Cause of Injury, § 3126.
(6) Allegations as to Injury Sustained, § 3127.
(7) Negativing Assumed Risks, § 3128.
(8) Negativing Contributory Negligence, § 3129.
d. Actions for Ejectment, §§ 3130-3136.
(1) In General, § 3130.
(2) Allegations as to Breach of Duty, §§ 3131-3133.
(a) Unauthorized and Wrongful Ejectment, § 3131.
(b) Use of Unnecessary Force, § 3132.
(c) Ejection at Improper Place, § 3133.

(3) Allegations as to Servant at Fault, § 3134.
(4) Connection between Ejection and Injury, § 3135.
(5) Negativing Contributory Negligence, § 3136.
e. Pleading Damages, §§ 3137-3138.
(1) In General, § 3137.
(2) Punitive Damages, § 3138.
B. Plea or Answer, § 3139.
C. Replication, § 3140.
D. Special Demurrer, Exceptions or Motion, § 3141.
E. Amendment, § 3142.
F. Aider by Subsequent Pleadings and Cure of Error, § 3143.
VI. Issues, Proof and Variance, §§ 3144-3162.
A. Issues, §§ 3144-3148.
a. In General, § 3144.
b. Issues as Affected by Plea or Answer, § 3145.
c. Additional Issues by Subsequent Pleadings, § 3146.
d. Under Amended Petition, § 3147.
e. Elimination of Issues by Dismissal, § 3148.
B. Proof, §§ 3149-3151.
a. Matters to Be Proven, § 3149.
b. Failure of Proof, § 3150.
c. Sufficiency of Proof, § 3151.
C. Variance, §§ 3152-3162.
a. In General, § 3152.
b. Tort and Contract, § 3153.
c. As to Contract of Carriage, § 3154.
d. As to Status of Plaintiff, § 3155.
e. As to Negligence or Cause of Injury, §§ 3156-3159.
(1) In General, § 3156.
(2) Negligence Averred Generally or Specifically, § 3157.
(3) Active or Passive Negligence, § 3158.
(4) Wilful or Wanton Negligence or Delay, § 3159.
f. As to Persons Liable, § 3160.
g. As to Injury or Damages, § 3161.
h. Amendment to Conform to Proof, § 3162.
VII. Presumptions and Burden of Proof, §§ 3163-3193.
A. In Action for Failure to Perform Contract, § 3163.
B. In Actions for Ejection, § 3164.
C. In Actions for Personal Injury, §§ 3165-3193.
a. As to Relation of Carrier and Passenger, § 3165.
b. As to Injury, § 3166.
c. As to Negligence or Cause of Injury, §§ 3167-3193.
(1) In General, § 3167.
(2) Connection between Negligence and Injury, § 3168.
(3) Presumption Arising from Evidence, §§ 3169-3174.
(a) General Rule—Prima Facie Case, §§ 3169-3173.
aa. Negligence Generally Pleaded, § 3169.
bb. Both General and Specific Negligence Alleged, § 3170.
cc. Specific Negligence Alleged, § 3171.
dd. Assumption of Unnecessary Burden by Plaintiff, § 3172.
ee. Effect of Attempted Explanation, § 3173.
(b) Operation and Effect of Presumption, § 3174.
(4) Rules Applied in Particular Cases, §§ 3175-3189.
(a) Stations and Stopping Places, § 3175.
(b) As to Roadbed and Track, § 3176.
(c) As to Vehicle, § 3177.

(d) Receiving and Discharging Passengers, §§ 3178-3181.
aa. In General, § 3178.
bb. Carriage beyond Destination, § 3179.
cc. Putting Off at Wrong Destination, § 3180.
(e) Duties and Accommodation in Transit, § 3181.
(f) Management of Vehicle, §§ 3182-3189.
aa. Jerks and Jolts, § 3182.
bb. Breaking Down or Overturning of Coach, § 3183.
cc. Injury from Animals Drawing Coach, § 3184.
dd. Derailment, § 3185.
ee. Collision, § 3186.
ff. Assaults, Insults, etc., by Carrier's Servants, § 3187.
gg. Duty to Protect Passengers from Third Persons, § 3188.
hh. Injury Resulting from Effort to Escape Danger, § 3189.
(5) Willfulness or Wantonness, § 3190.
(6) Passengers on Freight Trains, § 3191.
(7) Passengers without Reward, § 3192.
(8) Contract Assuming Risk or Releasing Liability, § 3193.
VIII. Admissibility of Evidence, §§ 3194-3237.
A. Failure to Perform Contract or Duty in General, §§ 3194-3199.
a. Evidence to Establish Contract, § 3194.
b. Failure or Refusal to Receive and Carry, § 3195.
c. Failure or Refusal to Honor Ticket, Mileage, etc., § 3196.
d. Failure or Refusal to Put Off at Destination, § 3197.
e. Protection and Accommodations, § 3198.
f. Delay, Failure to Make Schedule, Connections, etc., § 3199.
B. In Actions for Ejectment, §§ 3200-3208.
a. Relevancy and Materiality in General, § 3200.
b. As to Contract or Relation, § 3201.
c. Ejection for Failure to Produce Ticket, § 3202.
d. Ejection for Refusal to Pay Fare, § 3203.
e. Violation of Statutes, Rules, and Regulations, § 3204.
f. Time, Place, etc., of Ejection, § 3205.
g. General Character and Disposition of Employee, § 3206.
h. Evidence as to Authority to Eject, § 3207.
i. Ratification of Conductor's Act, § 3208.
C. In Suits for Personal Injury, §§ 3209-3237.
a. Relation of Carrier and Passenger, § 3209.
b. As to Negligence or Cause of Injury, §§ 3210-3231.
(1) In General, §§ 3210-3218.
(a) Relevancy and Materiality, § 3210.
(b) Degree of Care, § 3211.
(c) Facts Constituting Transaction, § 3212.
(d) Statements and Declarations, § 3213.
(e) Matter to Show Notice to Carrier, § 3214.
(f) Rules of Carrier, § 3215.
(g) Habit or Custom, § 3216.
(h) Evidence of Other Accidents, Transactions, etc., § 3217.
(i) Character of Parties, § 3218.
(2) Stations and Stopping Places, § 3219.
(3) Condition of Track or Roadbed, § 3220.
(4) Condition of Vehicle and Appliances, § 3221.
(5) Receiving and Discharging Passengers, §§ 3222-3223.
(a) In General, § 3222.
(b) Time to Board or Alight—Sudden Starting, § 3223.

(6) Carriage beyond Destination, § 3224.
(7) Accommodation and Duties in Transit, § 3225.
(8) Management of Conveyance, §§ 3226-3229.
(a) In General, § 3226.
(b) Under Allegation of Derailment, § 3227.
(c) Under Allegation of Collision, § 3228.
(d) Effort to Escape Danger, § 3229.
(9) Competency of Employees or Care in Selecting Them, § 3229½.
(10) Failure to Protect from Third Persons, § 3230.
(11) Assaults, Insults, etc., by Servants, § 3231.
c. As to Injury, §§ 3232-3233.
(1) Evidence as to Existence of Injury, § 3232.
(2) Nature and Extent of Injury, § 3233.
d. As to Damages, §§ 3234-3237.
(1) Damages for Breach of Contract, § 3234.
(2) In Actions for Ejectment, § 3235.
(3) In Action for Personal Injury, § 3236.
(4) Punitive Damages, § 3237.
IX. Weight and Sufficiency of Evidence, §§ 3238-3287.
A. In General, § 3238.
B. As to Negligent Acts of Employees, §§ 3239-3248.
a. In General, § 3239.
b. Ejecting Passenger, § 3240.
c. Assaulting Passenger, § 3241.
d. Escorting Passenger Across Track, § 3242.
e. Controlling Conduct of Other Passengers, § 3243.
f. Aiding in Making Arrests, § 3244.
g. Negligently Closing Door, § 3245.
h. Inviting Passenger on Engine, § 3246.
i. Putting up Berth, § 3247.
j. Injury to Passenger in Custody of Employee, § 3248.
C. As to Negligence in Respect to Condition of Carrier's Premises, § 3249.
D. As to Negligence in Respect to Condition of Means of Transportation, § 3250.
E. As to Negligence in Management of Conveyances in General, § 3251.
F. As to Negligence Causing Passenger to Fall from Vehicle, §§ 3252-3256.
a. In General, § 3252.
b. Defective Means and Instrumentalities, § 3253.
c. Negligent Management of Conveyance, § 3254.
d. Negligent Pushing Passenger from Car, § 3255.
e. Negligence after Passenger Has Fallen, § 3256.
G. As to Cause of Derailment, § 3257.
H. As to Negligence Causing Collision, § 3258.
I. As to Negligence in Taking up Passengers in General, §§ 3259-3269.
a. In General, § 3259.
b. Place of Taking up Passengers, § 3260.
c. Passenger Boarding Moving Train, § 3261.
d. Passenger Boarding Car on Wrong Side, § 3262.
e. Negligent Starting Car, § 3263.
f. Negligent Backing Car, § 3264.
g. Negligent Coupling Cars, § 3265.
h. Negligent Pushing of Passenger from Train, § 3266.
i. Negligent Shutting of Gate on Passenger, § 3267.
j. Passenger Injured by Brake Handle, § 3268.
k. Failure to Control Conduct of Other Passengers, § 3269.
J. As to Negligence in Setting Down Passengers, §§ 3270-3277.
a. In General, § 3270.
b. Defective Instrumentalities or Premises, § 3271.

c. Passenger Alighting from Moving Train, § 3272.
d. Negligent Stopping of Car, § 3273.
e. Negligent Starting of Car, § 3274.
f. Negligent Backing of Car, § 3275.
g. Carrying Passenger Past Station, § 3276.
h. Passenger Injured after Alighting, § 3277.
K. As to Companies or Persons Liable for Injuries, § 3278.
L. Limitation of Liability, § 3279.
M. Passenger in Elevators, § 3280.
N. Evidence to Rebut Presumption of Negligence Arising from Injury, §§ 3281-3287.
a. In General, § 3281.
b. Injury Caused by Defective Means of Transportation, § 3282.
c. Injury Caused by Negligent Management of Conveyance, § 3283.
d. Injury Caused by Negligent Setting Down Passengers, § 3284.
e. Injury Caused by Derailment, § 3285.
f. Injury Caused by Collision, § 3286.
g. Injury Caused by Another Passenger, § 3287.
X. Questions for Court or Jury, §§ 3288-3320.
A. Actions for Breach of Contract in General, § 3288.
B. Actions for Wrongful Ejection, §§ 3289-3292.
a. In General, § 3289.
b. Whether Plaintiff Was Passenger, § 3290.
c. Questions as to Carrier's Regulations, § 3291.
d. Place and Manner of Ejection, § 3292.
C. Actions for Personal Injuries, §§ 3293-3320.
a. In General, § 3293.
b. Existence of Relation of Carrier and Passenger, § 3294.
c. Care as to Passengers under Disability, § 3295.
d. Acts of Carrier's Employees, § 3296.
e. Number and Efficiency of Employees, § 3297.
f. Acts of Fellow Passengers or Other Third Persons, § 3298.
g. Condition and Use of Carrier's Premises, § 3299.
h. Taking Up Passengers, §§ 3300-3301.
(1) In General, § 3300.
(2) Starting or Moving Car While Passenger Is Boarding Same, § 3301.
i. Operation of Trains at Places Where Passengers Are Being Received or Discharged, § 3302.
j. Railroad Cars, § 3303.
k. Cars and Equipment of Street Railroads, § 3304.
l. Tracks and Roadbeds, § 3305.
m. Condition of Elevators, § 3306.
n. Management of Conveyances, §§ 3307-3314.
(1) In General, § 3307.
(2) Overloading or Crowding Cars, § 3308.
(3) Rate of Speed, § 3309.
(4) Sudden Lurches, Jerks, or Jolts, § 3310.
(5) Passing Other Vehicle or Objects, § 3311.
(6) Collision, § 3312.
(7) Derailment of Cars, § 3313.
(8) Management of Elevators, § 3314.
o. Protection of Passengers from Incidental Dangers, § 3315.
p. Setting Down Passengers, §§ 3316-3318.
(1) In General, § 3316.
(2) Starting or Moving Car While Passenger Is Alighting, § 3317.
(3) Providing Safe Place or Means for Alighting, § 3318.

q. Proximate Cause of Injury, § 3319.
r. Companies Liable, § 3320.
XI. Instructions, §§ 3321-3368.
A. Actions for Personal Injuries, §§ 3321-3362.
a. General Consideration, §§ 3321-3336.
(1) Right to and Propriety of Instructions Generally, § 3321.
(2) Form and Requisites, §§ 3322-3326.
(a) Correct, Full and Fair Statement of Law, § 3322.
(b) Language and Terminology, § 3323.
(c) Clearness and Definiteness, § 3324.
(d) Argumentativeness, § 3325.
(e) Misleading Instructions, § 3326.
(3) Requests for Instructions, § 3327.
(4) Duty to Explain Issues, § 3328.
(5) Conformity to Pleadings and Issues, § 3329.
(6) Applicability to Evidence, §§ 3330-3332.
(a) In General, § 3330.
(b) Ignoring Evidence or Facts in Case, § 3331.
(c) Assuming Facts, § 3332.
(7) Invading Province of Jury, § 3333.
(8) Harmless Error, § 3334.
(9) Curing Error, §§ 3335-3336.
(a) Obviating Error by Other Instructions, § 3335.
(b) Subsequent Explanation of Charge, § 3336.
b. Existence of Relation of Carrier and Passenger, § 3337.
c. Definition or Explanation of What Constitutes Negligence, § 3338.
d. Degree of Care Required, § 3339.
e. Acts of Carrier's Servants, Fellow-Passengers, or Third Persons, § 3340.
f. Condition of Carrier's Premises, § 3341.
g. Taking Up Passengers, § 3342.
h. Starting or Moving Car While Passenger Boarding Same, § 3343.
i. Sufficiency and Safety of Means of Transportation, § 3344.
j. Management of Conveyances, § 3345.
k. Causing Passengers to Fall from Train or Car, § 3346.
l. Sudden Jerks, Lurches or Jolts, § 3347.
m. Collisions, § 3348.
n. Derailment, § 3349.
o. Elevators, §§ 3350-3351.
(1) Safety and Sufficiency, § 3350.
(2) Management, § 3351.
p. Setting Down Passengers in General, § 3352.
q. Starting or Moving Train While Passenger Alighting, § 3353.
r. Providing Safe Place or Means for Alighting, § 3354.
s. Care as to Persons Accompanying Passengers, § 3355.
t. Liability to Persons Accompanying Stock, § 3356.
u. Proximate Cause, § 3357.
v. Companies or Persons Liable, § 3358.
w. Presumptions and Burden of Proof, § 3359.
x. Weight and Sufficiency of Evidence, § 3360.
y. Credibility of Witnesses, § 3361.
z. Damages, § 3362.
B. Actions for Breach of Contract of Carriage, §§ 3363-3365.
a. Form, Requisites and Sufficiency in General, § 3363.
b. Acts Constituting Breach and Excuses Therefor, § 3364.
c. Damages, § 3365.

C. Actions for Ejectment, §§ 3366-3368.
a. Form, Requisites and Sufficiency in General, § 3366.
b. Right to Eject, § 3367.
c. Damages, § 3368.
XII. Verdict and Finding, § 3369.
XIII. Appeal and Error, § 3370.
XIV. Costs, § 3371.

§ 3092. Scope of Chapter.—This chapter is scoped to include all actions by passengers, against carriers as such, arising out of the contract of carriage or for personal injuries. It does not include actions in regard to baggage and the passengers' personal effects;[1] actions against sleeping and palace car companies;[2] actions arising out of relations of connecting carriers;[3] and actions by licensees, invitees, trespassers, etc.[4]

§ 3093. Right of Action.—The general principle that a party performing the terms of a contract has a remedy against the other party for breach thereof applies to a railroad ticket issued to a passenger.[5] The passenger's right of action for being ejected on the ground that the fare tendered was insufficient under the statute, is not destroyed by a repeal of the statute which merely fixes the rate, the right sued on not being statutory.[6] Where a breach of the contract between a carrier and a passenger is entirely consummated, no cause of action arises out of the passenger's ejection upon a second attempt to obtain transportation under the contract,[7] but the question as to whether or not the breach of the contract has been consummated depends upon the facts presented in each particular case.[8]

The keeper of a public ferry is liable to an action on the case for the consequential damages resulting from a refusal to set a passenger across the stream over which he keeps his ferry,[9] and this although there is a statute giving a fixed penalty for such neglect of duty; and the warrant need not specify the watercourse.[10]

1. **Personal effects.**—See post, "Passengers' Effects," chapter 29.

2. **Palace cars and sleeping car companies.**—See post, "Palace Cars and Sleeping Car Companies," chapter 30.

3. **Connecting carriers.**—See post, "Connecting Carriers," Part V.

4. See ante, "Licensees, Invitees, Trespassers, etc.," chapter 26.

5. **Nature and form.**—Ann Arbor R. Co. *v.* Amos, 97 N. E. 978, 85 O. St. 300.

6. **Right of action not statutory.**—Laws 1907, c. 216, § 1, prohibiting a carrier of intrastate passengers from demanding more than two and one-fourth cents per mile for transportation, was repealed by acts Ex. Sess. 1908, c. 144, effective April 1, 1908, § 6 of which provides that no railroad company shall be held liable by reason of anything done or attempted to be done in violation of the repealed act. Plaintiff sued several months before the repealing statute became effective to recover for being ejected from defendant's passenger train, after having tendered the proper amount of fare required by Laws 1907, on the ground that the fare tendered was insufficient. Held, that the right of action sued on was not statutory, though the rate of transportation was fixed by statute, so that the subsequent repeal of laws 1907 did not destroy plaintiff's right of action. Williams *v.* Atlantic, etc., R. Co., 69 S. E. 402, 153 N. C. 360.

7. See Scofield *v.* Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224.

8. **Fact not showing consummation of breach.**—Where a railroad company agrees to transport a passenger between specified points, with the right to stop off at an intermediate point, and the ticket coupon covering the distance between such points is taken up by the company's conductor, over the passenger's objection, before reaching the intermediate point—the right to stop off being denied—the passenger's right of action against the company for breach of contract is not thereby consummated, so as to deprive him of a right of action for expulsion from a succeeding train on resuming his journey from the place of stopover; such expulsion being directed by the company's agent after investigation. Scofield *v.* Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224.

9. **Action on case.**—Wallen *v.* McHenry, 22 Tenn. (3 Humph.) 245.

10. **Statutory penalty immaterial.**—Wallen *v.* McHenry, 22 Tenn. (3 Humph.) 245.

That a penalty is imposed by statute on the carrier for violation of the law requiring the giving of transfers does not deprive a passenger, presenting a transfer valid on its face, who is summarily ejected, of a remedy by action for damages.[11]

Contract between Carrier and Third Persons.—When the plaintiff is received, voluntarily or involuntarily, as a passenger upon the defendants' car, to be transported under a contract made, between county authorities and the carrier to transfer the sick to the county pest house, the obligation of carrier and passenger at once arises under the contract, as well as impliedly, for the proper, safe, and convenient transportation contemplated by the contract; and for a breach of the duty of the defendant to him under the contract that plaintiff would have a proper cause of action, either upon the contract or in an action ex delicto, as he might elect.[12] This doctrine has been extended by persuasive authority, to one of a class of persons where the class is sufficiently designated.[13]

In Pari Delicto Rule.—Where both the passenger and the carrier are engaged in an illegal transaction the rule of in pari delicto applies and no cause of action can result from the carrier's negligence.[14] But this rule should be strictly applied and only to cases where the relation of carrier and passenger arises out of and is a part of the illegal transaction.[15] Where the parties enter into a contract exempting the carrier from negligence, they can not be said to be in pari delicto, as the carrier's duty is founded in public policy and not in contract.[16]

Subsequent Conduct as Affecting Rights.—Where the original wrong on the part of the carrier or its servants results in injury to the passenger, subsequent acts or conduct upon their part can not excuse the wrong.[17]

11. Penalty imposed by statute.—Charbonneau *v.* Nassau Elect. R. Co., 108 N. Y. S. 105, 123 App. Div. 531.

12. Jenkins *v.* Chesapeake, etc., R. Co., 61 W. Va. 597, 57 S. E. 48, 49 L. R. A., N. S., 1166, 11 Am. & Eng. Ann. Cas. 967. See on this subject, also, Nutter *v.* Sydenstricker, 11 W. Va. 535; Johnson *v.* McClung, 26 W. Va. 659, and Ross *v.* Milne, 29 Va. (12 Leigh) 204, 37 Am. Dec. 646.

13. Burton *v.* Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; Johannes *v.* Phœnix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; Locklin *v.* Beckwith, 43 Hun 633, 6 N. Y. St. Rep. 583; Jenkins *v.* Chesapeake, etc., R. Co., 61 W. Va. 597, 57 S. E. 48, 49 L. R. A., N. S., 1166, 11 Am. & Eng. Ann. Cas. 967.

14. In pari delicto.—Where during the war a company of men organized as soldiers, though unarmed, were on their way from Columbus to Atlanta with the open intent to offer themselves to the governor as soldiers in the Confederate army, and a railroad company received them on its cars as soldiers with their baggage, the transportation to be paid by the state or Confederate authorities, both the men and the company were engaged in an illegal transaction, and the rule in pari delicto applied to a suit against the company for negligence in its duty as a carrier. Redd *v.* Muscogee R. Co., 48 Ga. 102.

15. Strict application.—A company of men organized as soldiers, though unarmed, were on their way from Columbus to Atlanta with the open intent to offer themselves to the governor for service as soldiers in the Confederate army. A railroad company received them on its cars as soldiers, transportation to be paid for by the state or Confederate authorities. One of the men had with him a negro slave, and the company refused to carry him as a soldier or as a part of or adjunct to the company, but demanded and received from the soldier fare for the slave as an ordinary passenger. Held, that the rule in pari delicto did not apply, and the owner of the slave was entitled to recover for an injury to the slave occasioned by the negligence of the company. Redd *v.* Muscogee R. Co., 48 Ga. 102.

16. Duty imposed by public policy.—A passenger injured while traveling under a pass furnished him by defendant gratuitously as the officer of another railroad company, but which, including the provision therein exempting defendant from liability for injuries caused by the negligence of itself or servant, was void as issued in contravention of statute, was not in pari delicto with defendant in violating the statute, so as to prohibit recovery for such injuries. John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632.

17. Plaintiff's intestate, a passenger on defendant's stagecoach, was drowned by the coach being precipitated into a river while attempting to board a ferry boat en route, caused by negligence on the part of the ferryman in fastening the boat to the shore. Held that, as defendant was

Rescission of Contract of Carriage.—The fact that, after the damage has accrued to a passenger by reason of his being wrongfully ejected, the contract of carriage is rescinded, will not defeat an action for such damages unless they are released in the contract of rescission.[18] So the fact that a passenger upon being wrongfully ejected before he reached the station which his ticket called for surrendered his ticket and received back his money did not prevent him from recovering damages due to his wrongful ejection.[19]

Subsequent Compliance with Condition of Ticket.—The fact that a passenger holding a return ticket, which requires that it must be signed and stamped at destination for the return passage, and who has been expelled from the train, returns to the point where he had boarded the train, and has the ticket signed and stamped as required within the time limit fixed therein, and uses the same in this condition for return passage on another train, does not waive or extinguish any right he might have for the wrong committed in expelling him from the train before the ticket was so signed and stamped.[20]

Gist of Action for Injury.—The gist of an action against a carrier for injuries received by a passenger is negligence.[21] So the negligence of another person or carrier can be no defense to the defendant's own negligence contributing to the injury.[22]

Violation of Absolute Duty.—Where the law imposes an absolute duty upon the carrier, a cause of action arises for a failure to comply therewith, which can not be defeated by any conduct of the passenger in not making other provisions for himself, until it becomes clearly apparent that the carrier is not going to perform the duty.[23]

Conditions Precedent.—In some cases the law requires a written notice containing a general description of the injury and of the time, place, and cause of its occurrence as a condition precedent to the maintenance of an action against a railway company.[24] The purpose of such a requirement is to enable the company to ascertain the facts within a reasonable time after the occurrence, and a notice which is sufficent for that purpose is good.[25]

liable for such negligence, it was immaterial that the driver of the coach did all in his power to save the passengers, and that they would have been saved had the ferryman acted with discretion after the accident, as it does not tend to excuse the original wrong. McLean *v.* Burbank, 12 Minn. 530, Gil. 438.

18. Rescission of contract of carriage.—Spry *v.* Missouri, etc., R. Co., 73 Mo. App. 203.

19. Whittemore *v.* Boston, etc., Railroad (N. H.), 86 Atl. 824.

20. Subsequent compliance with conditions of ticket.—Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; Southern R. Co. *v.* Moses, 114 Ga. 145, 40 S. E. 1037.

21. Gist of action.—Butler *v.* Wilmington City R. Co., 2 Boyce's (25 Del.) 262, 78 Atl. 871.

22. Persons liable.—In an action by a street car passenger, injured in a collision of the car with a railroad train, it is no defense to show that the railroad company was also negligent. Parker *v.* Des Moines City R. Co., 133 N. W. 373, 153 Iowa 254, Ann. Cas. 1913E, 174. See ante, "Companies and Persons Liable," §§ 2630-2667.

23. Absolute duty.—Under Rev. St. 1895, § 4521, requiring depots to be warm for at least an hour before the arrival of passenger trains, and making the company liable for damages suffered by reason of a violation, a company which has neglected to warm the depot or give a prospective passenger definite information as to when a late train will arrive can not escape liability on the ground that she should have abandoned her trip and returned to her home. St. Louis, etc., R. Co. *v.* Lowe (Tex. Civ. App.), 97 S. W. 1087. See ante, "Contributory Negligence," chapter 24.

24. Conditions precedent.—Reference to the statutes of the particular states must be had.

25. Purpose of notice.—Thorson *v.* Groton, etc., St. R. Co., 81 Atl. 1024, 85 Conn. 11.

Sufficiency of notice.—A notice of injury to a trolley car passenger which alleges that, while plaintiff was a passenger on a car which left N. for G. at about 10:45 p. m. on a designated date, she was struck on the head by the falling of one of the transoms of the car, bruising and injuring her head, brain, and nervous system, and that the injuries were inflicted on plaintiff while she was on the car shortly after the taking of the first fare and before taking the second, sufficiently

Defenses to Cause of Action.—The defenses to the various causes of action arising out of breach of contract and personal injury are discussed under the various specific substantive law chapters and no attempt is made to cover such questions in this chapter.

§ 3094. Nature and Form of Action.—Where the right of action is based on the implied contract to carry plaintiff safely to his destination, it is not a right of action ex delicto.[26] A breach by a railroad company of an executory contract, into which it was under no legal duty of entering, to furnish the other contracting party with transportation from one point to another, is not a tort and does not give rise to an action ex delicto, but to one ex contractu.[27] But for the violation of a legal duty the plaintiff may sue in contract,[28] or in tort for any injury and the breach of a public duty, independent of statute, by the wilfulness or negligence of the carrier.[29] Where, by the default of the carrier, a passenger is compelled to pay his fare a second time, his remedy is either in assumpsit or tort, at his election. The form of the action is unimportant, save on the question of damages, they being limited to compensation in assumpsit, while in tort exemplary damages may be recovered.[30] In the case of injury to a passenger by carelessness, he may waive the tort and sue in assumpsit,[31] and the same rule it seems should apply

gives a general description of the injury and of the time, place, and cause of its occurrence within Gen. St. 1902, § 1130. Thorson *v.* Groton, etc., St. R. Co., 85 Conn. 11, 81 Atl. 1024.

26. Right based on contract.—Evansville, etc., R. Co. *v.* Kyte, 6 Ind. App. 52, 32 N. E. 1134; People *v.* Halbustro, 16 Alb. L. J. 151.

27. Executory contract.—Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968.

28. Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460; Hodges *v.* Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917; Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

29. Pickens *v.* Georgia R., etc., Co., 126 Ga. 517, 55 S. E. 171; Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113; Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

A breach of a contract made by a common carrier with one of its passengers is a breach of its public duty for which it is liable in a tort. Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

A passenger who is injured by the negligence of a carrier may, at his election, sue for a breach of the contract to safely transport, or for a breach of the duty springing from a violation of the contract of carriage. Rushin *v.* Central, etc., R. Co., 128 Ga. 726, 58 S. E. 357.

Where there is a breach of the carrier's contract to transport a passenger safely and he is injured thereby, he has two remedies, one an action for the breach of the contract, the other an action on the case for the wrong, and he may elect which remedy he will pursue; if he sues upon the breach and there is a final adjudication upon the merits he can not afterwards sue the same defendant on the tort. Patterson *v.* Augusta, etc., R. Co., 94 Ga. 140, 21 S. E. 283.

"Where a person makes a contract with a railway company engaged in the business of a common carrier, to be transported from one point to another along its line of road, and he is injured by the negligence of the carrier, he has two remedies: One, an action for a breach of the contract, and the other an action on the case for the wrong; and he may elect which of the remedies he will pursue." Aiken *v.* Southern R. Co., 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107.

In Aiken *v.* Southern R. Co., 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107, the court said: "Of course, we do not mean to hold that where a railroad company has undertaken to safely carry a wife, or child, or servant, the husband, or father, or master may not, in an action of tort, recover any damages he sustains on account of the tort, * * * and not for the breach of any implied contract which the law raises in his favor."

Where a railroad company agrees, for a consideration, to carry a passenger over its road, and by its negligence an injury results to the passenger, he may, at his election, sue upon the contract or in tort. Pennsylvania R. Co. *v.* Peoples, 31 O. St. 537.

A passenger, injured by the derailment of a car, may bring action for a tort or for a breach of contract. Sawyer *v.* El Paso, etc., R. Co., 49 Tex. Civ. App. 106, 108 S. W. 718.

30. Difference in damages.—Louisville, etc., R. Co. *v.* Storms, 15 Ky. L. Rep. 333.

31. In case of personal injury.—Saltonstall *v.* Stockton, Fed. Cas. No. 12,271, Taney 11, affirmed in 13 Pet. 181, 10 L. Ed. 115.

A passenger who is injured by the negligence of a carrier may, at his election,

where the passenger is wrongfully ejected from the train or excluded from a particular car,[32] and this is certainly true in all jurisdictions where the common law obtains.[33] If the act producing the injury be in itself tortious, it may be so treated for all remedial purposes; and it would be absurd to hold that because the wrong done amounts to the breach of a contract, it is therefore purged of its tortious character. A promise and a tort may be coincident, giving to the party injured by the breach of the promise a remedy as for a simple wrong, without reference to the accompanying contract as such. In other words, the breach of a contract may be a wrong, in respect of which the party injured may sue in tort, instead of suing upon the contract.[34] If he sues upon the contract he must allege the negligent acts of defendants as a breach of the contract, or if he proceeds in tort, he must make the negligence the ground of his action.[35] If the plaintiff elect where the breach of a contract of transportation is a wrong, he may sue in tort instead of suing on the contract.[36] It has been held that a passenger wrongfully ejected from a train may sue on the contract of carriage or in tort at his election.[37] Thus it is said that trespass will lie against a railroad company for forcibly

sue for a breach of the contract to safely transport, or for a breach of the duty springing from a violation of the contract of carriage. Rushin *v.* Central, etc., R. Co., 58 S. E. 357, 128 Ga. 726.

Where a passenger has sustained a personal injury by the negligence of a carrier, he may maintain an action of tort or an action for breach of contract. Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 619, 48 Am. Rep. 134.

A passenger, injured by the derailment of a car, may bring action for a tort or for a breach of contract. Sawyer *v.* El Paso, etc., R. Co., 108 S. W. 718, 49 Tex. Civ. App. 106.

32. Pullman Palace Car Co. *v.* Booth (Tex. Civ. App.), 28 S. W. 719, 721, affirmed in 93 Tex. 693, no op.

33. In those jurisdictions where the common law obtains, an action by a passenger against a common carrier for personal injuries may be maintained either for the breach of the contract of carriage or for the breach of the public duty to exercise a high degree of care. Canaday *v.* United R. Co., 114 S. W. 88, 134 Mo. App. 282.

An action on the case in tort may be maintained in any case in which trespass will lie. Therefore, if a passenger is wrongfully ejected from a car when he has paid his fare, though no force was used in ejecting him, he may bring an action on the case in tort against the carrier. Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10; Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158; Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

34. Sheldon *v.* The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

An action for injuries to plaintiff's wife from negligently setting her down at the wrong station is ex delicto, though defendant's acts were alleged to have been in violation of the contract of carriage. Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

In an action against a carrier, the petition alleged that plaintiff was accepted as a passenger, whereupon it became the duty of defendant to transport plaintiff with reasonable dispatch, but that defendant failed in such regard, whereby plaintiff was detained in the course of transportation a certain number of hours, and that the car in which plaintiff was being transported had no heating contrivance, that the weather was intensely cold, and the car locked so that plaintiff could not get out, and that plaintiff while so detained suffered from the coldness of the weather whereby he was injured, etc. Held, that the gravamen of the complaint was not failure to furnish a proper car, but a breach of duty in not transporting without unnecessary delay. Green *v.* Missouri, etc., R. Co., 97 S. W. 646, 121 Mo. App. 720.

35. Malcomb *v.* Louisville, etc., R. Co., 155 Ala. 337, 46 So. 768, 18 L. R. A., N. S., 489.

36. Right to sue in tort.—Sheldon *v.* The Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193.

Where plaintiff was ejected from defendant's street car, while a passenger thereon, because the transfer tendered by him to defendant's conductor had been so negligently issued by the conductor of one of defendant's other cars as to be worthless, the fact that plaintiff might have sued for a breach of the contract of carriage did not deprive him of the right to sue in case for the negligence. Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

Where a town grants a street railway franchise, the contract limiting the rate of fare between any two points, an individual who has been ejected from a car for refusing to pay more than that rate may avail himself of the contract, in trespass for assault and battery. Adams *v.* Union R. Co., 42 Atl. 515, 21 R. I. 134, 44 L. R. A. 273.

37. Ejection—Tort or contract.—Delmonte *v.* Southern Pac. Co., 83 Pac. 269, 2 Cal. App. 211.

A street railway passenger who has been wrongfully ejected may maintain an

ejecting a passenger, where the ejection is unlawful in itself, and not from the mode of doing it,[38] and it seems to be proper for the passenger in such cases to sue in tort, it being the more appropriate and adequate remedy.[39] But where a passenger is ejected, but not in such a manner or under such circumstances as to be tortious in its nature, he can only recover as upon contract.[40] Thus, where the portion of a ticket upon which the passenger endeavors to ride is void on its face, the ejection is not of a tortious character.[41] So it has been held that if there

action in tort, and is not limited to an action for breach of contract to carry. Morrill *v.* Minneapolis St R. Co., 115 N. W. 395, 103 Minn. 362.

A passenger who is wrongfully ejected from a train by the conductor, on the claim that he is not the person named in his ticket, is not limited to an action for breach of contract, but may sue the company in tort. Pittsburg, etc., R. Co. *v.* Russ, 57 Fed. 822, 6 C. C. A. 597.

A passenger paid the price of an excursion ticket from Detroit to Quebec and return, and accepted from the company's agent, without reading it, what the latter represented to be such a ticket. The agent, however, inadvertently stamped upon the return coupon the word "Detroit" above the word "Quebec," instead of vice versa, as was necessary to make it valid. On the homeward journey the conductor refused to receive the ticket, notwithstanding the passenger's explana- and the latter, having no means to pay the cash fare, was put off at a way station, and suffered much humiliation and inconvenience. Held, that he was not restricted to assumpsit for the breach of contract, but might sue the company in tort for damages. Pouilin *v.* Canadian Pac. R. Co., 47 Fed. 858.

A passenger who brings an action of tort for wrongful expulsion from a train is not restricted to a recovery as for breach of contract, but may recover for his injury as a tort. Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315.

Trespass will lie against a railroad company for the wrongful ejection of a passenger from its train by its employees. St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Chicago, etc., R. Co. *v.* Peacock, 48 Ill. 253.

Coupons improperly detached.—The forcible expulsion of a passenger from a railway train, where he presents the conductor a ticket from which coupons have been improperly detached by another conductor of the company on an earlier portion of the passage, is a tort by breach of duty, for which the passenger is entitled to recover any damage he may have sustained, as determined by the jury from the evidence. It was held by the court that the law laid down in Morse *v.* Southern R. Co., 102 Ga. 302, 29 S. E. 865, and in Southern R. Co. *v.* McKenzie, 102 Ga. 313, 29 S. E. 869, was in point with the case at hand. Moore *v.* Central, etc., R. Co., 1 Ga. App. 514, 58 S. E. 63.

38. Unlawful ejection.—Chicago, etc., R. Co. *v.* Casazza, 83 Ill. App. 421.

39. Proper form of action.—An action on the case in tort is proper against a carrier for wrongful ejecting from its train a passenger who has paid his fare, though no force was used in ejecting him. Emigh *v.* Pittsburg, etc., R. Co., Fed. Cas. No. 4,449, 4 Biss. 114; Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10; Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158.

Case is the proper remedy for ejection from a train in an improper manner, though the ejection itself was lawful. St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353.

An action for wrongful ejection is ex delicto. City, etc., R. Co. *v.* Brauss, 70 Ga. 368.

Trespass is the appropriate form of action where the action is instituted for the unlawful ejection of a passenger whose ejection is by an agent of the defendant traction company acting pursuant to orders received from his principal. Chicago Union Tract. Co. *v.* Brethauer, 125 Ill. App. 204, judgment affirmed in 79 N. E. 287, 223 Ill. 521.

40. Where a passenger pays a railroad agent fare for a certain trip, but by the agent's mistake receives a ticket for a trip in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, his ejection from the train without unnecessary force will not be ground of action against the company as for a tort, but the action must be based on the breach of the contract to carry. MacKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913.

41. Ticket void on face.—A passenger presented a ticket consisting of two parts, one for the going trip and one for the return trip. The conductor, by mistake, retained the return ticket, and gave the passenger the going trip ticket. The passenger, on the return trip, tendered this ticket, but the conductor refused it, and the passenger, at the request of the conductor, left the train and walked the distance as he refused to pay the fare or permit any one else to do so. Held, that the passenger could sue as for breach of contract of carriage, but he could not sue for a tortious act on the part of the conductor ejecting him from the train, as the ticket presented was void on its face. Harrison *v.* Pennsylvania R. Co., 118 N. Y. S. 1022.

exist a valid contract for transportation and he is ejected by reason of some mistake as to fare, ticket or otherwise, he can only sue in contract, unless unnecessary force is used.[42] On the other hand, some cases hold that a passenger who without fault on his part, but through the mistake or negligence of an agent of a railroad company, has been given an invalid ticket, and in consequence is ejected from a train for which he has paid fare, may recover damages therefor from the company whether the action is on the contract or in tort.[43] And the wrongful refusal of a railway company to carry a passenger to his destination, or to stop and put him off at his destination, is ordinarily a tort, and not a breach of contract, and an action therefor is an action ex delicto.[44] It may, perhaps, be true that it is not every case in which the refusal of a carrier to carry passengers, who have rightfully entered its train, to their destination can be deemed a tort.[45] Nor is an assault on a trespasser on a street car by the conductor a breach of contract of carriage.[46] In the absence of proof of a contract between the passenger and the carrier, the pasenger can, of course, have no right of action ex contractu.[47]

Determining Character of Action.—In cases of this kind the character of the action must be determined by the nature of the grievance rather than by the form of the declaration, and it seems that the courts are inclined to consider it as founded in tort unless a special contract is clearly shown by the declaration.[48]

42. Mistake as to ticket, etc.—A ticket agent, by mistake, gave plaintiff a ticket to an intermediate point instead of one to that point to which he had paid his fare, and, though plaintiff stated the facts to the conductor, he insisted on payment of fare beyond the intermediate point, and on plaintiff's refusal to pay ejected him. Held, that plaintiff's remedy was an action for breach of the contract, and not in tort for the eviction, unless more than necessary force had been used. Virginia, etc., R. Co. *v.* Hill, 54 S. E. 872, 105 Va. 729, 6 L. R. A., N. S., 899.

43. Either contract or tort.—Baltimore, etc., R. Co. *v.* Thornton, 188 Fed. 868, 110 C. C. A. 502.

44. Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453.

It is the general rule, and one that has long prevailed in this state, that the wrongful refusal or failure of a common carrier to carry passengers is a tort for which an action will lie. Cincinnati, etc., Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179; Lake Erie, etc., Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464; Toledo, etc., R. Co. *v.* McDonough, 53 Ind. 289; Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1, 92 Am. Dec. 276; S. C., 38 Ind. 116, 10 Am. Rep. 103; Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453.

45. Lake Erie, etc., R. Co. *v.* Acres, 108 Ind. 548, 9 N. E. 453.

A complaint alleging that plaintiff went to the station of defendant, a common carrier, to take passage on its advertised train, but that the train passed without stopping, and allowed no passengers to get on it, to plaintiff's great disappointment, annoyance, and damage in the sum of $500, states an action for a tort, and not for breach of contract. Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

A complaint alleging that defendant disregarded its contract of carriage in refusing to stop at plaintiff's destination, and that, when asked to stop, the conductor used insulting language, and that by the violation of contract, insults, and mistreatment plaintiff had been damaged $2,500, presents a cause of action in tort. Fordyce *v.* Nix, 58 Ark. 136, 23 S. W. 967.

46. Assault on trespasser.—Rothstein *v.* Brooklyn Heights R. Co., 114 N. Y. S. 344, 129 App. Div. 527.

47. Absence of contract.—Where a street car passenger was ejected on his refusal to pay fare, except with a transfer which the conductor declined, his right of action, in the absence of proof that the transfer was good, was limited to an action for battery in the use of excessive force in ejecting him from the car. Brown *v.* Brooklyn, etc., R. Co., 121 N. Y. S. 445, 136 App. Div. 690.

48. Determining character of action.—Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Ansell *v.* Waterhouse, 6 Man. & Sel. 385; Pozzi *v.* Shipton, 8 Ad. & El. 963.

In an action against a street railway company, a complaint alleging that, after plaintiff purchased his ticket and entered defendant's car, he was ejected by defendant's servant, and praying damages, states an action in tort, and not one for breach of contract for which plaintiff can only recover his pecuniary loss. Denver Tramway Co. *v.* Cloud, 6 Colo. App. 445, 40 Pac. 779.

A delay of a train for three hours, without reasonable excuse and without notice to a passenger, under such conditions as resulted in her injury, was not a breach of the contract of carriage, but negligence amounting to a tort. Gulf, etc., R. Co. *v.* Redeker, 100 S. W. 362, 45 Tex. Civ. App. 312.

A petition for damages against a railroad company, for injuries alleged to have

And it has been said that a petition in which it is uncertain, from the allegations made, whether it is brought ex contractu or ex delicto will, in the absence of a timely special demurrer pointing out the defect, be given, as to this matter, that construction most favorable to the upholding of the plaintiff's full case as laid.[49] The contract may be set out merely as inducement, with a view to raise the relation, the stress of the action being put upon his expulsion from the train, which, if wrongful, is not only a breach of the contract, but a violation of a public duty by a common carrier.[50] The business of a common carrier of passengers charges it with duties to the public, which when violated entitles the party aggrieved to an action for the tort which is wholly distinct from a matter of individual contract.[51] A carrier is bound by the rules of the common law to perform work tendered it; no consideration other than the general legal obligation resting upon

been caused by an employee carelessly and willfully slamming the car door against plaintiff's hand, which was resting against the door facing or jamb, though its sets forth in general terms a contract of carriage and alleges a breach thereof, should be treated as an action ex delicto, when it is manifest from the allegations and structure of the petition that plaintiff is seeking a recovery because of defendant's breach of duty, and not on account of its breach of contract. Rushin *v.* Central, etc., R. Co., 58 S. E. 357, 128 Ga. 726.

A petition, alleging that plaintiff purchased a ticket from one named station to another and return, paying the regular round trip fare; that on his return trip the conductor took up the ticket, but gave him no opportunity to alight at the station where under his ticket he was entitled to leave the train, but carried him beyond, and then stopped the train and told him to alight; that while he was doing so the conductor used insulting language and struck him, causing him to fall from the train and be injured; and that the plaintiff sought to recover only for the tort—stated a cause of action for tort, and not breach of contract. King *v.* Southern R. Co., 57 S. E. 507, 128 Ga. 285.

Carrying past station.—A petition against a railroad company, for damages alleged to have been occasioned to the plaintiff by wrongfully carrying her past the station to which she had purchased a ticket, should, though it sets forth in general terms a contract of carriage and alleges facts showing a breach thereof, be treated as an action ex delicto, when it is manifest from the allegations and prayers of the petition, taken all together, that the plaintiff is seeking a recovery because of the defendant's breach of duty and not on account of its breach of the contract. Seals *v.* Augusta, etc., R. Co., 102 Ga. 817, 29 S. E. 116.

49. Construed favorable to pleador.—Payton *v.* Gulf Line R. Co., 4 Ga. App. 762, 62 S. E. 469.

50. Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; Louisville, etc., R. Co. *v.* Newman, 128 Ga. 283, 57 S. E. 515.

An action by a passenger against a railway company for wrongfully and violently expelling him from the train, though the declaration allege a contract for carriage, is not for breach of the contract, but for a tort by breach of duty, and punitive damages are recoverable. Head *v.* Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434.

As plaintiff sought to recover for the negligence of the servants of defendant railroad company in failing to keep its road in repair, his cause of action was in tort, though he also alleged a contract with defendant to carry him safely as a passenger; that being merely matter of inducement to show that he was where he had a legal right to be when he was injured. Chesapeake, etc., R. Co. *v.* Hanmer, 66 S. W. 375, 23 Ky. L. Rep. 1846.

A delay of a train for three hours, without reasonable excuse and without notice to a passenger, under such conditions as resulted in her injury, was not a breach of the contract of carriage, but negligence amounting to a tort. Gulf, etc., R. Co. *v.* Redeker, 100 S. W. 362, 45 Tex. Civ. App. 312.

An action should be regarded as in trespass on the case, and not in assumpsit, where the declaration, after setting out a contract for the transportation of plaintiff as a passenger on defendant's cars, and that plaintiff had taken his seat in one of such cars as such passenger, that the defendant, disregarding its undertaking, did not convey plaintiff as it agreed to do, but instead thereof violently and with force ejected him from the car, and compelled him to walk a long distance to a hotel. MacKay *v.* Ohio River R. Co., 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132.

An action for damages, actual and exemplary, by a passenger against a railway company for carrying him beyond his point of destination and wrongfully putting him off the train, is in tort, although the petition alleged the purchase by plaintiff of a ticket from the railway company. Galveston, etc., R. Co. *v.* Roemer, 1 Tex. Civ. App. 191, 20 S. W. 843.

51. Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

it from the nature of its business need be shown by a party who has been injured by its act of omission or commission whether negligent, fraudulent or deceitful.[52] It is no bar or answer to an action in contract that one in tort might be and ordinarily would be, brought for the act complained of; hence, the dividing line between the breach of contract and tort is often dim and uncertain, and there is no definition of either class of defaults which is universally accurate or acceptable. In a general way, a tort may be distinguished from a breach of contract, in that the latter arises under an agreement of the parties, whereas a tort ordinarily is a violation of a duty fixed by law independent of contract or the will of parties, although it may have relation to obligations growing out of or coincident with a contract.[53] And in a given case the fact that independent of contract the carrier would be subject to duties and obligations, the violation of which would amount to tort, is not at all decisive that the action is not and could not be in contract.[54]

52. Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Philadelphia, etc., R. Co. *v.* Derby (U. S.), 14 How. 486, 14 L. Ed. 502.

53. Distinction dim and uncertain.—Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460; Rich *v.* New York, etc., R. Co., 87 N. Y. 382.

54. A complaint alleging that plaintiff became a passenger of defendant, to be carried on one of its cars, and, in consideration of five cents paid, defendant agreed "safely to carry" plaintiff, and "to treat him properly and carefully," and that, after he had passed onto a platform at a station to take a train, defendant, through its employees, in violation "of the terms of said contract," assaulted him, states a cause of action for breach of contract, and not in tort. Judgment, 96 N. Y. S. 747, 110 App. Div. 705, affirmed in Busch *v.* Interborough Rapid Trans. Co., 80 N. E. 197, 187 N. Y. 388, 10 Am. & Eng. Ann. Cas. 460.

A complaint showing that plaintiff became a passenger on defendant's car, and that the servants of defendant, without cause and in violation of their duty, assaulted plaintiff, was upon a cause of action consisting of the violation of defendant's contract to carry safely. Schwartz *v.* Interborough Rapid Transit Co., 103 N. Y. S. 80, 53 Misc. Rep. 289.

Hart *v.* Metropolitan St. R. Co., 65 App. Div. 493, 72 N. Y. S. 797, was brought in municipal court to recover damages directly caused by an assault by one of defendant's employees. The argument was made, as here, that the court was without jurisdiction because the action was for assault. The pleadings were oral, and not of assistance in determining the question, so that resort was had to the proofs. Upon these the court held that the action should not be treated as one of assault, but rather as one brought to recover damages for the neglect of the defendant to discharge its obligation as a carrier of passengers. Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

Hines *v.* Dry Dock, etc., R. Co., 75 App. Div. 391, 78 N. Y. S. 170, also was brought to recover damages resulting from the assault of an employee. The complaint was oral, and was "for personal injuries." It was held that the action was not to be regarded as one for assault, but rather for breach of contract by the misconduct of the defendant's servant. Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

In Miller *v.* King, 84 Hun 308, 32 N. Y. S. 332, 65 N. Y. St. Rep. 490, damages were sought for the unlawful ejection of plaintiff from one of defendant's cars while he was a passenger, and it was held "that there was a plain breach of contract of which the ticket was evidence." Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185, was an action to recover damages by reason of the alleged malicious and unjustifiable assault made upon the plaintiff by one of defendant's employees, and it was said that "by defendant's contract with the plaintiff it had undertaken to carry him safely and to treat him respectfully;" that the conduct of the employee constituted a breach of the contract; that "it is the defendant's failure to carry safely and without injury that constitutes the breach, and it is no defense to say that the failure was the result of the wilful or malicious act of the servant." Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

The case of Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, was brought to recover damages which in reality resulted from an assault by one of defendant's alleged employees. An inspection of the complaint discloses that it was in contract, being expressly based upon the allegations that "defendant contracted and agreed and it became the duty of defendant to safely convey plaintiff," etc., and that the assault in question was a violation by defendant of "its said contract as common carrier with plaintiff." while the form of action was not under consideration, still the court took as the

Where Distinction between Actions Abolished.—The formal distinction between actions having been abolished, an action against a carrier for a breach of duty to discharge a passenger at his station will be regarded as sounding in tort, though the purchase of a ticket for that station be pleaded; it being by way of inducement to show that the passenger was lawfully on the train.[55] In such cases, where a carrier negligently fails to stop for a person desiring to take passage such person is entitled to recover the damages resulting, whether the action is brought for the breach of the contract or for the tort.[56] And in an action for wrongful expulsion the passenger can not be excluded from recovering for humiliation because of doubt as to the form of his action.[57]

§ 3095. Parties.—In actions by passengers against carriers for causes arising out of breaches of contracts and personal injury, the question of parties is relatively unimportant except as to the joinder of others in such actions. Where railroad companies jointly operate their roads through the agency of a lessee, they may be joined in one action for negligent injuries to a passenger being carried over their lines, where the negligent acts are continuous and chargeable to the common agent of the lessee.[58] And the superintendent of a street railway company, whose negligence caused an accident, is properly joined with the company as defendant in a passenger's action for resulting injures.[59] So may the conductor or any other employee whose negligence resulted in the injury be

basis for its opinion the proposition that the defendant was under "contract obligations," and assumed that the assault was a violation of that contract, provided the defendant was responsible for the acts of the alleged employee who committed it. Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

Gillespie *v.* Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503, was brought to recover damages for insulting, abusive, and wrongful conduct towards plaintiff by one of defendant's conductors. The complaint was colorless upon the question whether the action was one in contract or for tort, merely setting up the facts relied upon. At the trial court plaintiff was only allowed to recover as the measure of her damages the change which was claimed to be due her. Busch *v.* Interborough Rapid Trans. Co., 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460.

A petition alleging that defendant, a common carrier, contracted for hire to carry plaintiff to a certain point, and that defendant, in violation thereof, failed to to stop at such place, but carried him beyond, and then, by a sudden starting of the train, injured him while attempting to alight in obedience to its orders, states a cause of action ex contractu, and not ex delicto. Kansas Pac. R. Co. *v.* Kunkel, 17 Kan. 145.

55. Distinction between forms of actions abolished.—New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

56. Contract or tort.—Williams *v.* Carolina, etc., R. Co., 57 S. E. 216, 144 N. C. 498, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

All forms of action are abolished, and we have now but one form for the enforcement of private rights and the redress of private wrongs, which is denominated a civil action (Revisal 1905, § 354), and the court gives relief according to the facts alleged and established. Clark's Code (3d Ed.) § 133, and notes; Sams *v.* Price, 119 N. C. 572, 26 S. E. 170; Bowers *v.* Richmond, etc., R. Co., 107 N. C. 721, 12 S. E. 452; Voorhees *v.* Porter, 134 N. C. 591, 47 S. E. 31, 65 L. R. A. 736; Williams *v.* Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

57. In an action for wrongful expulsion of a passenger from a train, where plaintiff has complied with the rules of procedure (Comp. Laws 1909, §§ 5533- 6269), as to the form of action and his pleading, he can not be precluded from recovering for humiliation because of a doubt as to whether his suit was ex contractu or ex delicto. St. Louis, etc., R. Co. *v.* Yount (Okla.), 120 Pac. 627.

58. Joinder of companies with lessees.—Carleton *v.* Yadkin R. Co., 143 N. C. 43, 55 S. E. 429, 10 Am. & Eng. Ann. Cas. 348.

Where an injury occurs on a road leased by one railroad corporation to another by reason of the negligence of the conductor employed by the conductor of the leased road, the injured party may sue either or both companies, where both have a voice in the control of the road, as a matter of right, and are principals. Cincinnati, etc., R. Co. *v.* Sleeper, 5 O. Dec. 196.

59. Joinder of superintendent.—Emerson *v.* Butte Elect. R. Co., 129 Pac. 319, 46 Mont. 454.

joined.[60] Where a foreclosure purchaser takes a railroad subject to all liabilities incurred by the receiver, he is properly joined as a defendant in an action for the death of a passenger while the receiver was operating the road. This has been so held under a statutory provision.[61] But in order to join such third persons in an action against the carrier, the averments of the petition must be sufficient as against them.[62]

Dismissal as to Parties.—Where the plaintiff has the right to make a negligent employee a party, he may dismiss as to him at any time before the jury retires, especially where the facts do not show that he was made a defendant for the purpose of weakening the effect of his evidence, should he be offered as a witness, for the defendant.[63]

§§ 3096-3143. Pleading—§§ 3096-3138. Declaration or Complaint—§ 3096. In General.—The function of a declaration, complaint, or petition is to inform the defendant of the nature of the demand made upon him.[64] Of course, in actions of this character, as in all others, it is necessary that the plaintiff set forth in his pleadings every element essential to his cause of action. Facts which are immaterial, and which if alleged could in no way affect the rights and liabilities of the parties, need not be set up in the pleading.[65] Irrelevant and redundant matter should not be alleged.[66] However, matters of inducement introductory to the narrative of the cause of action is not subject to a special demurrer.[67]

60. Negligent employee.—Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308.

61. Foreclosure purchaser.—Civ. Code, § 11, provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. A decree of foreclosure against the property of a railroad was entered in the federal court, and the property sold thereunder, the foreclosure decree providing that the purchaser at sale should take the property subject to all liabilities incurred by the receiver before the delivery of the possession to the extent that the assets in the hands of the receiver were insufficient for that purpose. Held, that the purchaser was properly joined as a defendant in an action for the death of a passenger while the railroad was being operated by the receiver. Denver, etc., R. Co. *v.* Gunning, 80 Pac. 727, 33 Colo. 280.

62. Sufficiency of averments.—Where an engineer and conductor of a railroad train were joined with the railroad company as defendants in an action for injuries to a passenger from the derailment of the train, the averment of the accident and injuries resulting therefrom to the plaintiff, though sufficient to constitute a cause of action against the railroad company, was insufficient as against the engineer and conductor. Order 122 Fed. 709, affirmed on rehearing in Bryce *v.* Southern R. Co., 125 Fed. 958.

63. Joinder of railroad company and conductor as parties defendant—Dismissal.—A passenger injured in alighting from the train sued the railroad company and its conductor. The plaintiff and the conductor were both examined as witnesses, and the interest of each was discussed in the argument to the jury. Upon the jury retiring the plaintiff dismissed as to the conductor. This was not known to counsel for the railway company. There was nothing tending to show that the conductor was made a party for the purpose of affecting his standing as a witness. Held, that the railway company could not complain of such dismissal, and it was no ground for a new trial. Texas, etc. R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308.

64. Functions of declaration, etc.—Richmond R., etc., Co. *v.* West, 100 Va. 184, 40 S. E. 643; Bush *v.* Campbell, 67 Va. (26 Gratt.) 403; Baltimore, etc., R. Co. *v.* Whittington, 71 Va. (30 Gratt.) 805; Eckles *v.* Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545.

65. Immaterial facts.—In an action by a passenger against a carrier for damages from failure to notify her where to change cars, an allegation that the motive power used was steam was immaterial. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

66. Irrelevant matters.—Southern R. Co. *v.* Wallis, 133 Ga. 553, 66 S. E. 370, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67.

67. Introductory matters.—In an action against a carrier for failure to stop its train at a flag station and receive plaintiff, a physician, as a passenger, there was no error in overruling a special demurrer to an allegation, as irrelevant, that plaintiff was not well, and had gone on the train to the flag station to see his patients, and to keep from driving through the

Intelligibility of Pleading.—Pleadings, both under the common-law rules and under Code practice acts, must set forth the facts constituting the cause of action in an intelligible form.[68]

Formal Defects.—In modern pleading mere defects of form are not the subjects of objections, but the validity of the pleading depends upon the facts set out as constituting the cause of action.[69]

Allegations as to Parties.—Allegations as to Plaintiff.—In an action against a railroad company for personal injuries sustained by a passenger in attempting to alight from a train, an allegation as to plaintiff's age is not necessary in the complaint.[70]

Allegation as to Status as Carrier.—To charge a railroad company with liability for personal injuries sustained by a passenger by reason of the derailment of a train, it is unnecessary to allege that defendant is a common carrier.[71] Where a declaration in an action against a railroad company for personal injuries alleges defendant's ownership of a railroad running through certain towns, and of cars running thereon for the conveyance of passengers, and that on a day specified defendant was the owner of and was running on said road a certain train of passenger cars for a reasonable reward paid to it, it is not necessary to also allege that defendant had power by its charter to become a common carrier.[72]

Corporate Capacity.—It seems to be an almost universal practice in suits against railway companies to allege the corporate capacity of the defendant. It would seem that, although the provision of a statute on the subject does not positively require such allegation, it contemplates such mode of procedure.[73]

As to Joint Defendants.—Where a complaint against two railroad companies designates them as several defendants, and alleges that each is a corporation, and

cold and bad weather, for it was but matter of inducement introductory to the narrative of the cause of the action. Southern R. Co. *v.* Wallis, 66 S. E. 370, 133 Ga. 553, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67.

A complaint in an action against a railroad for the negligent killing of a passenger alleged that, during ten days before the accident occurred, a conductor repeatedly ran one portion of a train violently against the other without due regard to the lives and safety of passengers; that the conductor was warned that, unless more care were taken in bringing the portions of the train together, some passenger would be seriously injured; and that, notwithstanding such warning, a portion of the train was run against another portion thereof, and the plaintiff's deceased thereby sustained injuries resulting in her death. Held, that the allegations as to what occurred within ten days before the accident should not be stricken out as irrelevant, since they tended to show gross negligence. Stuckey *v.* Atlantic, etc., R. Co., 38 S. E. 416, 60 S. C. 237, 85 Am. St. Rep. 842. See post, "Allegations as to Negligence and Cause of Injury," §§ 3107-3125.

68. Intelligibility.—Southern R. Co. *v.* Burgess, 143 Ala. 364, 42 So. 35.

69. Formal defect.—Southern R. Co. *v.* Burgess, 143 Ala. 364, 42 So. 35. See post, "Special Demurrer, Exceptions or Motion," § 3141.

70. Allegations as to plaintiff.—Galveston, etc., R. Co. *v.* Thornsberry (Tex.), 17 S. W. 521.

71. Allegation as to status as carrier.—Atlantic, etc., R. Co. *v.* Laird, 58 Fed. 760, 7 C. C. A. 489.

Where the declaration, in an action against a railroad corporation for a personal injury to one of the plaintiffs, after stating that the defendants were the owners of a certain railroad, running through the towns of W. and P., and of certain cars for the conveyance of passengers upon that road, averred that, on the day specified, the defendants were the owners of, and were running and propelling upon said road, a certain train of passenger cars, for a certain reasonable reward paid to the defendants, it was held that it sufficiently appeared from the declaration that the defendants were common carriers. Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

The court in a dictum expresses the view that while not essential, it is better in an action against a carrier of freight or passengers or its lessee to allege that it is a common carrier of freight or passengers, as the case may be. Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

72. Allegations as to charter provisions.—Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

73. Allegations as to parties.—In a suit by a passenger against a railroad company, defendant's corporate capacity should be alleged. Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 482, 17 S. W. 133.

that they jointly own and operate the road on which plaintiff was injured, and jointly committed the acts causing such injury, an allegation that they together "were a common carrier of passengers on said road" cannot be construed to mean that they were a single company, and so incapable of separate liability.[74]

§§ 3097-3103. Actions for Failure to Perform Contract or Duty in General—§ 3097. Refusal to Receive and Carry.—A complaint will be held insufficient unless it sets forth such facts as are necessary to show a relation putting the carrier under the duty of accepting the complainant as a passenger.[75] An allegation that, by contract between the carrier and two certain towns, the carrier was bound to transport passengers from a certain city to either of such towns for one five-cent fare, and that, plaintiff having taken passage on a car of defendants, the conductor refused to accept the five-cent fare offered for a continuous ride from the city to one of the towns, did not amount to a statement that defendant refused to carry plaintiff.[76]

Payment of Fare.—In an action for breach of duty by a railroad company in not conveying a passenger, it is not necessary for plaintiff to allege in his complaint a strict legal tender of his fare. It is sufficient to allege that plaintiff was ready and willing and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fare are contemporaneous acts.[77] A complaint which alleges that a conductor willfully, wrongfully, unlawfully, and intentionally refused plaintiff passage on a train on tender of the legal fare sets up a cause of action for punitive damages.[78]

Refusal to Receive and Carry for Regular or Lawful Fare.—Where the statute regulates the rate or amount of fare in a particular case or under a certain state of facts, in an action for the refusal to receive and carry in accordance with the statute, every fact essential to bringing the case within the statute must be alleged.[79]

Demurrer.—Questions of fact as to the reasonableness of rules and regula-

74. As to joint defendants.—Atlantic, etc., R. Co. *v.* Laid, 17 S. Ct. 120, 164 U. S. 393, 41 L. Ed. 485, affirming judgment 58 Fed. 760, 7 C. C. A. 489.

75. Sufficiency of complaint.—A complaint in an action against a common carrier of passengers for damages for refusing to accept plaintiff as such a passenger, alleging that plaintiff on a certain date applied to the servants or agent of the carrier in charge of one of its cars for transportation thereon, but such servant, acting within the scope of his employment, wrongfully and without legal excuse refused to permit plaintiff to become a passenger on the car or to be transported thereon, and that her intention and desire to become a passenger and be transported was known to the servant, is not sufficient to show such a relation between the plaintiff and the carrier as to put the latter under the duty of accepting plaintiff as a passenger. Birmingham R., etc., Co. *v.* Anderson, 3 Ala. App. 424, 57 So. 103.

76. Refusal to receive and carry.—Dierig *v.* South Covington, etc., St. R. Co., 72 S. W. 355, 24 Ky. L. Rep. 1825.

77. Payment of fare.—Tarbell *v.* Central Pac. R. Co., 34 Cal. 616.

In an action against a railway company for its refusal to transport plaintiff as a passenger, it is necessary to allege that plaintiff was ready and willing to pay his fare. St. Louis, etc., R. Co. *v.* Thomas (Tex. Civ. App.), 27 S. W. 419.

In declaring against a common carrier of passengers for refusing to carry, there must be an averment that plaintiff offered or was ready and willing to pay the fare. Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62

78. Allegations for punitive damages.—Kibler *v.* Southern Railroad, 64 S. C. 242, 41 S. E. 977.

79. Allegations that on a certain date defendant railway company leased a certain railway, and on a later date, being the owner or lessee of two other roads, refused plaintiff a continuous trip over the three for one fare, do not show that the three roads were united by the same contract, and hence do not state a cause of action, under Railroad Laws, §§ 78 104, authorizing a railway company to contract with any other company for the use of its railway, and requiring a corporation so contracting to give transfers, without extra charge, entitling passengers to a continuous trip on the railways embraced in the contract. Mendoza *v.* Metropolitan St. R. Co., 62 N. Y. S. 580, 48 App. Div. 62, judgment reversed on rehearing in 64 N. Y. S. 745, 51 App. Div. 430.

tions as to who shall be excluded from trains, cars and stations can not be determined upon demurrer.[80]

§ 3098. Fraud, Mistake, or Negligence as to Ticket or Transfers.—While it may be admitted that the weight of authority is that the conductor must rely entirely on the ticket in determining his action, and that the conductor can not be guilty of a wrong for ejecting a passenger who does not produce a proper transfer,[81] yet all of the authorities recognize that, while in such case there may not be a right of recovery on the ground of the wrongful ejection, yet there can be a recovery for the failure to fulfill the contract to carry, or for the negligence of the agent in giving the wrong ticket or transfer,[82] or for the refusal of an agent to stamp a ticket to render it valid for return trip.[83] And as the gravamen of the action may be the negligence of the carrier's agent and the ejection averred merely as the result of such negligence, a declaration stating such a cause is not subject to demurrer. The fact that the plaintiff might have sued for a breach of the contract of carriage can not deprive him of the right to sue in case for the negligence.[84]

Facts to Be Pleaded.—Where a husband signed his own name to his wife's railroad ticket, which provided that it must be signed by the person intending to use it, on being told by the agent that he could sign it, he must plead such facts in an action by him for damages sustained by his wife from the company's refusal to accept the ticket.[85]

80. Demurrer.—Brown *v.* Memphis, etc., R. Co., 4 Fed. 37.

81. Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851; Kiley *v.* Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460; Garrison *v.* United R., etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452; Bradshaw *v.* South Boston R. Co., 135 Mass. 407, 46 Am. Rep. 481; Keen *v.* Detroit Elect. Railway, 123 Mich. 247, 81 N. W. 1084; Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25.

82. Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

83. A count in a complaint against a railroad company alleging the purchase by plaintiff of a round-trip ticket from defendant, providing that the holder shall be identified before a certain designated agent of the company before presenting the same for return passage, and that such ticket shall be void unless stamped by such agent, and alleging that plaintiff presented herself for identification as required, but that said agent refused to stamp the ticket, and that, when she presented the same for passage, she was ejected from the train, states a cause of action for the refusal to stamp the ticket. McGhee *v.* Reynolds, 23 So. 68, 117 Ala. 413.

In an action against a railroad company, a count of the complaint averred that plaintiff purchased a round-trip ticket from the defendant, which provided that, before it was good for return passage, the holder had to be identified as the original purchaser before the defendant's station agent at the place to which the plaintiff was going, who would, at that time, sign, date, and stamp the ticket as said agent; that plaintiff was carried as a passenger from the place of the purchase of the ticket to her point of destination, and, wishing to return, she presented the ticket to the defendant's said agent for his official stamp and signature, and offered to prove her identity as the contract on the ticket required her to do, in order to use the ticket for the return passage; but that, notwithstanding it was the said station agent's duty to sign, date, and stamp the said ticket, he refused to do so, and, by reason of said ticket not being so dated, stamped, and signed, the plaintiff was ejected from defendant's train while attempting to return to the place from which she started by the use of such ticket. Held, that said count stated a good cause of action for the alleged refusal of the defendant's agent to stamp, date, and sign the plaintiff's return trip ticket, so as to make it available for her passage, but that it did not set forth a cause of action for the plaintiff's ejection from the train. McGhee *v.* Reynolds, 29 So. 961, 129 Ala. 540.

84. Southern R. Co. *v.* Jones, 132 Ala. 437, 31 So. 501; Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

The complaint as amended was not demurrable, since plaintiff, while not entitled to recover on the ground of a wrongful ejection, had a right of action for the breach of the contract to carry, or for defendant's negligence in not issuing a proper transfer. Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

85. Signing ticket.—Mexican Cent. R. Co. *v.* Goodman (Tex. Civ. App.), 43 S. W. 580.

§ 3099. Misinformation or Incorrect Information.—When any servant of a railroad company having requisite authority misdirects a passenger to his injury, the company should be responsible therefor, but in an action for such injury the complaint should be based upon such disdirection.[86] A complaint alleging a wrongful and forcible ejection from a train which the plaintiff entered by misdirection of a station agent, sets up a sufficient cause of action for the misdirection.[87] Where an action is brought for damages resulting from incorrect and careless information given by the carrier's agent, if the matter was one within the scope of the agent's apparent duties, the person injured need not allege a custom or usage of similar agents in that respect.[88]

§ 3100. Failure to Stop and Receive.—In an action for a breach of a contract to carry a passenger, and that the carrier failed to stop and receive him, the petition should allege a duty on the part of the carrier to stop,[89] and the consequences arising from the failure to stop.[90] Where a railroad makes a special agreement with a passenger purchasing a ticket to a station named and return, good only on the date of sale, that its return train on that day shall stop at such station to allow the passenger to return thereon, it is not a necessary allegation of the complaint, in an action for failure to stop such train, that it was scheduled to stop at such place according to the regulations of the company.[91]

Flag or Signal Stops.—An allegation that plaintiff signaled at a flag station in such a manner that it could be seen on the approaching train for a mile, and that the signal was seen by defendant's employees, who willfully and negligently failed to stop the train, is sufficient to raise an issue as to negligence in failing to see the signal.[92] In an action against a carrier for failure to stop its train at a

86. Complaint based upon misdirection.—Plaintiff, when buying a ticket to a certain station on defendant's road, was told by the ticket agent to take a particular train. The train proved to be one which was not allowed by defendant's regulations to stop at such station, and its conductor, though told of the direction which the ticket agent had given plaintiff, refused to stop there, and took plaintiff to the next stopping place beyond. Held, that plaintiff should have counted on the negligent misdirection of the agent, and not on the refusal of the conductor to stop. Marshall *v.* St. Louis, etc., R. Co., 78 Mo. 610.

87. Misdirection by station agent as to train.—Alabama, etc., R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

88. Pleading usage or custom.—Where plaintiff inquired of defendant's ticket agent as to the best route for his wife to take in order to reach a certain point, though the representations of the agent were not binding on the company when made in reference to matters about another road, unless he was authorized so to do, or unless such representations were made in connection with his duties, where he makes representations in relation to such other route in order to induce parties to purchase over his road, and such parties are so induced to purchase, and an injury results therefrom, the road he represents is liable therefor, and, such acts being within the scope of his apparent authority, it was not necessary to allege in the complaint custom and usage of ticket agents so to do. St. Louis, etc., R. Co. *v.* White (Tex. Civ. App.), 86 S. W. 71, judgment reversed in 89 S. W. 746, 2 L. R. A., N. S., 110.

89. Duty to stop and receive.—In an action against a street railway company for damages in consequence of failure of a car to stop at a given station in response to a signal by an intending passenger, the petition should show that it was the duty of the company to stop the particular car in question for the purpose of taking on such person as a passenger. Battle *v.* Georgia R., etc., Co., 48 S. E. 337, 120 Ga. 992; S. C., 48 S. E. 338, 120 Ga. 994.

90. Consequences.—Where a petition alleges that plaintiff bought tickets for himself and wife for a particular train, soon due at the station; that they stood alongside the track, waiting for that train, which passed without stopping, thereby occasioning the breach of the contract of carriage; that there were no accommodations, except in the stationhouse; that by reason of the condition of the waiting room the plaintiff's wife was rendered ill, and plaintiff was put to expense and deprived of the value of her services—it states a cause of action for consequences arising from the failure to transport. Brown *v.* Georgia, etc., R. Co., 46 S. E. 71, 119 Ga. 88.

91. Allegations as to scheduled stop unnecessary.—Evansville, etc., R. Co. *v.* Wilson, 50 N. E. 90, 20 Ind. App. 5.

92. Failure to stop at flag station.—San Antonio, etc., R. Co. *v.* Safford (Tex. Civ. App.), 48 S. W. 1105.

flag station and receive plaintiff as a passenger, there was no error in overruling a special demurrer to the allegation that plaintiff, in accordance with the rules of the company and custom, flagged the train and tried to bring it to a stop, to board, on the ground that it failed to specify in what way the train was flagged, or what custom or rule of the company was violated.[93] It is proper for the complainant to set forth the conditions under which he was left at the station by the carrier, for the consideration of the jury in ascertaining damages.[94]

§ 3101. Putting Passenger on Wrong Train.—A complaint in an action against a carrier alleging that its servants carelessly and negligently ordered, directed, and caused plaintiff to enter one of defendant's passenger trains for which she had a ticket given her by mistake, in the absence of an averment that such servants had any knowledge that plaintiff did not desire to take passage on the train indicated by the tickets she held, is insufficient, as not stating facts constituting a cause of action.[95]

§ 3102. Separation of Passengers.—If it be actionable per se as against a carrier for its conductor in endeavoring to comply with the statute requiring the separation of white and colored passengers to negligently mistake a white passenger for a colored one, and in the presence of others inform him that he must sit in that portion of the car set apart for negroes, it is essential that the petition alleged plaintiff to be a white person,[96] or entitled to ride in the coach or apartment for white passengers.[97]

§ 3103. Failure to Set Down at Destination.—In order for a complaint against a carrier to set out a good cause of action for failure or refusal to set complainant down at his destination, it must allege the existence of the relation of carrier and passenger and a duty upon the part of the carrier to stop at that particular station or stopping place for him to alight.[98]

Putting Off Short of Destination.—In an action for damages in being set down at a wrong station, the complaint should show the relation of passenger and carrier, and a violation of the passenger's rights in that regard, in order to state a substantial cause of action.[99]

Allegation of Duty to Stop.—In an action for being compelled to debark short of his desired destination, the failure to aver with certainty that such des-

93. Specifying mode of flagging.—Southern R. Co. *v.* Wallis, 133 Ga. 553, 66 S. E. 370, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67.

94. Conditions under which passenger left station.—In an action against a carrier for failure to stop its train at a flag station and receive plaintiff as a passenger, there was no error in overruling a special demurrer to an allegation that plaintiff was left at the station without means of conveyance to get home, that it was just at nights, and that the weather was cold and bad, and the roads muddy, and that plaintiff had to walk home, seven miles, and on account thereof was made sick. Southern R. Co. *v.* Wallis, 133 Ga. 553, 66 S. E. 370, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67.

95. Putting passenger on wrong train.—Scott *v.* Cleveland, etc., R. Co., 43 N. E. 133, 144 Ind. 125, 32 L. R. A. 154.

96. Allegation as to color.—Wolfe *v.* Georgia R., etc., Co., 53 S. E. 239, 124 Ga. 693.

97. Under the separate coach law (Ky. St. 1899, §§ 797, 799), requiring railroad companies transporting passengers to furnish separate coaches for white and colored passengers, and directing the conductor to assign to each white or colored passenger his respective coach, a complaint to recover damages for requiring plaintiff to occupy a seat in the coach for negroes, which fails to allege that plaintiff was a white woman, or entitled to ride in the coach for white passengers, is insufficient to sustain a judgment for damages. Southern R. Co. *v.* Thurman, 76 S. W. 499, 25 Ky. L. Rep. 804.

98. Allegations constituting cause of action.—Birmingham R., etc., Co. *v.* McDaniel, 6 Ala. App. 322, 59 So. 334.

Wilfulness.—In an action against a street railroad company for failing to set plaintiff down at her destination, a count alleging willfulness on the part of the conductor held insufficient. Birmingham R., etc., Co. *v.* McDaniel, 6 Ala. App. 322, 59 So. 334.

99. Putting off at wrong destination.—Southern R. Co. *v.* Melton, 158 Ala. 404, 47 So. 1008.

tination was one of the scheduled or customary stopping places of the train for the taking on and discharge of passengers, was fatally defective.[1] He must also allege that the train on which he took passage was one which by its running arrangement should have stopped at such station.[2] The words "good on passenger trains only," contained in a passenger's ticket, are not an agreement that all passenger trains would stop at the station printed on the ticket, and in an action for being carried past the station, plaintiff should allege that it was one at which the company's regulations required the train to stop.[3] But the complaint need not aver that the plaintiff knew that the train was scheduled to stop at the station.[4]

Action Erroneously Based on Refusal to Stop.—In an action against a carrier for refusal to set a passenger down at his destination, it appearing that he boarded a train not scheduled to stop, by misdirection of the station agent, the complaint is insufficient if it bases the right of recovery on the refusal of the carrier's servants to stop the train rather than the agent's negligence.[5]

Setting Out Ticket.—In an action for the failure of defendant's train to stop at plaintiff's destination, and her ejection at a station further on, it is not necessary for plaintiff to set out a copy of her ticket in the complaint.[6]

Wilful Breach of Duty.—A complaint in an action against a carrier, which is based on a wilful breach of the carrier's duty to stop its train at a station to permit a passenger to alight, does not prevent recovery for the actual damages alleged and proved as a result thereof, but authorizes a recovery of both actual and punitive damages on proof of willfulness.[7]

Immaterial Allegation.—In an action against a street railway for carrying plaintiff, a passenger, beyond her destination, an allegation in the petition that plaintiff was a stranger in the city was not material to her right of recovery.[8]

§§ 3104-3129. Actions for Personal Injuries—§ 3104. Pleading in General.—It may be said in a general way that a declaration to state a cause of action must charge that the person killed or injured was a passenger for hire, that he was in the exercise of reasonable care for his own safety, and that while he was a passenger his injury or death resulted as the proximate effect of the negligence of the defendant.[9] The test of the sufficiency of a declaration in an

1. **Averments as to destination.**—Cook *v.* Southern R. Co., 153 Ala. 118, 45 So. 156.

2. **Allegation of duty to stop.**—Ohio, etc., R. Co. *v.* Hatton, 60 Ind. 12; Owens *v.* Atlantic, etc., R. Co., 147 N. C. 357, 61 S. E. 198.

3. **"Good on passenger trains only."**—Ohio, etc., R. Co. *v.* Swarthout, 67 Ind. 567, 33 Am. Rep. 104.

4. **Averring passenger's knowledge as to stops.**—Louisville, etc., R. Co. *v.* Cayce, 17 Ky. L. Rep. 1389, 34 S. W. 896.

5. **Action based on refusal to stop.**—Marshall *v.* St. Louis, etc., R. Co., 78 Mo. 610.

6. **Setting out ticket.**—Evansville, etc., R. Co. *v.* Kyte, 6 Ind. App. 52, 33 N. E. 1134.

7. **Wilful breach of duty.**—Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236.

8. **Immaterial allegation.**—Henderson *v.* Metropolitan St. R. Co., 100 S. W. 1111, 123 Mo. App. 666.

9. **Action for personal injury—Pleading in general.** — *Alabama.* — Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841.

Florida.—Pelot *v.* Atlantic, etc., R. Co., 60 Fla. 159, 53 So. 937.

Georgia.—Primus *v.* Macon R., etc., Co., 126 Ga. 667, 55 S. E. 924; Gardner *v.* Waycross Air Line R. Co., 94 Ga. 528, 19 S. E. 757; Wilkes *v.* Western, etc., R. Co., 109 Ga. 794, 35 S. E. 165; Charleston, etc., R. Co. *v.* Boyd, 5 Ga. App. 137, 62 S. E. 714; Mack *v.* Savannah, etc., R. Co., 118 Ga. 629, 45 S. E. 509.

Illinois.—Wayne *v.* St. Louis, etc., R. Co., 165 Ill. App. 353.

In an action for injuries to a passenger, the declaration must allege the existence of a duty on the part of the defendant to protect plaintiff from the injury of which he complains, defendant's failure to perform such duty, and an injury to plaintiff resulting from such failure. Greinke *v.* Chicago City R. Co., 85 N. E. 327, 234 Ill. 564, affirming judgment in 136 Ill. App. 77; Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

A petition alleging that plaintiff was a passenger and had paid his fare, and that the cars were negligently kicked against the car in which he was a passenger, which threw him against the stove, breaking two of his ribs, and causing the injuries alleged and to lose the use of his

action against a carrier for personal injuries, where a general demurrer is filed, is whether the defendant can admit all that is alleged and escape liability.[10]

Intendment Indulged in Favor of Pleading.—As against a general demurrer, every reasonable intendment must be indulged in favor of the pleading. Hence an allegation that, before plaintiff could ascend the steps of defendant's car and enter it, the engineer signaled to go ahead and plaintiff was injured by the starting of the train, will be construed to mean that the plaintiff was ascending the steps at the time the train started, and not that it was moving when he started to board it.[11]

Duplicity.—Mere diversity of facts alleged in a single count will not make a double. The plaintiff may, in his declaration, allege any number of circumstances, or faults, if, taken together, they amount to one connecting cause, or relate to one ground of recovery. The allegations of improperly constructed track, and of running the car at a dangerous rate of speed over the improperly constructed track, relate to the cause of the alleged accident, for which the action is brought. It is not necessary to declare upon each of said allegations in a separate count in order to avoid duplicity.[12]

Vague and Uncertain Pleading.—The petition or complaint should not be vague or uncertain in the allegations upon which the cause of action depends, but should be definite in setting out every element which is necessary as a basis for

left leg and to suffer great pain, states a good cause of action by which he could recover for the pain and suffering, and is sufficient to resist the general demurrer. Douglas, etc., R. Co. *v.* Swindle, 59 S. E. 600, 2 Ga. App. 550.

A complaint in an action against a carrier, which alleges that decedent was a passenger, that the conductor, while acting within the scope of his authority, ordered decedent to leave a coach and go into another while the train was in motion, that decedent, while attempting to comply with the order, was thrown from the train and killed, and that his death was proximately caused by the negligence of the carrier's servant, states a cause of action. Central, etc., R. Co. *v.* Carleton, 163 Ala. 62, 51 So. 27.

A complaint in an action against a carrier, which alleges that decedent was a passenger, and that his death was proximately caused by the negligence of the trainmen in and about the carriage of decedent as a passenger, or which alleges wanton, willful, and intentional misconduct of the trainmen, states a cause of action as against a demurrer. Central, etc., R. Co. *v.* Carleton, 163 Ala. 62, 51 So. 27.

A declaration which sets out the relation of passenger and carrier between the plaintiff and defendant, the circumstances out of which the particular duty arose, and the breach of that duty, is sufficient. Richmond City R. Co. *v.* Scott, 86 Va. 902, 11 S. E. 404.

10. On general demurrer.—Douglas, etc., R. Co. *v.* Swindle, 2 Ga. App. 550, 59 S. E. 600, citing Glenn *v.* Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83.

Negative contributory negligence.—See post, "Negativing Contributory Negligence," § 3129.

11. Intendment indulged in favor of pleading.—Galveston, etc., R. Co. *v.* Fink, 44 Tex. Civ. App. 544, 99 S. W. 204.

12. Duplicity.—Mullin *v.* Bluementhal & Co. (Del.), 1 Pen. 476, 42 Atl. 175; Braunstein *v.* People's R. Co., 1 Boyce's (24 Del.) 310, 77 Atl. 738.

A petition alleged that defendant was a common carrier; that plaintiff shipped on its road certain cattle; that it was necessary for him to accompany them; that at C. defendant negligently sidetracked the cattle, without plaintiff's knowledge, and proceeded with the balance of the train and plaintiff; that, on discovering the accident, and that the cattle had been unloaded, plaintiff was informed by the conductor that he would stop the train at a station at which there would be a train returning to C., which plaintiff could board. The petition then detained the personal injuries sustained by plaintiff in attempting to board the returning train, and charged that they were caused by defendant's negligence in leaving the cattle at C., and in certain other matters relating to the time and place of receiving the injuries, and "that, by reason of said injuries," plaintiff had been "damaged in the sum," etc. Held that, while the petition contained much superfluous matter that might have been stricken out on motion, it stated but one cause of action. Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

Allegations in different counts of different causes of injury.—In Gulf, etc., R. Co. *v.* Buford, 2 Tex. Civ. App. 115, 21 S. W. 272, which was a suit against a railway company for personal injuries, it was held that plaintiff's petition was not duplicitous because it alleged in one count that plaintiff was thrown from the car without fault on his part, and in another that he was injured by voluntarily attempting to leave the train.

the claim.[13] The rule of pleading applicable in such cases is certainty to a common intent.[14]

§ 3105. Allegations as to Contract or Relation.—In an action in tort for personal injuries resulting from negligence or for assaults and insults, it is necessary to allege the existence of such a relation between the carrier and the party injured as to obligate the carrier in some duty, the breach of which constitutes the cause of action.[15] Thus, where the suit is brought as one to recover for an injury to the plaintiff as a passenger, the relation must be properly and sufficiently alleged,[16] and it is sufficiently so done if the complaint aver that the plain-

13. Averments that defendant announced, upon leaving each station, that the next station would be the station next on the route at which said train was scheduled to stop, which was the only audible announcement made by the said railroad in plaintiff's coach; that on leaving a certain station the brakeman announced that the next stop would be at plaintiff's station; that the train was actually stopped some 300 feet before reaching the station; that upon such stop plaintiff proceeded to the platform of the coach to ascertain if the train had in fact reached his station, and if it were safe to alight; that immediately after stopping the train defendant started the same without warning; and that the platform was dark, and plaintiff, while exercising due care, missed his footing, and was thrown off and injured, are too vague and uncertain. Ward *v.* Chicago, etc., R. Co., 46 N. E. 365, 165 Ill. 462.

In an action against a railroad company by a passenger who was injured in getting off the cars at a station, a complaint, averring that the platform at the station was depressed in the center so as to incline towards the cars, and was "out of repair," and "wholly unsuitable for the reception of passengers," but containing no other allegation as to negligence, is bad on demurrer, such averments not raising the presumption of negligence to a certainty. Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874.

14. A complaint alleging that in the car in which plaintiff was riding, on the wall over the seat given him, defendant railroad company had negligently hung, placed, or affixed a bottle containing a fluid, and that the bottle was broken or exploded, and the contents negligently spilled on plaintiff's clothes and person, alleges with certainty to a common intent the negligence of defendant. Alabama, etc., R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327.

15. Allegations as to relation.—*Alabama.*—Williams *v.* Louisville, etc., R. Co., 150 Ala. 324, 43 So. 576, 10 L. R. A., N. S., 413; Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

Florida.—Warfield *v.* Hepburn, 62 Fla. 409, 57 So. 618.

Indiana.—South Chicago City R. Co. *v.* Moltrum, 26 Ind. App. 550, 60 N. E. 361; Smith *v.* Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753.

Missouri.—Scott *v.* Metropolitan St. R. Co., 138 Mo. App. 196, 120 S. W. 131.

Texas.—Gulf, etc., R. Co. *v.* Gorman, 6 Tex. Civ. App. 230, 25 S. W. 992.

While plaintiff, suing for injury sustained upon the track or premises of a railroad company and relying upon simple negligence, must show that he is not a trespasser, an averment that he had gone to the carrier's premises to take passage upon its train, then due or about due, is sufficient. Louisville, etc., R. Co. *v.* Glasgow (Ala.), 60 So. 103.

A count, in a complaint against a carrier for injuries, alleging that the wreck was caused by the gross or reckless negligence of defendant, and that said gross and reckless negligence consisted in allowing rotten, unsound, and insecure cross-ties to remain under the rails of said road, etc., charges only simple negligence, and hence a failure to aver that plaintiff was rightfully on the train makes the count demurrable. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81; Owens *v.* Atlantic, etc., R. Co., 147 N. C. 357, 61 S. E. 198.

16. A count in a complaint against a railway company for personal injuries claimed to have been received in a collision of cars on one of which plaintiff was at the time alleged that while plaintiff was on such car "at the request or invitation of defendant, its agents, or employees, in violation of its duty to plaintiff, the defendant, its agents or employees, propelled said car wantonly, willfully, or intentionally," etc. Held, that it did not allege facts showing that plaintiff was a passenger, nor that the car was a passenger car, nor that the agent or employee who invited or requested him to go on the car was acting within the scope of his employment, and was therefore demurrable. Thompson *v.* Nashville, etc., Railway, 160 Ala. 590, 49 So. 340.

Averments that plaintiff became or was about to become a passenger on defendant's elevator might fairly be regarded as a mere statement that she took passage or was about to take passage in the elevator, and not that the relation of carrier and passenger existed with its corresponding obligations and duties; the proof showing that plaintiff was employed in

tiff was a passenger when the injury was received.[17] And where a passenger sues for an assault by the conductor or other employee a general averment in the complaint that he was a passenger at the time of the assault is sufficient, and it need not allege that the passenger was at the time on the car of the carrier.[18] In an action against a railroad company for injuries to a passenger, it is not necessary for the pleader to aver the nature of the contract or the duties of the carrier, but the court will judicially take notice of the duties which are annexed by law to the contract to carry.[19] Where the carrier's duly authorized agent accepted the plaintiff's ticket and subsequently committed a tort upon him, in alleging the relation it is not necessary to allege the details in regard to the purchase, identification, etc., as to the ticket.[20] A petition setting forth that the passenger was riding on a train under the terms of a written live stock shipment contract, sufficiently alleges the relation of carrier and passenger.[21] The question as to whether the relationship of carrier and passenger has terminated may also arise and the continued existence must be sufficiently alleged.[22] Where a right under the contract to alight at intermediate stations is claimed, such right must be alleged. The allegation that the right exists by reason of contract may be sufficient as against general demurrer, but the provision of the contract should be set forth.[23] But in alleging the relation of carrier and passenger it is not neces-

defendant's hotel at the time of the injury. Walsh *v.* Cullen, 85 N. E. 223, 235 Ill. 91, 18 L. R. A., N. S., 911.

Elevator case.—A declaration alleged that defendant carried on a retail business in its store building, and operated an elevator for carrying passengers from floor to floor, that plaintiff was rightfully in the store and was a passenger in the elevator, and that it was defendant's duty to carry him safely, in which it failed, owing to the fact that the machinery broke down, and precipitated the plaintiff into the basement. Held, that the declaration sufficiently charged that plaintiff was a passenger. Steiskal *v.* Marshall Field & Co., 142 Ill. App. 154, judgment affirmed in 238 Ill. 92, 87 N. E. 117.

17. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024; Birmingham R., etc., Co. *v.* Hunnicutt, 3 Ala. App. 448, 57 So. 262.

18. Need not allege presence on car.—Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142; Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448.

In an action by a passenger against a carrier for an assault committed upon him by other passengers, the complaint alleged that defendant was a corporation operating a railroad and engaged in carrying passengers for hire and that plaintiff was a passenger on one of defendant's cars. Held, that the complaint sufficiently averred that the plaintiff was a passenger and that defendant was a carrier of passengers for hire. Culbersor *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

19. Nature of contract and duties need not be alleged.—Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

20. Allegations that a round trip ticket was purchased between two named stations, for which the full round trip fare was paid, that the conductor took up the ticket on the return passage, and that under the ticket the passenger was entitled to be treated as the law required that passengers should be treated, sufficiently described the ticket. King *v.* Southern R. Co., 57 S. E. 507, 128 Ga. 285, distinguishing Southern R. Co. *v.* Dyson, 109 Ga. 103, 34 S. E. 997.

Certainly it was not necessary in such a case, in order to show the relation which existed between the plaintiff and the railroad company, for him to allege or set out these various details in reference to the ticket which the company's agent had received from him and which was no longer in his possession. See Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678; Pickens *v.* Georgia R., etc., Co., 126 Ga. 517, 55 S. E. 171; King *v.* Southern R. Co., 128 Ga. 285, 57 S. E. 507.

21. In a suit against a carrier for injuries to plaintiff, while passenger on freight train, allegation that plaintiff was permitted to ride on freight train by terms of written live stock shipment contract, was good against general demurrer. International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

22. Continued relationship.—In an action against a railroad company for injuries to a passenger, the petition, which shows that plaintiff was injured while being transported by defendant under its agreement, is sufficient, though it fails to allege that the accident occurred at a place between the point of departure and his destination. International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216.

23. Allegation as to right of plaintiff traveling on live stock contract to alight at intermediate station.—An averment that plaintiff was traveling on a live stock contract, and alighted from the train at an intermediate station to attend to his stock, "which it was his right and duty to do under the terms of his contract," and

sary to aver that the injury occurred at a place between the points of destination.[24]

Purchase of Ticket.—In an action for injuries to a passenger, a petition failing to state where plaintiff purchased his ticket, and when and where he became a passenger, is subject to special demurrer.[25] Where the plaintiff alleges that she purchased a ticket over both of defendant's railroads, she can be required by special demurrer to allege whether she purchased it from one or the other company, or its agents, or from an outsider.[26]

Passenger Riding on Freight.—Where plaintiff was injured while riding on a freight train by authority of the conductor, it is not necessary to allege in the complaint that authority was given by the carrier to such servant to carry passengers. There is no law prohibiting persons from riding or carriers from carrying persons on freight trains, and when a person is permitted by those in charge to ride on a freight he is presumed to be there of right. It is not necessary for plaintiff to plead the carrier's rules and set forth a non-compliance therewith: such things are matters of defense to be set up by the defendant.[27]

§ 3106. Allegations as to Time, Place and Vehicle.—A complaint for injury to a passenger should state as definitely as possible the time, the kind of train on which she was riding, and the particular point where the injury occurred.[28] The allegation in a complaint that plaintiff was injured while on a car of defendant, which operated its cars in a particular city, is a sufficient allegation as to the place where the injury occurred.[29] The description of the locality should not be too extensive and indefinite.[30]

Injury in Another State.—In an action against a railroad company for personal injuries to a passenger, the fact that the accident occurred in another state than the one where action is brought may be shown without being alleged in the declaration.[31]

§§ 3107-3125. Allegations as to Negligence and Cause of Injury—§ 3107. In General.—Facts constituting carrier's negligence toward a passenger must be pleaded, either by a charge of special negligence, or of general negligence,

was injured in so doing, sufficiently alleges his right to alight at intermediate stations, as against a general demurrer, though the provisions of the contract conferring such right should have been set forth. International, etc., R. Co. *v.* Downing, 41 S. W. 190, 16 Tex. Civ. App. 643.

24. In an action against a railroad company for injuries to a passenger, the petition, which shows that plaintiff was injured while being transported by defendant under its agreement, is sufficient, though it fails to allege that the accident occurred at a place between the point of departure and his destination. International, etc., R. Co. *v.* Underwood, 67 Tex. 589, 4 S. W. 216.

25. Allegations as to purchase of ticket—Special demurrer.—Charleston, etc., R. Co. *v.* Boyd, 62 S. E. 714, 5 Ga. App. 137.

26. Riley *v.* Wrightsville, etc., R. Co., 133 Ga. 413, 65 S. E. 890, 24 L. R. A., N. S., 379, 18 Am. & Eng. Ann. Cas. 208.

27. In an action for an injury alleged to have occurred while plaintiff was a passenger in defendant's caboose attached to a freight train, the petition need not allege that defendant's agent in charge of the caboose was authorized by defendant to carry passengers. Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

28. Time, place and vehicle.—St. Louis, etc., R. Co. *v.* Wright (Ark.), 150 S. W. 766.

29. Allegation as to place of injury.—Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

30. Extensive and indefinite description.—Plaintiff was injured by stones thrown at defendant's cars while he was traveling on defendant's line. Held (sustaining a demurrer to the declaration) that, although a case might be conceived where repeated acts of stone throwing at a particular locality, known to the company, might raise a duty to take some measures of prevention or security to the passenger, yet the narr. in plaintiff's declaration was not up to the requirements of such a case, as the description of the locality of the stone throwing "near Phœnixville" was too extensive and indefinite, and in the averment of plaintiff's injury it was not said that it was received at or near the locality named. Missimer *v.* Philadelphia, etc., R. Co. (Pa.), 42 Leg. Int. 405, 17 Phila. 172.

31. Injury in another state.—Hobbs *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 873.

stating facts with sufficient certainty to point the adversary to the event or the occurrence in the happening of which negligence is charged.[32] It is only necessary for the complaint to set out such elements as are the basis of the absolute right of recovery;[33] other averments which go to questions of damages, punitive damages, and the amount of recovery may be pleaded by the plaintiff;[34] and facts which constitute elements of defense may be set up by defendant by the way of plea or answer.[35] Aside from matters of inducement and of averment of relations between the parties injured and the defendant, counts charging negligence may and very often do, contain two distinct features; one descriptive of the means of injury and of the physical circumstances surrounding and attending the injury;[36] another, ascribing the injury to negligence for which the defendant is responsible.[37]

32. Charging negligence—In general.—Benjamin *v.* Metropolitan St. R. Co., 151 S. W. 91, 245 Mo. 598; Pelot *v.* Atlantic, etc., R. Co., 60 Fla. 159, 53 So. 937; Fremont, etc., R. Co. *v.* Hagblad, 72 Neb. 773, 101 N. W. 1033, 4 L. R. A., N. S., 254; Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394.

In an action by a passenger against a railroad company for personal injuries, facts constituting the carrier's negligence need not be alleged. Kentucky Cent. R. Co. *v.* McMurtry, 3 Ky. L. Rep. 625.

Negligence held not pleaded.—A complaint alleging that, while plaintiff was a passenger on defendant's car, "said car started or jerked, or the speed thereof was suddenly increased, and as a proximate consequence thereof plaintiff was thrown or caused to fall or struck on or against said car or some hard substance therein, and was made sick and sore: * * * that he was thrown or caused to fall or be struck as aforesaid, and to suffer said injuries and damages by reason and as the consequence of the negligence of defendant in or about carrying plaintiff as defendant's passenger," is insufficient to state a cause of action, as it does not allege that defendant or its agents were guilty of negligence. Birmingham R., etc., Co. *v.* Weathers, 164 Ala. 23, 51 So. 303.

Plaintiff, thrown from a train derailed by failure of a switch to lock, sued the operating company, whose servant was alleged to have been negligent in the use of the switch, and the railway company, to whom the switch belonged, alleging that it was in a defective condition. The only allegation as to the proximate cause of the derailment was that the operating company neglected to properly throw and lock the switch, as was necessary. Held, that the complaint did not, as against a demurrer, state a cause of action against the company owning the switch. Floody *v.* Great Northern R. Co., 116 N. W. 943, 104 Minn. 474.

33. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

34. A complaint for injuries to a passenger carried beyond her station, and required to alight and walk back to the station, need not allege that her eyesight was defective, or that she could not see at night, or that her affliction was apparent to the conductor, in order to state a cause of action. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

35. The complaint, in an action by a passenger for personal injuries received while returning to a station beyond which he had been negligently carried, need not negative the fact that there was an open, obvious, and safe way which the passenger could have traveled back to the station, since that fact was available in defense. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

That a passenger carried beyond her station pursued a dangerous way back to the station, when a safe way was obvious and open to her selection, was available only in support of the defense of contributory negligence, and she need not negative it in her pleadings. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

Where a carrier carrying a passenger beyond her station, and requiring her to alight and walk back to the station, believed that the injury sustained by the passenger while walking back to the station was proximately caused by her defective eyesight, and not by the negligence of the trainmen, it must by special plea allege such facts, in the absence of any allegation in the complaint as to defective eyesight. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

36. Birmingham R., etc., Co. *v.* Wilcox (Ala.), 61 So. 908.

In an action by a passenger against a carrier for injuries, the declaration, alleging that, while plaintiff was a passenger on defendant's train, defendant's porter on the train, who was in the discharge of the duties of his employment, negligently, violently, and suddenly, regardless of plaintiff's rights, shoved a swinging door in the passenger coach upon plaintiff's foot without any fault of plaintiff, thereby causing serious injury to plaintiff's foot, states a good cause of action. Pelot *v.* Atlantic, etc., R. Co., 60 Fla. 159, 53 So. 937.

37. Birmingham R., etc., Co. *v.* Wilcox (Ala.), 61 So. 908.

A complaint alleging negligence in operating car by whch plaintiff was struck

Allegation of Negligence in Terms.—A petition in an action against a railway company which alleges specific facts making a prima facie case of negligence is not demurrable because negligence of the railway company is not alleged in terms.[38]

Allegation of Simple Negligence.—A complaint in an action for injuries or death to a passenger, which ascribes the injury to the company's negligence, and avers the proximate cause to be the consequential, as distinguished from the intentional, result of the misconduct charged, states a cause of action for simple negligence.[39] And the mere use of the epithet "wilful" will not control the other averments, where the cause of action as set out in the complaint is one of negligence, and not of intentional or malicious wrong.[40] An allegation of simple negligence is insufficient, unless the complaint shows the relation of carrier and passenger to exist, as simple negligence does not render the carrier liable to a trespasser.[41]

Wanton and Wilful Negligence or Injury.—A complaint which alleges that the defendant's servant "wantonly and recklessly or intentionally" injured plaintiff[42] or wantonly and intentionally caused him to suffer injury,[43] sufficiently

on an adjoining track at high speed without signal, sign, or warning held to state a cause of action. Elliott *v.* Seattle, etc., R. Co., 122 Pac. 614, 68 Wash. 129, 39 L. R. A., N. S., 608.

38. Allegation in terms.—Lake Shore, etc., R. Co. *v.* Hobart, 13 O. C. C., N. S., 592.

39. Allegation of simple negligence.—Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037; Birmingham R., etc., Co. *v.* Glover, 142 Ala. 492, 38 So. 836.

A complaint for injuries to a street car passenger, which alleges that it was the duty of the company to carry plaintiff safely, and "that, failing in this duty, and with a reckless disregard for the safety of plaintiff, and knowing that the probable consequences thereof would be to inflict injury on plaintiff," the employees in charge of the car, acting within the scope of their duties, willfully, wantonly, or intentionally ran the car while the passenger was in the act of alighting, so that he was injured, only charges simple negligence, and is good as against a demurrer raising the question of a joinder of corporate negligence with negligence of employees; the word "this" referring only to the duty of the company, and the conjoined sentence beginning with the words "with a reckless disregard" referring to the circumstances under which the company, as distinguished from the employees, failed to perform its duty. Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037.

A complaint for injuries to a passenger, which alleges the existence of the relation of carrier and passenger just before and at the time of the injuries, and which states that the carrier, failing in its duty to carry the passenger safely, so negligently conducted its business that by reason of such negligence the passenger received as a proximate result thereof personal injuries, states a cause of action for simple negligence, and is good as against a demurrer. Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037.

A count in a complaint, alleging that defendant was a common carrier, and that it so negligently conducted its business that by reason of such negligence plaintiff's intestate, who was a passenger on one of defendant's trains, received personal injuries which caused his death, stated a cause of action for simple negligence. Louisville, etc., R. Co. *v.* Perkins, 152 Ala. 133, 44 So. 602.

40. Mere use of words or epithets.—Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

41. Allegation of simple negligence insufficient.—Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

42. Wanton and wilful negligence.—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 79, 45 So. 292.

A complaint, in an action for injuries to a passenger while alighting from a train, which alleges that plaintiff, urged by the "willful," "unlawful," and "reckless" injunctions of the conductor, and in obedience to his directions, proceeded to alight from the train while in motion, and in so doing was injured, does not charge negligence, but charges willfulness; the word "unlawful" assigning no specific legal character to the acts alleged, and the word "reckless" being equivalent to "willful." Crosby *v.* Seaboard, etc., Railway, 61 S. E. 1064, 81 S. C. 24.

43. The averment of the complaint that defendant's servant, in charge of its car, while acting in the line and scope of his authority as such servant, wantonly or intentionally prevented plaintiff from boarding said car as aforesaid, and thereby wantonly or intentionally caused plaintiff to suffer said injuries, it being theretofore alleged that said servant failed to allow plaintiff a reasonable time or opportunity to board said car, is sufficient as against a demurrer that it does not show that the injury was wantonly or intentionally

charges wantonness and intentional injury. The complaint should show that the servant was conscious at the time that his act would probably result in the injury complained of, otherwise the allegation will amount to one simply of simple negligence.[44] A complaint alleging wanton negligence against defendant's servants or some of them in suddenly starting a street car, knowing that plaintiff was disembarking, is insufficient in not averring that all of the servants knew of the plaintiff's position, or that those who started the car knew of it.[45] And where the complaint is for wilful injuries to a passenger, due to a collision, if it fails to charge that defendant intended through proper servants willfully and purposely to inflict the injury complained of, it is insufficient to show a cause of action for willful injury.[46] Where the facts stated are insufficient on which to predicate a charge of willful and wanton misconduct, the petition, if it alleges such willful and wanton injury, is inconsistent and repugnant.[47]

§ 3108. Specific Averment of Negligence.—The complainant may, in every jurisdiction, it seems, make a specific averment of negligence as distinguished from a general averment of negligence. Where the allegations constitute a specific charge, the plaintiff is, of course, limited to such charges and the case will be adjudged from that standpoint.[48]

inflicted. Birmingham R., etc., Co. *v.* Wise, 149 Ala. 492, 42 So. 821.

The count of a complaint for injury to plaintiff at a certain time and place while a passenger on defendant's car, alleging that its servant or agent in charge or control thereof, acting within the line and scope of his authority as such, wantonly or intentionally caused plaintiff to be injured, is not subject to demurrer for uncertainty and indefiniteness. Birmingham R., etc., Co. *v.* Fisher, 173 Ala. 623, 55 So. 995.

44. A complaint which alleges that the plaintiff, while under the influence of liquor, boarded an open car and road on the train, and that the road was new and rough, and that running the train at a fast rate of speed would cause it to jolt, and to endanger those on the open car, and that these facts were well known to the engineer, but, with full knowledge of them, he willfully and wantonly ran the engine at the high rate of speed, etc., states a cause of action for negligence only, and not for willful or wanton injury, because it fails to show that at the time of the injury the engineer was conscious that his act would probably result in injury; the expression "with full knowledge of said facts" only showing that he knew the elements of the dangerous situation. Alabama Cent. R. Co. *v.* Humphries, 169 Ala. 369, 53 So. 1013.

The count, in an action against a carrier for injury to a passenger from the starting of the car while he was attempting to alight from it, averring that the motorman in charge willfully, wantonly, and negligently started the car back, and that the conductor and other employees of defendant knew it was necessary for plaintiff to get off at the corner of B. and S. streets, but not averring that they knew he had to get off at the particular point at said crossing, or that this was the place of making transfers, and that this was so known to the servant starting the car, and not averring consciousness by the motorman of plaintiff's peril, or that the car was started at a point where its starting was known to the motorman as being dangerous, or that the motorman knew plaintiff was preparing to alight or in the act of alighting when he started the car, or that people customarily transferred at that particular point, does not charge wanton or willful misconduct. Selma, etc., R. Co. *v.* Campbell, 158 Ala. 438, 48 So. 378.

45. Birmingham R., etc., Co. *v.* Bennett, 39 So. 565, 144 Ala. 369.

46. Willfullness must be alleged.—Southern R. Co. *v.* McNeeley, 44 Ind. App. 126, 88 N. E. 710.

A count, alleging wanton injury to a passenger by the sudden movement of a street car, should aver that the persons who caused the car to move, as alleged, were the servants of the defendant; that they were conscious of the danger and wantonly inflicted the injury. Birmingham R., etc., Co. *v.* Barrett, 4 Ala. App. 347, 58 So. 760.

47. A complaint in an action for injuries to a passenger by the derailment of a train alleged the defective condition of the ties, knowledge on the part of defendant of such condition of the ties, and that, notwithstanding, the cars were propelled along the track at a great rate of speed, recklessly, wantonly, and intentionally, and as a proximate consequence thereof the coach in which plaintiff was riding was derailed and plaintiff injured. Held, that the facts stated were insufficient to predicate a charge of willful and wanton misconduct, and rendered the complaint demurrable for inconsistency and repugnancy. St. Louis, etc., R. Co. *v.* Pearce, 159 Ala. 141, 49 So. 247.

48. Detrich *v.* Metropolitan St. R. Co., 143 Mo. App. 176, 127 S. W. 602.

§ 3109. General Averment of Negligence.—It may be generally stated that a complaint for injuries or death, in an action against a carrier, is demurrable unless it alleges negligence on the part of the carrier.[49] But in actions against carriers for personal injuries or death it is the breach of a duty which he owed that constitutes the cause of action. The particular circumstances which evidence that breach are not the breach itself, but are merely the facts which prove that a breach of the duty which was owed, has occurred.[50] In the structure of

The petition alleged that, while plaintiff was a passenger on defendant's cable car, the gripman negligently failed to release the cable from the grasp of the grip at a street corner where the cable ran under another cable crossing it, so as to negligently permit the grip to come in contact with appliances under the ground, causing the car to suddenly and violently stop, throwing plaintiff from her seat and injuring her, etc. Held, that the petition alleged specific acts of negligence, and not negligence generally, so that only the acts alleged could be relied upon to establish liability. Detrich *v.* Metropolitan St. R. Co., 127 S. W. 603, 143 Mo. App. 176.

Effect of special allegations as to negligence as superseding general allegations.—In actions against a carrier for negligent injuries the general and well-established rule applies that when one having a right to rely upon general allegations for the admission of his proof chooses to plead specially the facts upon which he relies for recovery, he must confine his proof to the facts alleged and can recover upon no other ground. Johnson *v.* Galveston, etc., R. Co., 27 Tex. Civ. App. 616, 66 S. W. 906, affirmed in 95 Tex. 680, no op., citing Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608; Galveston, etc., R. Co. *v.* Herring (Tex. Civ. App.), 36 S. W. 129; Missouri, etc., R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167; Gulf, etc., R. Co. *v.* Scott (Tex. Civ. App.), 27 S. W. 827; Gulf, etc., R. Co. *v.* Younger, 10 Tex. Civ. App. 141, 29 S. W. 948; International, etc., R. Co. *v.* Bibolet, 24 Tex. Civ. App. 4, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

Though a complaint against two railroad companies for injuries to a passenger by a collision between their trains avers generally negligence in the operation of the trains, specific allegations of negligence in certain particulars confine the issue to such particular acts. Missouri, etc., R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167.

In an action by a passenger against railroad for damages for personal injuries sustained through the derailment of train, defendant was entitled to an instruction confining the acts of negligence to those alleged in the petition. Fordyce *v.* Moore (Tex. Civ. App.), 22 S. W. 235.

49. Lake Erie, etc., R. Co. *v.* Huffman (Ind.), 97 N. E. 434.

50. General averment.—*Alabama.*—Birmingham R., etc., Co. *v.* Jordan, 170 Ala. 530, 54 So. 280; Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841.

Florida.—Warfield *v.* Hepburn, 62 Fla. 418, 57 So. 618.

Indiana.—Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028; Lake Erie, etc., R. Co. *v.* Huffman (Ind.), 97 N. E. 434; Indianapolis, etc., R. Co. *v.* Wall (Ind. App.), 101 N. E. 680.

Louisiana.—Carmanty *v.* Mexican Gulf R. Co., 5 La. Ann. 703.

Maryland.—Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

Missouri.—Monday *v.* St. Joseph R., etc., Co., 136 Mo. App. 692, 119 S. W. 24; Detrich *v.* Metropolitan St. R. Co., 143 Mo. App. 176, 127 S. W. 603; Black *v.* Metropolitan St. R. Co., 162 Mo. App. 90, 144 S. W. 131; Stauffer *v.* Metropolitan St. R. Co., 243 Mo. 305, 147 S. W. 1032.

Nevada.—Sherman *v.* Southern Pac. Co., 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287.

A complaint against an electric railway company for injury to a passenger which alleged the relation of carrier and passenger, that the conductor ordered plaintiff from a safe place on a car, and that while plaintiff was attempting to comply with the order and standing on the rear platform, the conductor negligently increased the speed of the train and caused the same to make a sudden and severe jerk or motion, directly causing plaintiff to be thrown to the ground and injured, sufficiently showed a breach of duty by the company and injury therefrom. Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

Plaintiff, having alleged that he was a passenger on defendant's street car when the injury complained of was received, may declare on defendant's negligence in general terms. Birmingham R., etc., Co. *v.* Hunnicutt, 3 Ala. App. 448, 57 So. 262.

Counts of a complaint charging simple negligence of defendant, a common carrier, to the injury of plaintiff, a passenger on one of its cars, by alleging that it so negligently conducted itself in and about carrying her thereon that at a certain time and place she was thrown or caused to fall, are sufficient. Birmingham R., etc., Co. *v.* Fisher, 173 Ala. 623, 55 So. 995.

In an action against a carrier for injuries to a passenger, resulting from the negligence of defendant in failing to give

pleadings, even in their strictest forms before the introduction of modern simplified systems, it was a most important principle that, although any particular facts might be the gist of a party's case, and though the statement of it was indispensable, still in alleging the facts it was unnecessary to state such circumstances as merely tend to prove the truth of the fact alleged.[51] Under such system a general allegation of the fact of negligence without detailing a variety of minute circumstances which constituted the evidence of it was sufficient.[52] And this same doctrine obtains even now when so much of the verbiage and practically all of the technical precision which was at one time required in pleading, has been abandoned, and it may be said that, only the facts constituting the cause of action need be stated, and it is cardinal rule that they must be averred or set forth with certainty; by which term is signified a clear and distinct statement of them so that they may be understood by the party who is to answer them, by the jury who is to ascertain the truth of them, and by the court who is to give judgment thereon.[53] It seems to be well settled that in suits by passengers against a common carrier for injuries sustained, much less certainty or particularity, in charging the negligence to which the injury sustained is attributable, is required than in other cases arising out of negligence, for the reason that such acts of negligence are peculiarly within the knowledge of the carrier.[54] Hence, it may be said that where all facts alleged, taken together, distinctly state a specific duty owed by the carrier to the passenger and a negligent breach thereof, the pleading will be held sufficient as contemplating every act or omission and all other facts essential to constitute such negligent breach of duty.[55] The general rule seems to be that when a duty is alleged, it is sufficient as a matter of pleading, as against a demurrer, to allege a negligent act in general terms without specifying the particulars of the act or

plaintiff sufficient time to resume his place in the cars after he had alighted on the train stopping at a siding, an amended complaint held to sufficiently allege defendant's negligence. Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

51. Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

52. Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

53. Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

54. New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670.

By the first count of a complaint plaintiff claimed damages, in that defendant was, on a certain date, a common carrier of passengers, and that plaintiff was a passenger on one of its cars, and, when approaching a certain point in the street, plaintiff was thrown with great violence against one of the seats, and one or more persons were thrown against her with great force, greatly injuring her side and one of her ribs, and alleged other damages, and in closing averred that her injuries were proximately caused by the negligence of defendant's servants or agents, or some of them, in charge or control of the car, in the negligent manner in which they ran or operated the same. Count two adopted and made a part thereof all of the first count down to the closing averment, and added an averment that her injuries were proximately caused by the negligence of the motorman, who had control of the car on which she was riding, in the negligent manner in which he operated the same. Held, that the counts were not subject to demurrer on the ground that they were vague, uncertain, and indefinite, and that it did not appear with sufficient certainty what duty defendant owed plaintiff, or wherein or how defendant violated any duty owed her. Birmingham R., etc., Co. *v.* Oden, 164 Ala. 1, 51 So. 240.

In an action against a carrier for injuries to a passenger, it is not necessary to aver with great particularity any specific acts of negligence which caused the injury. San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752.

55. Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Millville Gas Light Co. *v.* Sweeten, 75 N. J. L. 23, 68 Atl. 1067; Breese *v.* Trenton Horse R. Co., 52 N. J. L. 250, 19 Atl. 204.

Where a complaint alleged that plaintiff was a passenger on defendant's car when she received the injury complained of, the duty of the defendant toward her was thus shown, and the averment of a failure to perform this duty was sufficient. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

In an action for injuries to a passenger, it is sufficient to charge negligence in general terms. Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037.

A declaration, in an action against a carrier for injuries to a passenger, which alleges that the carrier "negligently and unskillfully conducted itself in carrying

omission which constitutes the negligence,[56] or designating the servants at fault,[57]

plaintiff and in managing the said railroad and the car and train in which plaintiff was a passnger," and that he was thereby injured, sufficiently specifies the particulars of the carrier's negligence, at common law and under Code Pub. Gen. Laws 1904, art. 75, § 24, subsec. 36, giving a form for a declaration in an action for injuries received by a passenger, and declaring that the same may be changed to adapt it to other cases by "changing the allegation as to the cause of the accident." Philadelphia, etc., R. Co. *v.* Allen, 62 Atl. 245, 102 Md. 110.

A street car, after waiting at a turnout, proceeding without meeting the approaching car, and in making a turn at rapid speed the other car was seen, and plaintiff was injured by the sudden stopping of the first car. His declaration averred that while on the car, in the exercise of due care, owing to the negligence of the company the car came into jeopardy of being run into by another car of defendant coming in opposite direction on the same tracks, and that, by reason of this position of both cars, plaintiff's car was stopped so negligently and so suddenly that plaintiff was injured, etc. Held, that a charge that plaintiff did not claim negligence in bringing the cars in jeopardy, but only in the stopping of the car, was error. Costigan *v.* Warren, etc., St. R. Co., 55 N. E. 317, 174 Mass. 553.

In an action for death of a passenger, the declaration must allege the duty which the carrier neglected, and aver the negligence, which must be proved as laid. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

In an action against a street railway for injuries, a petition alleging that plaintiff, in passing over the floor of the defendant's car, received a severe electric shock through stepping on an electrified plate on the floor of the car, and that the shock was caused by the negligence of the defendant in negligently constructing, maintaining, and operating the car, sufficiently alleged negligence on defendant's part. McRae *v.* Metropolitan St. R. Co., 102 S. W. 1032, 125 Mo. App. 562.

A declaration averring that defendant railroad company so negligently operated its railroad and failed in the exercise of reasonable precaution that plaintiff, a passenger, in alighting from the car while it was at a standstill, stepped on a piece of loose iron negligently concealed upon the platform of the car and was thrown and injured, discloses a breach of duty resulting in injury to plaintiff, and is good on demurrer. Mettler *v.* Delaware, etc., R. Co., 71 Atl. 111, 77 N. J. L. 97.

56. *Alabama.*—Birmingham R., etc., Co. *v.* Glover, 142 Ala. 492, 38 So. 836; Kansas, etc., R. Co. *v.* Matthews, 142 Ala. 208, 39 So. 207; Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

Illinois.—Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

Indiana.—Southern R. Co. *v.* Adams, 52 Ind. App. 322, 100 N. E. 773; Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34; Cleveland, etc., R. Co. *v.* Colson, 51 Ind. App. 225, 99 N. E. 433; Indiana Union Tract. Co. *v.* Swafford, 179 Ind. 279, 100 N. E. 840; Indianapolis, etc., R. Co. *v.* Wall (Ind. App.), 101 N. E. 680; Lake Erie, etc., R. Co. *v.* Beals, 50 Ind. App. 450, 98 N. E. 453.

Maryland.—Philadelphia, etc., R. Co. *v.* Allen, 102 Md. 110, 62 Atl. 245.

Missouri.—Copper *v.* Century Realty Co., 224 Mo. 709, 123 S. W. 848; Brady *v.* Springfield Tract. Co., 140 Mo. App. 421, 124 S. W. 1070; Wolven *v.* Springfield Tract. Co., 143 Mo. App. 643, 128 S. W. 512.

Montana.—Hoskins *v.* Northern Pac. R. Co., 39 Mont. 394, 102 Pac. 988.

Texas.—Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; International, etc., R. Co. *v.* Anthony, 24 Tex. Civ. App. 9, 57 S. W. 897.

The plaintiff, in a suit against a railroad company to recover damages for injuries received while traveling as a passenger on the defendant's cars, through the defendant's negligence, is not bound to state in his declaration the particular facts constituting the negligence. It is sufficient to state generally that the injury was the result of the defendant's negligence. Clark *v.* Chicago, etc., R. Co., 15 Fed. 588, 4 McCrary 360.

A complaint alleging that plaintiff, while a passenger upon defendant's railway, was injured, and that his injuries were proximately caused by the negligence of defendant's servants, was not demurrable on the ground that it did not specify with sufficient particularity the manner in which plaintiff was injured. Birmingham R., etc., Co. *v.* Adams, 40 So. 385, 146 Ala. 267, 119 Am. St. Rep. 27.

A complaint in an action for injuries to a passenger which avers the negligence of the carrier in such general language as to amount to hardly more than a statement of a mere conclusion is good as against a demurrer. Birmingham R., etc., Co. *v.* McCurdy, 172 Ala. 488, 55 So. 616.

A complaint against a street railway company, alleging that a passenger was thrown very violently to the ground through the negligence of the company's servants and agents in carrying him as a passenger, though general in its averments of negligence, conforms to the rule permitting in such cases a nonspecific allegation of the negligence relied on. Birmingham R., etc., Co. *v.* Haggard, 155 Ala. 343, 46 So. 519.

In a declaration against a common car-

57. Kansas, etc., R. Co. *v.* Matthews, 142 Ala. 208, 39 So. 207.

or specifying their duties in the operation of the vehicle.[58] It seems to be required in such an action that an act, the doing of which is complained of, and that such act was negligently done, must be alleged.[59] However, no exact criterion can be set forth, as some states hold that the better rule is to the effect that the certainty in the statement of the plaintiff's case must be such that it is intelligible, and that in a reasonable measure it must apprise the defendant of the substantial case to be made against him.[60] Where the complainant merely sets

rier for injuries to the plaintiff while a passenger, it is sufficient to charge in general terms that the plaintiff was injured while boarding car as a passenger, as a result of the defendant's negligence, but, if specific acts of negligence are alleged, they must be proved. Jaquette *v.* Capital Tract. Co., 34 App. D. C. 41.

A complaint charging negligence in suddenly accelerating the motion of defendant's train while plaintiff was leaving it need not be made more definite and certain by showing by whom, and by what acts, the motion was suddenly accelerated, and in what respects such acts were negligent. The pleading must be construed in view of the general knowledge of the manner of running trains. Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

A complaint in an action against a carrier which alleged that plaintiff's injuries were caused "solely by the fault, carelessness, and negligence of the defendant and its servants" sufficiently averred negligence to withstand attack by demurrer. Citizens' St. R. Co. *v.* Jolly, 67 N. E. 935, 161 Ind. 80.

Where plaintiff's injuries resulted from the unscrewing of a nut on one of the wheels of defendants' stagecoach, a declaration alleging that defendants "so carelessly and negligently provided, fitted out, managed, and conducted their stagecoach that, while they were driving and conducting the same, it broke down," is sufficient, without alleging in what particular defendants were negligent. Ware *v.* Gay (Mass.), 11 Pick. 106.

A petition against a carrier for injuries to a passenger need not specify the negligent acts which caused the injury, but it is sufficient that it charge in general terms that plaintiff was injured while being carried as a passenger as the result of the negligence of the carrier. Hamilton *v.* Metropolitan St. R. Co., 89 S. W. 893, 114 Mo. App. 504.

A declaration, which avers that decedent was killed by the oversetting and throwing down of the railroad car in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car were caused by the negligence of defendant, is not demurrable on the ground that the allegation is too general. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

What constitutes a general allegation.—A declaration charges negligence generally where it avers that the "defendant then and there, by its servants, agents and employees, so carelessly, recklessly, willfully, negligently" drove and managed its car that "by and through the negligence * * * of the defendant through its said servants," the plaintiff was injured. West Chicago St. R. Co. *v.* Mileham, 138 Ill. App. 569.

58. Kansas, etc., R. Co. *v.* Matthews, 142 Ala. 208, 39 So. 207.

59. Allegation of act and negligent performance.—Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

A complaint in a personal injury suit against a street railway, which contained no other allegation of defendant's negligence than a statement at the close of the pleading that plaintiff's injuries in a collision were received through defendant's carelessness and negligence, was insufficient and demurrable, because not showing to what carelessness and negligence the injuries were attributed. South Chicago City R. Co. *v.* Moltrum, 60 N. E. 361, 26 Ind. App. 550.

A complaint, alleging that a street railway car negligently approached a switch at a dangerous rate of speed and negligently ran into the switch at such dangerous rate of speed, and that by reason thereof the car left the track, thereby negligently throwing a passenger from her seat and injuring her, sufficiently charges negligence as against a demurrer. Indiana Union Tract. Co. *v.* McKinney, 78 N. E. 203, 39 Ind. App. 86.

A complaint alleging that a street railway car negligently approached a switch at a dangerous rate of speed and negligently ran into the switch, and that by reason thereof the car left the track, thereby negligently throwing a passenger from her seat and injuring her, sufficiently charges the negligent derailment of the car. Indiana Union Tract. Co. *v.* McKinney, 78 N. E. 203, 39 Ind. App. 86.

60. A declaration in case charged defendant with "so negligently and carelessly operating a certain electric car, which was then and there running for the carriage of persons for hire, that thereby the said plaintiff, who was then and there a passenger on said car, was, through the negligence and carelessness of the said defendant as aforesaid," thrown from the car and injured. Held insufficient, since the statement of facts admits of almost any proof to sustain it. King *v.* Wilmington, etc., R. Co. (Del.), 41 Atl. 975, 1 Pen. 452.

A count in case, which charges defendant with "so negligently and carelessly

forth a conclusion his pleading is not sufficient. Some facts or fact which gives rise to a duty, the breach of which constitutes the negligence, must be set up.[61]

running a certain car in which the plaintiff was then and there a passenger for hire, and was then riding, that the said car jumped from the track," thereby causing the plaintiff's injury, is sufficiently certain. King *v.* Wilmington, etc., R. Co. (Del.), 41 Atl. 975, 1 Pen. 452.

A declaration in case charged defendant with "so negligently and carelessly omitting and neglecting to use proper care and caution in running one of its cars, wherein the said plaintiff was then and there a passenger for hire, that said car ran from the rail with great force and violence," whereby plaintiff was thrown out and injured. Held sufficiently certain. King *v.* Wilmington, etc., R. Co. (Del.), 41 Atl. 975, 1 Pen. 452.

A count in case is sufficiently definite where it charges defendant with "negligently and carelessly running two cars, upon one of which the said plaintiff was then riding as a passenger for hire, upon a certain track, which was then and there, through the negligence and carelessness of the said defendant, improper and unsafe," whereby the car was thrown from the track, and plaintiff thereby thrown to the ground and injured. King *v.* Wilmington, etc., R. Co. (Del.), 41 Atl. 975, 1 Pen. 452.

In an action against a street railway for injuries to a passenger, a narr, averrng generally that the company negligently used insufficient and defective brakes and other appliances, by reason of which its servants lost control of the car, and plaintiff was injured while endeavoring to escape, was demurrable for not specifying the particular appliances that caused the injury, and how the injury was received. Newton *v.* People's R. Co. (Del.), 55 Atl. 2, 4 Pen. 350.

In an action against a street railroad company for injuries to a passenger, allegations that defendant did not use proper care in transporting plaintiff, by reason of which plaintiff, while a passenger, was thrown to the ground through the negligence and carelessness of defendant, and while alighting from defendant's car, which was then being negligently and carelessly moved and operated by defendant, was insufficient, because not specifying the particulars in which defendant was negligent. Riedel *v.* Wilmington City R. Co. (Del.), 64 Atl. 257, 5 Pen. 572.

A count of a declaration alleging that the plaintiff was in the railroad car of the defendant, and was thrown therefrom by the carelessness of the defendant, is too general in its description of the mode of the injury. Central R. Co. *v.* Van Horn, 38 N. J. L. 133.

A complaint alleging that, on or about a certain day, plaintiff's intestate, "being then rightfully on a train of cars of defendant on his way to W., was, by the wrongful act, neglect, and default of defendant, slain and killed," and further alleging that plaintiff's intestate, "between B. and W., by the gross negligence of defendant, was slain and killed," does not sufficiently set out the negligence complained of. Conley *v.* Richmond, etc., R. Co., 109 N. C. 692, 14 S. E. 303, distinguished Hardy *v.* North Carolina Cent. R. Co., 74 N. C. 734.

A declaration against a street railroad for injuries to a passenger, alleging that there were in the running board of the car certain apertures and defects, negligently made, etc., the nature whereof was and is unknown to plaintiff and can not be more particularly described by her, and further alleging that plaintiff's foot or shoe was caught upon the running board by reason of said apertures or defects, whereby the heel of her shoe was torn off, and she was thrown and injured, is insufficient in its allegations of negligence. Wilbur *v.* Rhode Island Co., 61 Atl. 601, 27 R. I. 205.

The declaration in an action against a street railroad company to recover damages for injury to a passenger held sufficient to state a cause of action under the rule of pleading in Virginia that the declaration in such cases must contain a statement of the material facts sufficiently specific to advise the defendant of what it is called upon to defend. Norfolk, etc., Terminal Co. *v.* Rotolo, 112 C. C. A. 583, 191 Fed. 4; Chesapeake, etc., R. Co. *v.* Hunter, 109 Va. 341, 64 S. E. 44; Norfolk, etc., Tract. Co. *v.* Rephan, 188 Fed. 276, 110 C. C. A. 254.

In an action by a passenger against a carrier for a personal injury, a declaration which simply charges in different counts that the defendant was negligent in the operation of its train, that it did not have a proper roadbed or track, and that its locomotive, cars and coaches were defective, is not sufficient, but if, in addition, there are charged in each count such facts and circumstances attending the injury, as show that the movement of the train was so unusual and extraordinary as to break the plaintiff loose from his hold on the water closet, and that the accident could not well have happened without negligence on the part of the carrier, the declaration is sufficient, as a prima facie presumption is raised of negligence on the part of the carrier. Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

61. Stating conclusion insufficient.—Devino *v.* Central, etc., R. Co., 63 Vt. 98, 20 Atl. 953, citing Kennedy *v.* Morgan, 57 Vt. 46.

A count for damages occasioned by a

But it would seem that where the allegation of negligence makes a prima facie case, as in case of derailment, collision, etc., no necessity exists for the plaintiff to undertake to set out the particular causes which finally culminated in the injury.[62] Where the petition states the act or omission complained of, and avers that it was negligence, or that it was negligently done it is unquestionably sufficient, unless such act or omission can be declared, as a matter of law, not to constitute negligence.[63] The allegations in the petition should, at any rate, show that the negligence was that of the carrier.[64]

Effect of Knowledge of Particular Act of Negligence.—Some courts hold that the fact that the plaintiff has knowledge of the particular act of negligence which caused the injury does not require him to allege such act specifically, nor deprive him of the benefit of the rule that in such action a petition alleging negligence in general terms is sufficient.[65] Others incline to the rule that such circumstances as he does know and must have contemplated and relied on when he framed his pleading, and are reasonably necessary for the defendant's information, should be set forth with reasonable certainty.[66] Of course, it is not required of him when, from the circumstances, it is not in his power to do so.[67]

railroad accident is fatally defective when it merely sets forth the facts giving rise to the relation of carrier and passenger, alleges the duty to carry safely, and a violation thereof by suffering plaintiff's wife to be killed and himself injured, without setting out the facts constituting the negligence which caused the accident. Devino *v.* Central, etc., R. Co., 63 Vt. 98, 20 Atl. 953.

62. Proof of derailment of a car, in consequence of which a passenger was injured, being ordinarily prima facie evidence of negligence, the particular cause of the accident need not be alleged in an action by a passenger for injuries. Hoskins *v.* Northern Pac. R. Co., 102 Pac. 988, 39 Mont. 394.

Where a declaration avers that decedent was killed by the oversetting and throwing down of the railroad car in which he was being carried at the time by the defendant as passenger, and that the oversetting and throwing down of the car were caused by the negligence of the defendant, it is not demurrable on the ground that the allegation is too general. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

And in Birckhead *v.* Chesapeake, etc., R. Co., 95 Va. 648, 29 S. E. 678, a declaration alleged that a carrier, disregarding its duties, negligently permitted the train on which the plaintiff was a passenger to stand on a track where it was in danger of a collision; that the carrier negligently permitted another train to collide with the train on which the plaintiff was a passenger; and that the carrier had knowledge of the danger in time to stop the other train, and prevent the collision, but failed to do so; and that the plaintiff was injured. Held, that the declaration described the plaintiff's cause of action with sufficient particularity.

63. Sufficiency of averment.—International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190, affirmed in 93 Tex. 643, no op.

A demurrer to a count of a declaration alleging that defendant, while the train was in motion, negligently refused to allow plaintiff to pass through the coach, and ordered him off the train, was properly overruled. Florida, etc., R. Co. *v.* Geiger, 60 So. 753, 64 Fla. 282.

A petition in an action for injuries to a passenger in consequence of the train colliding with a tree on the track, which alleges generally the existence of the relation of passenger and carrier, and the act of the carrier in permitting a tree to be on its track, and in running its train into it to the passenger's injury, states a cause of action, for the negligence of the carrier arises on proof of the allegations, and, where the allegations are proved, the burden is on the carrier to show its freedom from negligence. Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

64. Showing that negligence was that of carrier.—In an action against a railroad company to recover damages for an alleged injury, the petition should state facts sufficient to show that the negligence complained of as the cause of the injury was the negligence of the company. O'Neil *v.* Baltimore, etc., R. Co., 2 O. C. C. 504, 1 O. C. D. 610.

65. Knowledge of particular acts of negligence.—San Antonio Tract. Co. *v.* Williams, 78 S. W. 977, 34 Tex. Civ. App. 372; Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

66. Other ruling.—King *v.* Wilmington, etc., R. Co. (Del.), 41 Atl. 975, 1 Pen. 452.

67. It is not incumbent on plaintiff in an action against a railroad for damages for the death of passenger, after showing accident which implies negligence, to go further and show what the particular negligence was, when from cir-

§ 3110. Restriction of General Averment by Other Averment.—It is a familiar rule that a general averment of negligence, where permissible, is restricted in its effect, to the particular facts alleged as affording the basis or bases for the negligence so generally charged; and if the particular facts alleged do not justify the conclusions of negligence, the count is demurrable.[68] Thus, where the facts alleged constitute a physical impossibility, the averment of negligence is without a basis and subject to demurrer.[69] But unless there is language in a count which constricts or contracts the general averment of negligence to acts of omissions described in the count, but which does not justify the conclusions of negligence so sought to be drawn by the pleader in general though referable terms, the description of the means of injury, etc., does not contract the general averment of negligence for the obvious reason that it merely describes the means of injury and other circumstances, and not the culpable act or omission which the law terms "negligence."[70] The plaintiff may plead neg-

cumstances it is not in his power to do so. Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

A passenger can rarely know the cause of a derailment, but from the very nature of the case the facts surrounding the derailment must be within the knowledge of the railway company, if within that of any one, and appellee was not required to allege matters of which he had no knowledge and which he was not required to prove in order to make out a prima facie case. This question is too well settled in Texas to require discussion. Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608; Galveston, etc., R. Co. *v.* Garcia, 45 Tex. Civ. App. 229, 100 S. W. 198.

The case of Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608, cited by appellant, does not sustain its contention. In discussing the question now being considered the supreme court in Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345, said: "There are some expressions in the opinion in Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608, which may seem to lead to a contrary conclusion, but an examination of the case will show that the question in it was whether the plaintiff should have been permitted to prove an act of negligence not alleged, when he had alleged that the accident resulted from the specific acts of negligence." Galveston, etc., R. Co. *v.* Garcia, 45 Tex. Civ. App. 229, 100 S. W. 198.

68. Birmingham R., etc., Co. *v.* Wilcox (Ala.), 61 So. 908, citing Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Birmingham Ore., etc., Co. *v.* Grover, 159 Ala. 276, 48 So. 682; Birmingham R., etc., Co. *v.* Parker, 156 Ala. 251, 47 So. 138; Birmingham R., etc., Co. *v.* Weathers, 164 Ala. 23, 51 So. 303; Indianapolis, etc., R. Co. *v.* Tucker (Ind. App.), 98 N. E. 431.

Under Code 1896, § 3441, requiring operators of trains to stop one hundred feet before crossing another railroad and not to proceed until they know that the way is clear, a complaint in an action by a street car passenger for injuries in a collision at a railroad crossing, alleging that the operatives of the car negligently ran the same on the railroad crossing without first knowing that the track was clear, and that by reason of such negligence plaintiff was injured, etc., was not objectionable as an insufficient attempt to particularize defendant's negligence. Montgomery St. R. Co. *v.* Lewis, 41 So. 736, 148 Ala. 134.

In a complaint against a carrier for injuries to a passenger, a general allegation of negligence is superseded by allegations of particular acts of negligence. Houston, etc., R. Co. *v.* Summers (Tex. Civ. App.), 49 S. W. 1106, affirmed in 51 S. W. 324, 92 Tex. 621.

Plaintiff having alleged that he was in the usual and proper place for taking a street car at the time he was struck, an allegation that defendant negligently failed to stop the car after discovering plaintiff's presence "at said time and place" was insufficient to raise the issue of discovered peril as the allegation itself negatives any inference of perilous position. Townsend *v.* Houston Elect. Co. (Tex. Civ. App.), 154 S. W. 629.

69. Physical impossibility.—Rome R., etc., Co. *v.* Keel, 3 Ga. App. 769, 60 S. E. 468.

70. Birmingham R., etc., Co. *v.* Wilcox (Ala.), 61 So. 908, citing Birmingham R., etc., Co. *v.* Jordan, 170 Ala. 530, 54 So. 280.

In an action for injuries to a passenger, counts of the complaint held not demurrable on the ground that the general averment of negligence therein was overcome by facts specifically alleged. Birm-

ligence generally, and rely upon the doctrine of res ipsa loquitur, and allegations that decedent's death was caused by the sudden derailment of the car because of the negligent condition of the appliances or the negligent management of the car by the employees only charges negligence generally, and does not allege particular acts of negligence.[71]

§§ 3111-3122. Averment of Basis or Bases for Negligence—§ 3111. In General.—While it is true that specific averments of facts may tend to and be sufficient to overcome the general allegation of negligence,[72] it is also true that such specific averments of facts may tend to support, rather than lessen, force of the general allegation of negligence.[73] And it is held that a plaintiff, suing a railroad company for damages, caused by the neglect of its servants, need not allege the particular cause of the accident; and, though he does so, his right of recovery is not limited by the allegation.[74]

Inconsistent Averments.—Inconsistent and contradictory averments in the same count, as a general rule, seem to nullify each other.[75] But it has been held, in an action for injuries to a passenger, inconsistency in averments of the complaint in alleging that the train left the track by reason of rotten and defective ties permitting the rails to spread, and that the breaking of the axle of a car caused the train to leave the track, does not make the complaint bad.[76] Specifications of negligence, in an action for injuries to a passenger while boarding a street car, in that the car was started before plaintiff was afforded a reasonable opportunity to board the same, and that it was not stopped subsequently to avert the peril impending in plaintiff's jeopardous situation, were not inconsistent.[77]

§ 3112. As to Stations and Stopping Places.—A complaint for injuries received while at the station, on the platform, in and about the station premises, or at the place of boarding, alighting, or stopping, without an allegation of defendant's negligence, does not state a cause of action at common law for the carrier's negligence.[78] While it seems to be unnecessary to expressly allege

ingham R., etc., Co. *v.* Wilcox (Ala.), 61 So. 908.

Complaint, alleging that a passenger was thrown to the floor of a street car by a sudden jerk while alighting, and that her injuries were proximately caused by the negligent manner in which defendant operated the car, was sufficient. Birmingham R., etc., Co. *v.* Gonzalez (Ala.), 61 So. 80.

Complaint, in a passenger's action for personal injuries in alighting, sufficiently charged negligence by alleging that, while he was in the act of alighting to the platform, defendant's servants, negligently and without notice, caused the train and car to suddenly start with such speed as to throw plaintiff to the platform. Lake Erie, etc., R. Co. *v.* Beals, 50 Ind. App. 450, 98 N. E. 453.

71. Special averments not alleging particular acts of negligence.—MacDonald *v.* Metropolitan St. R. Co., 118 S. W. 78, 219 Mo. 468, 16 Am. & Eng. Ann. Cas. 810.

A complaint for injuries to a street railway passenger may charge that the accident was due to the negligence of the motorman, or to defects in the car, and is not confined to one ground of negligence. Paducah Tract. Co. *v.* Baker, 113 S. W. 449, 130 Ky. 360, 19 L. R. A., N. S., 1185.

72. See Stauffer *v.* Metropolitan St. R. Co., 243 Mo. 305, 147 S. W. 1032.

73. Specific averment of facts.—Indianapolis, etc., R. Co. *v.* Tucker (Ind. App.), 98 N. E. 431.

74. Specific negligence averred.—Carmanty *v.* Mexican Gulf R. Co., 5 La. Ann. 703.

75. Averments nullified.—Wilbur *v.* Rhode Island Co., 27 R. I. 205, 61 Atl. 601.

76. Inconsistent averments.—Southern R. Co. *v.* Roach, 78 N. E. 201, 38 Ind App. 211.

77. Specifications not inconsistent.—Shanahan *v.* St. Louis Trans. Co., 83 S. W. 783, 109 Mo. App. 228.

78. Negligence must be alleged.—Fremont, etc., R. Co. *v.* Hagblad, 101 N. W. 1033, 72 Neb. 773, 4 L. R. A., N. S., 254, modified on rehearing in 106 N. W. 1041.

In an action against a street railroad for injuries to a passenger, the complaint alleged that defendant negligently and carelessly failed to provide a platform or safe and convenient place and means of leaving the car at the point where it was stopped for plantiff to alight, and that it negligently failed to stop the car at the usual place, but ran it to a point where there was a distance of about two or three feet from the step to the ground, negligently informed plaintiff when the

negligence in such cases, there must be such averments of related facts as to overcome any presumption in the defendant's behalf and to definitely show a negligent breach of duty.[79] The pleading need not state the facts showing the negligence of the carrier in a given case. Thus, it need not state what constitutes a safe place, nor give a minute description of the stopping place, nor of the injury and the manner and means of its infliction.[80] In an action for injuries received at a station or stopping place, a complaint sets forth a cause of action where, after alleging the relation, it avers a negligent breach of some duty owing by the carrier to the passenger.[81] Thus, it may base the negligence on failing to provide adequate stations, facilities, platforms, approaches, etc., failing to provide and maintain safe and suitable exits for ingress and egress or for boarding and alighting from the vehicle,[82] failing to keep proper lookouts,

car stopped that she had arrived at her destination, and failed to assist her in alighting. Held, that in respect to the failure to provide a platform in the street, and in running the car beyond the usual place, the complaint showed no cause of action, but the remaining allegations taken together constituted a showing of negligence. Indiana Union Tract. Co. *v.* Jacobs, 78 N. E. 325, 167 Ind. 85.

79. A complaint, in an action against a street railway company for injuries to a passenger while alighting from a car in consequence of the distance from the step of the car to the surface of the street, alleged that the surface of the street was lower than the top of the rail of the track, but did not aver that the track was not laid to conform to the established grade of the street. Held, that it would be presumed that the track conformed to the established grade, as required by Burns' Ann. St. 1901, § 5454, and the complaint did not show a negligent construction of the track. Indianapolis Tract., etc., Co. *v.* Pressell, 77 N. E. 357, 39 Ind. App. 472.

A complaint, in an action against a street railway company for injuries to a passenger, while alighting from a car, in consequence of the distance from the step of the car to the street, which alleged that the top of the track was a foot higher than the surface of the street contiguous thereto, did not charge negligence in the construction of the track in that it was not constructed on the proper grade or because of the condition of the street outside of the part which it occupied. Indianapolis Tract., etc., Co. *v.* Pressell, 77 N. E. 357, 39 Ind. App. 472.

A complaint, in an action against a street railway company for injuries to a passenger while alighting from a car in consequence of the distance from the step of the car to the surface of the street, alleged that the step was two feet above the top of the rail of the track; that, owing to the condition of the street, the step stood three feet above the level thereof; that the company did not furnish an additional step, whereby the egress from the car might be made in safety. Held not to show negligence in failing to furnish an extra step to enable the passenger to alight in safety. Indianapolis Tract., etc., Co. *v.* Pressell, 77 N. E. 357, 39 Ind. App. 472.

The petition in an action against a street railway company for injury to a passenger by turning her ankle over in alighting in the daytime states no cause of action; it alleging the car did not stop at the usual place where the street was smooth, but was negligently stopped where the street was paved with rough and uneven granite stones, which made it an unsafe place to alight, that she had no means of observing and was not warned of the unsafe condition, and that the conductor knowingly failed to warn her of the danger of alighting there, and urged her to haste; there being no averment that the stones were more rough and uneven than was usual on streets so paved, that there was a hole there, that the conductor knew it was unsafe for her to alight there, or that the condition of the stones were not obvious to her. Murnahan *v.* Cincinnati, etc., St. R. Co., 86 S. W. 688, 27 Ky. L. Rep. 737.

80. In an action against a street railway company for injuries received by a passenger on alighting from a car, a complaint alleging the failure of the defendant to provide a safe place for alighting is not demurrable in not averring what constitutes a safe place, nor in giving a minute description of the place where the stop was made and of the alleged injuries. Montgomery St. R. Co. *v.* Mason, 32 So. 261, 133 Ala. 508.

81. Georgia R., etc., Co. *v.* Lloyd, 129 Ga. 650, 59 S. E. 801.

Where plaintiff in his petition alleged that while sustaining the relation of a passenger to the defendant, and at the time when he was on the platform constructed and maintained by defendant for the use of its passengers at a station on its line, he received a physical injury from the running of defendant's train, the petition was not subject to general demurrer. Georgia R., etc., Co. *v.* Adams, 56 S. E. 409, 127 Ga. 408.

82. Exits for egress and ingress.—A complaint in an action for injuries to a passenger which alleges that he alighted at a depot in the nighttime, that while passing from the depot along a much traveled pathway he fell into a ditch and

or give proper and necessary notices or signals, as to condition of stopping places and attending dangers,[83] failing to stop vehicle at proper and safe places,[84] or the failure to otherwise observe due caution in the handling of its vehicles or other facilities,[85] or in failing to properly regulate the use of its premises by other persons or carriers.[86] This same rule applies in cases of

was injured, that the pathway was on the carrier's premises, and was habitually used with its knowledge and acquiescence by its passengers in leaving its depot and trains, at and before the time of the injury by the invitation of the carrier, and that the carrier negligently allowed the pathway to remain unsafe, makes a case of a passenger leaving a train by a route which he, as well as passengers in general, was invited by the carrier to use, and states a cause of action as against a demurrer. Alabama, etc., R. Co. *v.* Godfrey, 156 Ala. 202, 47 So. 185.

To board or alight.—A petition in an action against a railroad company for injuries to a passenger received while disembarking, owing to the distance from the step of the car to the ground below, held good as against a general demurrer. International, etc., R. Co. *v.* Clark (Tex. Civ. App.), 71 S. W. 587, judgment reversed in 72 S. W. 584, 96 Tex. 349.

In an action by a passenger for injuries sustained in alighting from a train, a petition alleging that defendant frequently moved its trains at such station while passengers were alighting to get the engine in position to take water, which custom was unknown to plaintiff; that the distance from the step to the ground, which was rocky and uneven, was twenty-five or thirty inches and that defendant neglected to have a stool in position; that the conductor saw plaintiff descending, knew that she needed assistance, that no stool was in position on which she could alight, and neglected to give her assistance, and that by reason of either or all the acts of negligence of defendants, its agents and servants, as alleged plaintiff sustained the injuries complained of, was sufficient as against a demurrer. St. Louis, etc., R. Co. *v.* Kennedy (Tex. Civ. App.), 96 S. W. 653.

A petition in an action against a railroad company for injuries to a passenger received while disembarking, owing to the distance from the step of the car to the ground below, held good as against a general demurrer. International, etc., R. Co. *v.* Clark (Tex. Civ. App.), 71 S. W. 587, judgment reversed on another point in 72 S. W. 584, 96 Tex. 349.

83. In an action for injuries to plaintiff's wife, a complaint is sufficient, on motion to dismiss, where under it plaintiff could prove that defendant was a street railroad operating its cars on a specified avenue; that on a date named the pavement within two feet, if its tracks was being repaired; that plaintiff's wife, having an infant in her care, was a passenger on a car, which came to a full stop on the avenue named; that plaintiff's wife alighted, and while taking her child from the car, without her own fault, her foot slipped into a hole, causing her to fall, thereby sustaining injuries; and that defendant knew the condition of the street, and did not give warning of such repairs. Catterson *v.* Brooklyn Heights R. Co., 116 N. Y. S. 760, 132 App. Div. 399.

84. A passenger alleged that the defendant company operated an electric line through a country district; that the car she was on was an open one; that at a regular station defendant maintained an elevated wooden platform; that plaintiff notified the conductor of her desire to alight at this station, and that it was the duty of the carmen to stop opposite the platform, but they carelessly ran the car beyond that, and stopped where the ground was three or four feet below the running board and the surface was rough; that when the car stopped the conductor carelessly called the name of the station, and waited for plaintiff to alight, without offering to assist her; and that in attempting to step carefully to the ground, by reason of the great distance and the uneven surface, she fell and was injured. Held, that the petition stated a cause of action, though it was not expressly averred that the place where the car stopped was unsafe or dangerous. Fillingham *v.* St. Louis, Trans. Co., 77 S. W. 314, 102 Mo. App. 573.

85. Georgia R., etc., Co. *v.* Lloyd, 129 Ga. 650, 59 S. E. 801.

A petition alleged that plaintiff was a passenger and left the waiting room in a station to board the train; that the passageway was not more than three feet wide, upon which were several baggage trucks on which negroes were seated, compelling plaintiff to pass between the trucks and the edge of the passageway next the track, that in so doing an engine of defendant approached her from the rear without any signal and struck petitioner on the back, knocking her down, and inflicting the injuries complained of; that the engine was running at a dangerous rate of speed, and that the employees in charge failed to keep a proper lookout. Held, to state a good cause of action. Georgia R., etc., Co. *v.* Lloyd, 59 S. E. 801, 129 Ga. 650.

86. Plaintiff alleged that he was a passenger of defendant railroad company; that he was invited by defendant's agent to enter its terminal at W. to board one of defendant's cars, and that while standing on defendant's platform defendant

injuries arising from the negligent or unlawful failure to open, light or heat station houses, etc.,[87] but there as in other cases the negligent breach of a duty must be alleged, or else the complaint is demurrable.[88] The complaint, for injuries to one waiting at a flag station to take passage, need not set up the instrumentality of the injury or the manner in which it was received.[89] But where no presumption of negligence arises from the basis or bases stated, the petition must allege negligence in that regard, or no sufficient cause of action is stated.[90] And such an allegation must not be indefinite and uncertain, if it would withstand a special demurrer.[91] An allegation in an action for compelling plaintiff to leave a railway waiting room at a junction point that she had to wait "several hours" for a train is subject to special demurrer where no reason appears why the time can not be more definitely alleged.[92]

§ 3113. As to Roadbed and Track.—An averment that the carrier had negligently constructed its tracks at or near the curve where the injury occured is sufficiently specific.[93] It has been held that an averment that the roadbed and track of the carrier were in bad condition and repair was not too general.[94]

knew, or had reasonable cause to know, that the agents of another railroad were using or about to use the platform by moving its freight trucks against and over plaintiff's foot; and that defendant negligently permitted them to do so. Held, that the declaration stated a cause of action. Miller *v.* West Jersey, etc., R. Co. (N. J.), 71 Atl. 1113.

87. See Smith *v.* Seaboard, etc., R. Co., 10 Ga. App. 227, 73 S. E. 523.

A petition charging a railroad with neglect of duty in not providing "proper lights and accommodations for passengers at its freight depot" at the time, and that plaintiff's fall and injuries were occasioned by that neglect, is sufficient on general demurrer. Stewart *v.* International, etc., R. Co., 53 Tex. 289, 37 Am. Rep. 753.

88. Smith *v.* Seaboard, etc., R. Co., 10 Ga. App. 227, 73 S. E. 523.

A complaint alleged that plaintiff purchased a round trip ticket to another town on defendant's road and return, intending to return on the same day by a train leaving the place to which she went at 10:26 p. m.; that she went to defendant's depot to return, and that the night was dark and defendant had negligently failed to provide any artificial lights, and the grounds and platform were in total darkness, and that by reason thereof plaintiff was unable to see the obstruction formed by the raised end of the platform by which she was caused to stumble and fall, permanently injuring her leg. Held, that the complaint stated a cause of action. Cleveland, etc., R. Co. *v.* Harvey, 45 Ind. App. 153, 90 N. E. 318.

89. Flag station—Instrumentality unnecessary.—Louisville, etc., R. Co. *v.* Glasgow (Ala.), 60 So. 103.

90. In an action against a carrier for injuries, plaintiff alleged that while passing through the doors of defendant's station which were opened in the usual manner, "said doors, without notice or warning to plaintiff, suddenly closed, and plaintiff was crushed between the same," and that she suffered certain specified injuries. Held, that the petition does not state a cause of action, as there is no allegation that the injuries resulted from defendant's negligence, and there is no necessary presumption of negligence from the facts stated. Rawson *v.* Kansas City Elev. R. Co., 129 Mo. App. 613, 107 S. W. 1101.

91. In a suit for injuries caused by the gross negligence of defendant's conductor in causing plaintiff to leave the train at a dangerous place in the nighttime other than that at which he had agreed to stop the train, an allegation that in plaintiff's attempt to get out of the place where defendant had negligently placed her she fell into a hole, badly wrenching her side and back, is subject to a special demurrer on the ground that the allegations are indefinite and uncertain, and should be stricken unless cured by amendment. Waldrup *v.* Central, etc., R. Co., 56 S. E. 439, 127 Ga. 359.

92. Allegation as to time of waiting.—Riley *v.* Wrightsville, etc., R. Co., 133 Ga. 413, 65 S. E. 890, 24 L. R. A., N. S., 379, 18 Am. & Eng. Ann. Cas. 208.

93. Sufficiently specific.—Braunstein *v.* People's R. Co., 1 Boyce's (24 Del.), 310, 77 Atl. 738.

94. Averment not too general.—In an action for damages for injury to the person, the complaint averred that the defendant, a railroad company, did not use due care, diligence, and skill, in carrying the plaintiff; but, on the contrary, the track of the railroad was in bad condition and repair, and the defendant, by his servants, etc., negligently, unskillfully, and carelessly ran its train of cars, whereby, etc. Held, on demurrer, that the averment of the condition of the track was not too general. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

And a petition which alleges negligence of servants in charge of the "railroad, train, and roadbed" alleges that the track was defective, though the word "roadbed" does not include track and ties, since the word "railroad" is broad enough to include the roadbed and the superstructure including cross-ties, rails, and fastenings.[95] In an action against a carrier for injuries to a passenger, an averment of the declaration that defendant negligently constructed its tracks at the curve where the accident occurred, and so carelessly maintained and repaired the tracks, and so carelessly allowed them to be and become unsafe and defective at the curve, etc., sufficiently alleged in what respect the tracks were improperly and unskillfully constructed.[96]

Obstructions on Roadbed or Track.—Where an injury resulted from a sudden jerk of a car caused by an obstruction on the track which was under the defendant's control, an allegation that the obstruction was "in and upon defendant's tracks" is a sufficient allegation that the obstruction was under defendant's control.[97]

§ 3114. As to Vehicle.—The plaintiff when suing for injuries resulting from defective conditions of the vehicle may aver the basis or bases of negligence and rely on the presumption in favor of the passenger.[98] But if the plaintiff states a case of specific negligence he abandons his right to the presumption arising from the rule of res ipsa loquitur and must prove the specific negligence as averred.[99] In an action for injuries arising from negligence in failing to repair defects, remove obstacles, etc., in the vehicle the petition is not subject to demurrer where it states the length of time the defect existed, and avers that it was sufficient for the carrier to have had notice thereof.[1] Nor is it necessary to allege that such obstacle or dangerous agency remained there any certain length of time, although some allegation in this respect may be necessary if the thing had been placed there by some one other than the carrier's agents.[2] Where the allegations of a complaint for an injury resulting from being thrown from the platform between cars, avers nothing inconsistent with due care on the part of the carrier with regard to vestibules to cars, there is no ground for implied negligence.[3]

95. Allegation broad enough.—Skiles *v.* St. Louis, etc., R. Co., 108 S. W. 1082, 130 Mo. App. 162.

96. Braunstein *v.* People's R. Co., 1 Boyce's (24 Del.), 310, 77 Atl. 738.

97. Obstructions on roadbed or track.—North Chicago St. R. Co. *v.* Schwartz, 82 Ill. App. 493.

98. A petition alleging that defendant allowed the car, controller, motor, and electrical appliances "to become out of order, and allowed the controller * * * to burn out, causing an explosion, setting said car on fire and causing a panic among the passengers, and plaintiff was thrown, pushed, and knocked from the car by the persons frightened * * * striking upon his head," etc., specially charges negligence. Kennedy *v.* Metropolitan St. R. Co., 128 Mo. App. 297, 107 S. W. 16.

An averment of the breaking of the machinery, and the consequent falling of the elevator from the third floor to the basement, raises a presumption of negligence. Winhein *v.* Field, 107 Ill. App. 145.

In an action for injuries, an averment that plaintiff was a passenger, in the exercise of due care, on an elevator operated by defendant, and that it was unsafe and unsound, and fell, injuring plaintiff, makes a prima facie case. Winhein *v.* Field, 107 Ill. App. 145.

99. Kennedy *v.* Metropolitan St. R. Co., 128 Mo. App. 297, 107 S. W. 16; McGrath *v.* St. Louis Trans. Co., 197 Mo. 97, 94 S. W. 872; Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

1. In an action against a carrier for injuries to a passenger who slipped on a banana peel lying on a step of the car when he was debarking, the complaint alleged that the peel was there long before the train left the terminal station and had been permitted to remain there for more than an hour, and that defendant might, by the exercise of ordinary care, have discovered the peel and removed it. Held, that the complaint was sufficient as against a demurrer for want of facts. Pittsburgh, etc., R. Co. *v.* Rose, 40 Ind. App. 240, 79 N. E. 1094, distinguishing Malott *v.* Sample, 164 Ind. 645, 74 N. E. 245.

2. Dallas, etc., St. R. Co. *v.* Black, 40 Tex. Civ. App. 415, 89 S. W. 1087.

3. Pittsburgh, etc., R. Co. *v.* Schepman, 171 Ind. 71, 84 N. E. 988.

Scope of Allegation.—Where a petition in an action for injuries to a passenger on a street car alleged that the motor was defective but also charged that the machinery, appliances, and parts of the car were defective, such allegation was sufficiently broad to include not only the motor but all the other electric appliances with which the car was equipped.[4]

Averment Too General.—In an injury action against a carrier by a passenger, an allegation that defendant so carelessly repaired and maintained the tracks and the running parts of the passenger car, and so carelessly allowed them to become unsafe and defective, etc., is too general in respect to how the tracks and running parts of the car were unsafe; the phrase "the tracks and running parts" not being restricted in meaning to wheels and axles, but being broad enough to embrace as much as the phrase "defective brakes and other appliances."[5]

§ 3115. Receiving and Discharging Passengers.—Where the complaint alleges negligence upon the part of the carrier, while the passenger is boarding or alighting from the vehicle, either in the management of the vehicle or upon the part of its servants or agents in the line of their duty, it is sufficient without setting forth the specific acts which are evidence of the negligence.[6] Where a duty to the person injured and a breach thereof is definitely shown, the petition is sufficient,[7] and averments from which these facts must necessarily be im-

4. Scope of allegation.—Prod *v.* St. Louis Trans. Co., 115 Mo. App. 202, 91 S. W. 993.

5. Averment too general.—Braunstein *v.* People's R. Co., 1 Boyce's (24 Del.), 310, 77 Atl. 738.

6. Taking up and setting down passengers.—Bobbitt *v.* United R. Co., 169 Mo. App. 424, 153 S. W. 70.

A declaration alleging that, while a passenger was "in the exercise of due care in alighting from said train at his destination, said train was carelessly and negligently moved, and * * * he was by such negligence and carelessness thrown violently down on the ground" and injured, sufficiently alleges negligence. Hunter *v.* Philadelphia, etc., R. Co., 1 Boyce's (24 Del.), 5, 75 Atl. 962.

A general allegation in a petition in an action for injuries to a passenger on a street car that the car was started before the passenger had time to be seated, and that injury resulted therefrom states a cause of action. Brady *v.* Springfield Tract. Co., 140 Mo. App. 421, 124 S. W. 1070.

A petition, in an action against a railroad company for injuries to a passenger, which alleges "that the train started before the plaintiff had reasonable time to alight," is a sufficiently specific averment that the train was negligently started while plaintiff was in the act of alighting. McCaslin *v.* Lake Shore, etc., R. Co., 93 Mich. 553, 53 N. W. 724.

In an action by a passenger for injuries sustained in alighting from a train, a petition alleging that defendant frequently moved its trains at such station while passengers were alighting to get the engine in position to take water, which custom was unknown to plaintiff; that the distance from the step to the ground, which was rocky and uneven, was twenty-five or thirty inches and that defendant neglected to have a stool in position; that the conductor saw plaintiff descending, knew that she needed assistance, that no stool was in position on which she could alight, and neglected to give her assistance, and that by reason of either or all the acts of negligence of defendants, its agents and servants, as alleged plaintiff sustained the injuries complained of, was sufficient as against a demurrer. St. Louis, etc., R. Co. *v.* Kennedy (Tex. Civ. App.), 96 S. W. 653.

Where the complaint alleged that the car had stopped, and passengers were alighting, and that plaintiff was in the act of stepping to the ground, when the car was suddenly started without warning, and she was violently thrown down, it was not demurrable, though there were allegations that because of defective eyesight plaintiff did not know, and could not have known by ordinary diligence, that the car was in motion. Mueller *v.* Washington Water Power Co., 106 Pac. 476, 56 Wash. 556.

7. South Chicago City R. Co. *v.* Zerler, 31 Ind. App. 488, 65 N. E. 599; Union Tract. Co. *v.* Siceloff, 34 Ind. App. 511, 72 N. E. 266; Citizens' St. R. Co. *v.* Shepherd (Ind. App.), 59 N. E. 349; Gorman *v.* St. Louis Trans. Co., 96 Mo. App. 602, 70 S. W. 731; Cramer *v.* Springfield Tract. Co., 112 Mo. App. 350, 87 S. W. 24.

A complaint claimed specific damages against an electric railway company on allegations that, while plaintiff passenger was alighting at his destination, the car started or jerked, or the speed thereof was suddenly increased, proximately causing him to fall, resulting in specified injuries; that he was thrown or caused to fall through and as a proximate conse-

plied are sufficient,[8] even though the pleading may be faulty in assuming, instead of alleging, some material fact where such fault is not pointed to by de-

quence of defendant's negligence in and about carrying him as its passenger. Held, that the complaint was not demurrable as being vague, uncertain, and indefinite, as not showing any duty or any violation of any duty. Birmingham R., etc., Co. *v.* McGinty, 158 Ala. 410, 48 So. 491.

A count charging in general terms that the car of defendant, by the carelessness of the management of those having it in charge, ran over the body and arm of the plaintiff who was a passenger and as he was alighting therefrom will be sustained. Breese *v.* Trenton Horse R. Co., 52 N. J. L. 250, 19 Atl. 204.

In an action against a railroad company for personal injuries sustained by a passenger in alighting from a train, the complaint alleged not only that the infirmity of plaintiff was well known to defendant, but also that it was dangerous for her to alight from the train without the aid of a footstool, which it was the custom of defendant to provide, but which was not provided at the time of the injury. Held, that negligence on the part of defendant was sufficiently alleged. Madden *v.* Port Royal, etc., R. Co., 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855.

Negligent breach of duty in elevator case.—In an action for injuries sustained in alighting from an elevator, a declaration alleging that, after the elevator had reached the floor at which plaintiff was to get off, she was invited to alight by defendant's servant opening the door, and such servant caused it to move upward, that while passing out of the elevator whereby one of plaintiff's feet was caught between the elevator and the floor of the building, and injured, was not demurrable for failure to state facts constituting a cause of action. Bullock *v.* Butler Exch. Co., 46 Atl. 273, 22 R. I. 105.

8. A complaint in an action against a street railway company for injuries received by a passenger while alighting from a car, in consequence of the sudden starting of the car, which alleged that the car stopped at the intersection of designated streets, which was plaintiff's point of destination; that she attempted to alight there; that before she had fully got off the car was put in motion, and as a proximate consequence thereof she was thrown to the ground; that the starting of the car caused the injuries complained of; and that the car was negligently operated—states a cause of action as against the objections that it fails to sufficiently state defendant's negligence, that it fails to allege that defendant put the car in motion while she was alighting, that it fails to allege that the car stopped for purpose of allowing passengers to alight, that it fails to show that the place where the car stopped was a regular stopping place for passengers to alight, and that it fails to show that defendant's servants had notice of her attempt to alight. Birmingham R., etc., Co. *v.* Handy (Ala.), 39 So. 917.

It is only necessary to allege that plaintiff was injured while being carried as a passenger, by the act of the carrier in operating the instrumentality; negligence being presumed. Nilson *v.* Oakland Tract. Co., 101 Pac. 413, 10 Cal. App. 103.

The complaint alleged that it was defendant's custom to stop its street cars at a certain street, and that when a car approached the corner in charge of its motorman and conductor, plaintiff, being in full view of the motorman and conductor, signaled the car to stop, and it had almost stopped, when plaintiff took hold of the support and was boarding the car, when it suddenly started forward without warning before plaintiff had obtained a footing, so as to jerk him so violently as to prevent him from getting on, whereby he was dragged, etc. Held to sufficiently allege that the motorman saw plaintiff and understood the signal to stop; the word "signal" meaning to communicate by means of an understood sign, and sufficiently showed that the injury was caused by the want of care of defendant's servants. Nilson *v.* Oakland Tract. Co., 101 Pac. 413, 10 Cal. App. 103.

The sudden jerking of a train is sufficiently pleaded as negligence, though it is not designated negligent, the complaint alleging that, after the carrier had caused its passengers to go on the car platform, in the nighttime, for the purpose of getting off its train at a station, and while plaintiff was attempting to alight, the train suddenly jerked, and threw her off the car. Rehearing 65 N. E. 557, denied in Cincinnati, etc., R. Co. *v.* Worthington, 66 N. E. 478, 30 Ind. App. 663, 96 Am. St. Rep. 355.

A petition, alleging that defendant's street cars regularly stopped at a designated point to discharge and receive passengers, that plaintiff attempted to enter a car at that point, and that, while in the act of doing so, defendant's servants negligently started the car forward with a violent jerk, is not subject to the objection that it states no cause of action, because not alleging that the car had stopped to receive passengers, the allegation that the car "started," by necessary implication, being an allegation that the car was stationary at the time. Peterson *v.* Metropolitan St. R. Co., 111 S. W. 37, 211 Mo. 498.

murrer.[9] Where the matter in which the injury was inflicted is set forth, it must be of sufficient certainty.[10] The complaint can not be said to be vague and uncertain merely because the plaintiff does not specify the points wherein the carrier was negligent, or because the servants are not expressly alleged to have been at the time engaged in their line of duty.[11] The gist of the negligence alleged in a petition in an action for injuries to a passenger while boarding or alighting from a car, is that the operators of the car negligently started the car before the passenger had reached a place of safety, and thereby put him in a position of danger when it was the duty of the operators of the car not to start it until he had been given a reasonable opportunity to reach a place of comparative safety,[12] and other averments as to surround-

9. A count alleging that plaintiff informed defendant's conductor of his desire to alight at a certain point; that it then became the duty of defendant's servant, after slackening the speed of the car, not to increase the speed until plaintiff had alighted, or had a reasonable opportunity to do so, but that, notwithstanding such duty, defendant's servant negligently, suddenly, and greatly increased the speed of the car before plaintiff had alighted or had a reasonable opportunity to alight, in consequence of which negligence plaintiff's body was thrown from the car, etc., though faulty in assuming, instead of alleging, that defendant's servant slackened the speed on being informed that plaintiff desired to alight, was nevertheless good as against a demurrer on the ground that it failed to allege increase of speed at the time plaintiff was in the act of alighting. Birmingham R., etc., Co. *v.* Glover, 38 So. 836, 142 Ala. 492.

10. In an action against a railroad company for personal injuries, a petition which avers, in substance, that plaintiff was a passenger, that by the negligence of the conductor he was induced and directed to step off the train before it reached the platform, the conductor telling him he was then at the right place, and that in so doing his injuries were receive, is sufficiently certain as to the manner in which the accident occurred. Depp *v.* Louisville, etc., R. Co., 12 Ky. L. Rep. 366, 14 S. W. 363.

11. Birmingham R., etc., Co. *v.* King, 149 Ala. 504, 42 So. 612.

A declaration alleging that a passenger on a street car who was leaving the car after it had stopped was injured by the sudden starting of the car without notice and sudden stopping with a jerk states a cause of action, and where the proofs sustain the allegations, an instruction that plaintiff is entitled to recover if the jury finds such to be the fact is not erroneous. Jacksonville Elect. Co. *v.* Batchis, 44 So. 933, 54 Fla. 192.

A declaration averring that a street car had slowed down almost to a standstill on notice by plaintiff of intent to board the same, and that said defendant by its servants then and there requested plaintiff to board, and that while he was so doing the car suddenly started to plaintiff's injury, is not bad on general demurrer. Hess *v.* Public Service R. Co., 86 Atl. 951, 84 N. J. L. 329.

12. The gist of the action.—Conway *v.* Metropolitan St. R. Co., 161 Mo. App. 81, 142 S. W. 1101; Houston, etc., R. Co. *v.* Hubbard (Tex. Civ. App.), 37 S. W. 25.

Rev. St. 1889, § 2074, requires that in construing a pleading to determine its effect its allegations shall be liberally construed with a view to substantial justice. A petition alleged that a passenger on a street car requested the conductor to let her off at a certain street; that, on reaching there, it appeared that the car was not going to stop, and the passenger again indicated to the conductor her wish to get off there; that immediately, as if in response to her request, the car slowed down, until its motion was scarcely perceptible, when she attempted to alight; and that while doing so the car started suddenly, and she was thrown down. Held, after verdict, that it did not charge that the passenger specially requested to be let off at an unusual palce, but it implied that the car was stopped at her request, and that the conductor saw, or should have seen, her alighting; so that it was unnecessary to allege that the car started before she had time to alight. Cobb *v.* Lindell R. Co., 50 S. W. 310, 149 Mo. 135. See McKinstry *v.* St. Louis Trans. Co., 108 Mo. App. 12, 82 S. W. 1108.

A complaint alleged that plaintiff's destination was at a certain street, and that while he was at his destination and in the act of getting off the car it was started without allowing him sufficient time to get off, whereby he was injured. Held, that the complaint stated a cause of action. Knuckey *v.* Butte Elect. R. Co., 109 Pac. 979, 41 Mont. 314.

A count of a declaration alleging the duty of a carrier to use proper care in the operation of its trains, so as to prevent injuries to plaintiff and carry her safely to destination, and the disregard of those duties, in that, while at the instance and request of the carrier she was attempting to board its train, defendant without warning negligently caused the train to be suddenly jerked forward, whereby she was thrown down, resulting in the injuries of which she complained, is good on demurrer, though it omits to allege that the carrier failed to stop its

ing circumstances are considered as matters of inducement,[13] and surplusage.[14] A complaint in an action for injuries to a street car passenger while alighting, which alleges that the injuries resulted as the proximate consequence of the negligence of the carrier or its servants in charge of the operation of the car, sufficiently charges the liability of the carrier as against a general demurrer.[15] A count for injury while attempting to alight from a car, averring the surroundings, and that the motorman negligently started the car, throwing the passenger, but not ascribing the negligence to the preceding detailed circumstances, does not predicate the negligence on them, and so is not insufficient because they do not show negligence.[16] It is not necessary to allege that the injury was caused by an unusual or unnecessary act on the part of the carrier or its servants,[17] but the averments must be such as to justify the inference that the acts or conduct amounted to negligence in the performance of a duty.[18] It is

train at the station for a sufficient length of time to enable her to get aboard and to a place of safety. Duty *v.* Chesapeake, etc., R. Co., 70 W. Va. 14, 73 S. E. 331.

Pleadings in action for failure to allow reasonable opportunity to alight.—Plaintiff alleged that, on the train's stopping at his destination, "plaintiff immediately proceeded to alight. * * * Said train was crowded, quite a number of people getting off at said point, which unavoidably caused plaintiff to be longer in getting off, by reason of said crowd being in front of him"—and that defendant, "disregarding the contract to safely carry plaintiff, without sound of bell or signal suddenly and recklessly started said train, thereby throwing plaintiff to the ground," etc. Held, on general demurrer, that the petition sufficiently alleged that the train was not stopped a sufficient length of time to allow plaintiff to alight with safety. Houston, etc., R. Co. *v.* Hubbard (Tex. Civ. App.), 37 S. W. 25.

In a suit against a railway company for injuries received in alighting from a train, where petition alleged the train did not stop long enough to allow the plaintiff to alight with safety and that he was thrown by its sudden starting, the defendant's negligence is predicated on both allegations, and a charge on its not stopping long enough is properly based on pleadings. Missouri, etc., R. Co. *v.* McElree, 16 Tex. Civ. App. 182, 41 S. W. 843, affirmed in 93 Tex. 735, no op.

13. An allegation in the petition, in an action against a street railway company for injuries received by a passenger while attempting to board a car in consequence of its sudden starting, that the car came to a stop when signaled, is a matter of inducement, and the negligence consists in the starting of the car. Forrester *v.* Metropolitan St. R. Co., 91 S. W. 401, 116 Mo. App. 37.

14. Plaintiff alleged that she was a passenger on defendant's train, and that after it stopped at her station, while she was attempting to alight in the exercise of ordinary care, and before she had fully left the train and had a reasonable time to alight safely therefrom, defendant, before the train had stopped a sufficient length of time to enable plaintiff using due diligence to alight, caused the train to be started forward with a violent and sudden jerk without knowledge or warning to plaintiff, causing her to be thrown to the gravel and cinder platform at the station, and by reason of the sudden and violent jerking and forward movement of the train plaintiff was struck on the head and body by the moving car and injured. Held, that defendant's failure to hold the train a sufficient length of time to permit plaintiff to alight therefrom was the gravamen of the charge, and that the allegation that the train was moved forward with a sudden jerk, etc., was surplusage. Kirby *v.* St. Louis, etc., R. Co., 146 Mo. App. 304, 130 S. W. 69.

A complaint which alleged that plaintiff was boarding a car of defendant, and while stepping on the lower step to enter the car, and before she had time to do so, an employee of defendant, knowing that plaintiff was so boarding the car, or could have known by ordinary care, negligently gave the motorman a signal to start, and he quickly started the car, throwing plaintiff against the rear of the car and injuring her, states a cause of action. Brown *v.* Springfield Tract. Co., 125 S. W. 236, 141 Mo. App. 382.

15. Injury while alighting.—Birmingham R., etc., Co. *v.* McCurdy, 172 Ala. 488, 55 So. 616.

16. Negligence not predicated on related circumstances.—Selma, etc., R. Co. *v.* Campbell, 158 Ala. 438, 48 So. 378.

17. Need not allege usual act.—A petition in an action for injuries to a street car passenger that the carmen negligently started the car with a sudden jerk and in such manner as to violently throw the passenger, who had not taken a seat, against the side of a seat, sufficiently charges negligence in the operation of the car without charging that the jerk was an extraordinary or unusual one. Brady *v.* Springfield Tract. Co., 140 Mo. App. 421, 124 S. W. 1070.

18. A count in a petition averred that plaintiff was a passenger, etc., and "was waiting to alight, or engaged in or about alighting therefrom," and "said car was started or jerked, or the speed suddenly

said that an allegation that plaintiff was injured while engaged in alighting was broad enough to include all acts between plaintiff's arising for that purpose and getting clear of the car.[19] Where a passenger sues for injuries incurred in alighting at his destination, the complaint must sufficiently allege that his destination had been reached and that he was in the act of properly alighting,[20] and that such place was a proper and regular stopping place,[21] or that he was misled by the carrier's servants, to alight at some other place.[22] His complaint should show that the vehicle had stopped and that he was in the act of alighting or boarding,[23] or that he was acting under proper and duly authorized in-

increased, and as a proximate consequence plaintiff was thrown," is demurrable, in that its allegations of negligence were insufficient, since it is not every increase in the speed of a car or starting of same, whether with or without a jerk, that amounts to negligence. Birmingham R., etc., Co. *v.* Parker, 156 Ala. 251, 47 So. 138.

19. Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

A petition in an action for injuries to a passenger while alighting from a moving car which alleges that the conductor promised to let him off at a designated point, that the speed of the car was checked as it approached the point inducing the passenger to believe that the conductor was about to stop the car, and that the passenger was in the act of alighting when the car was started at an accelerated speed, throwing him from the car, embraces every negligent act on the part of the conductor as to stopping and starting the car at that point. Moeller *v.* United R. Co., 112 S. W. 714, 133 Mo. App. 68.

20. A complaint for injuries to an interurban passenger, thrown to the floor by a jerk of the car while passing to the door to alight, alleging that when the car came to and near plaintiff's point of destination, the same was stopped, and passengers began to alight, is not open to the objection that it merely charges that the car stopped "at or near" the point at which plaintiff desired to alight, and not that it had reached the stopping place. Terre Haute Tract., etc., Co. *v.* Payne, 45 Ind. App. 132, 89 N. E. 413.

Allegations, in an action for injuries to an interurban passenger thrown to the floor by a jerk of the car while passing to the door to alight, that defendant ran its cars from a city named to S. street in another city, and that plaintiff paid her fare between such points, may fairly be construed as charging that the car had arrived at its destination when plaintiff attempted to alight. Terre Haute Tract., etc., Co. *v.* Payne, 45 Ind. App. 132, 89 N. E. 413.

21. A complainant in an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car, which alleges that a signal to stop was given, that the motorman slowed down and almost stopped the car, that plaintiff, believing that the car was going to stop to discharge passengers, started to get off, and that the motorman negligently started the car with a jerk, throwing plaintiff from the car, sufficiently alleges that the place was a usual stopping place. Winona, etc., R. Co. *v.* Rousseau, 93 N. E. 1028, 48 Ind. App. 248, denying rehearing, 93 N. E. 34.

A complaint in an action for injuries to a street car passenger while attempting to alight, which shows that a signal was given to stop the car at a regular stopping place, and that the accident happened at such stopping place, is not defective for failing to allege that the place of the accident occurred where the street railway company was required to stop to permit passengers to alight. Louisville, etc., Tract. Co. *v.* Korbe, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768, reversing judgment 90 N. E. 483.

In an action against a street railway company for injuries to an alighting passenger, a complaint, alleging that plaintiff became a passenger on defendant's car for passage to a certain street intersection and regular stopping place on signal, that, as the car reached such intersection, one of the passengers signaled to stop, and the conductor signaled the motorman to stop, and that as the car was stopping, plaintiff got up from her seat, and was thrown to the street while attempting to alight, sufficiently alleged that the place where the accident occurred was one where defendant was required to stop to let passengers alight. Louisville, etc., Tract. Co. *v.* Korbe (Ind. App.), 90 N. E. 483; Ft. Wayne, etc., Tract. Co. *v.* Olinger, 46 Ind. App. 733, 90 N. E. 652.

22. An averment that in the nighttime, on approaching, but before reaching, a station, the porter announced it, and opened the door for passengers to alight; that the train had not in fact reached the station, but was on a trestle, through which plaintiff fell into the water in alighting; and that the conductor would not allow him a stop-over, and in continuing his journey he caught cold, resulting in sickness and disability—sufficiently alleges that the injury occurred through the carrier's negligence. Missouri, etc., R. Co. *v.* Overfield, 47 S. W. 684, 19 Tex. Civ. App. 440.

23. The allegation that plaintiff attempted to board the car a short distance south of where defendant's line crossed another railroad does not, by reason of

structions to alight or board while the car was in motion,[24] and these facts, it seems, may be implied from the language used in making the general averment of the duty and the breach thereof.[25] In such a case the plaintiff is not required to aver that the car was stopped to allow passengers to alight where the passengers have a right to assume that it was stopped for the purpose for which the place was provided.[26] But the complaint will not be sufficient where it does not set forth any custom or habit, or other state of facts which would warrant the passenger in believing that he would be permitted to get aboard or alight at that point.[27]

§ 3116. Accommodations and Duties in Transit.—A petition, showing that severe illness of a passenger caused by negligent failure of the carrier to have its car properly heated resulted in serious physical injury to the plaintiff and in partial paralysis, was not subject to general demurrer.[28] And a complaint which alleges that the carrier's servants wrongfully and willfully caused the passenger to ride in a car of inferior accommodations, proximately causing him injury, states a cause of action. It is not necessary in such cases of simple negligence to allege that it was done over the passenger's protest.[29] An alle-

the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting line, raise the inference that the car was at rest, as it is not averred that the train was on a north bound trip, or that it was within a hundred feet of the crossing, the distance at which trains are obliged to stop. North Birmingham R. Co. *v.* Liddicoat, 99 Ala. 545, 13 So. 18.

24. Durham *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 757, 29 S. W. 737.

25. In an action against a carrier for injuries to a passenger, the complaint alleged that, while plaintiff was getting off the car, it was started and put in motion, whereby he was injured. Held, that the language implied that the car had stopped and was started while plaintiff was alighting. Knuckey *v.* Butte Elect. R. Co., 109 Pac. 979, 41 Mont. 314.

The complaint for injury to a passenger in alighting, averring that when the car reached the town it was stopped by the motorman and conductor at the place for passengers to alight; that, when it had so stopped, plaintiff immediately arose from her seat and passed to the rear platform; that on reaching the platform she immedaitely stepped to the lower step, and was in the act of stepping from it to the ground, when the car was started forward with a sudden movement—clearly shows the car was standing still at all times from the time plaintiff arose till she stepped onto the lower step. Indianapolis, etc., Trans. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138.

26. Purpose for which vehicle stopped.—Indianapolis, etc., Trans. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138.

The complaint for injury to a passenger by the starting of the car while she was alighting, averring that, when the car reached and stopped at a place provided by defendant as a regular stopping place for passengers to alight from and board its cars, she immediately arose and passed to the rear platform to alight, and stepped onto the lower step thereof, and was about to alight, need not set forth with more clearness that plaintiff acted on the assumption that the car was stopped to allow the passengers to alight. Indianapolis, etc., Trans. Co. *v.* Walsh, 45 Ind. App. 42, 90 N. E. 138.

27. Where, in an action for injuries to a passenger in attempting to board a train, the complaint alleges the failure of defendant to bring its train to a full stop at a railroad crossing, and the sudden increase of speed of the train just before reaching the crossing, and that the regulations of the defendant company required a stop at the crossing, but does not allege that such stop was for the purpose of receiving passengers that might desire to board the train, though it does allege that, if any one should happen to get on board the train during the stopping, he would be permitted to remain on the train, the complaint is subject to demurrer, as not stating any custom to stop which would warrant the plaintiff in believing that he would be allowed to board the train as a passenger at that point. Creech *v.* Charleston, etc., R. Co., 45 S. E. 86, 66 S. C. 528.

28. Accommodations in transit.—Atlantic, etc., R. Co. *v.* Powell, 56 S. E. 1006, 127 Ga. 805, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

29. A count in a complaint for injuries received from accommodation furnished, which alleged that plaintiff boarded defendant's train, which contained at least one first-class car, and paid first-class fare; that he was blind, and so constituted physically that the inhaling of tobacco smoke in large quantities would make him sick, and defendant's servant wrongfully and negligently caused plaintiff to remain in a smoker, where the air was so laden with smoke that as a proximate consequence thereof plaintiff was made sick —was not insufficient because failing to

gation tending to show knowledge or notice to the carrier's agent of the condition alleged is open to special demurrer, where it does not show what agent it was or that he was connected with the operation of the vehicle.[30] In an action for negligent failure to furnish accommodations, the petition should specify the character of the vehicle upon which the plaintiff was a passenger, as the right to accommodations vary with the character of the vehicle.[31]

Overcrowding Vehicle.—Where a passenger, by reason of the overcrowding of the cars, was obliged to stand on the platform, from which he was pushed by the jostling of other passengers, his petition to recover for the injuries need not allege the acts of the other passengers to render evidence thereof admissible.[32]

§ 3117. Assisting Passenger.—While no general duty rests upon the carrier to assist passengers in boarding or alighting from its vehicles, yet under certain conditions such duty might arise, and where it can not be said as a matter of law that no such duty exists, in view of the facts alleged, the complaint is good on demurrer.[33] Thus, where it is alleged that the agent knew that the passenger was blind and offered to assist, but negligently failed to do it, the question should not be determined on demurrer.[34]

§ 3118. Carriage beyond Destination.—In a suit for injuries resulting from a negligent breach of duty in carrying the plaintiff beyond his destination, it is only necessary for the plaintiff to aver the relation, the duty, and a negligent breach of the duty by the carrier, resulting in injury.[35]

§ 3119. Alighting at Intermediate Station.—Where a passenger is injured while alighting at an intermediate station he must allege in his petition that he had a right to alight at that point and that he was within his rights in so doing when injured, and it is sufficient merely to allege his contract right in general terms, though it would be better to set forth the terms of his contract.[36]

allege that plaintiff was placed in the car against his protest or objection; those allegations not being necessary in an action for simple negligence. Louisville, etc., R. Co. *v.* Weathers, 163 Ala. 48, 50 So. 268.

Likewise a count embracing the above count, with additional averments that defendant's servant, acting within the line of his authority as such, being informed that to inhale tobacco smoke would make plaintiff sick, nevertheless wrongfully and wantonly, or wrongfully and intentionally, caused plaintiff, against his protest to be or remain in a car where there was a large quantity of tobacco smoke, known as a "second-class car" or "smoker," and thereby the servant so acting wrongfully, wantonly, and vexatiously caused plaintiff to suffer the said injuries and damages, was sufficient. Louisville, etc., R. Co. *v.* Weathers, 163 Ala. 48, 50 So. 268.

30. In an action for injuries to a passenger from failure to heat a car properly, an allegation that the attention of the agent of the carrier was called to the condition of the car, and requests made to have it heated, was open to special demurrer on the ground that it fails to show what agent of the company was referred to, and whether he was connected with the operation of the train. Atlantic, etc., R. Co. *v.* Powell, 56 S. E. 1006, 127 Ga. 805, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

31. In an action for injuries to a passenger from failure to heat the car, a petition, failing to show whether plaintiff was a passenger on a freight or passenger train, was subject to special demurrer, as the defendant was entitled to have information in regard to that feature of the case. Atlantic, etc., R. Co. *v.* Powell, 56 S. E. 1006, 127 Ga. 805, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

32. Overcrowding car.—International, etc., R. Co. *v.* Williams, 50 S. W. 732, 20 Tex. Civ. App. 587.

33. Georgia R., etc., Co. *v.* Rives, 137 Ga. 376, 73 S. E. 645, 38 L. R. A., N. S., 564.

34. Georgia R., etc., Co. *v.* Rives, 137 Ga. 376, 73 S. E. 645, 38 L. R. A., N. S., 564.

35. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

36. Stopping at intermediate station.—International, etc., R. Co. *v.* Downing, 16 Tex. Civ. App. 643, 41 S. W. 190. See ante, "Allegations as to Contract or Relation," § 3105.

Petition in a personal injury suit by passenger against carrier which alleged that plaintiff left the train at a station on

§ 3120. Management of Conveyance.—A general allegation of the complaint that the passenger's injuries were proximately caused by the negligent manner in which the defendant operated the vehicle is sufficient as an allegation of negligence,[37] unless the specific averments overcome its effect.[38] But if the negligence is specifically alleged, the plaintiff will be confined to such specific acts.[39] Where the acts alleged as constituting the negligence are physically impossible, the averment of negligence is without a basis and is insufficient.[40]

Management of Crowded Vehicle.—Where it is alleged that a passenger, who was riding on the platform because of the crowded conditions of the vehicle, was injured by reason of the negligent management thereof, the petition is sufficient.[41]

Speed of Train or Car.—In an action against a carrier for injuries to a passenger, an averment that defendant negligently drove a passenger car at dangerous speed upon a curve, is sufficiently specific,[42] without charging a violation of the law or any rule of the carrier.[43]

assurance of the conductor that the train would stop long enough to allow him to cross the street and return, and that the train started almost immediately after he alighted, and that he was injured while trying to board the moving train and alleging conductor's negligence, was good against general demurrer. Foreman *v.* Missouri Pac. R. Co., 4 Tex. Civ. App. 54, 23 S. W. 422.

37. Management of conveyance.—*Alabama.*—Alabama, etc., R. Co. *v.* Gilbert, 6 Ala. App. 372, 60 So. 542; Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335.

Florida.—Warfield *v.* Hepburn, 62 Fla. 418, 57 So. 618.

Illinois.—Ruch *v.* Aurora, etc., R. Co., 150 Ill. App. 329, petition stricken out for certiorari, in 90 N. E. 924.

In an action for injuries to plaintiff's wife, while a passenger on defendant's train, allegation that the injuries were proximately caused by defendant's negligence in the manner in which it ran or operated a certain street car sufficiently charged negligence. Birmingham R., etc., Co. *v.* Barrett, 4 Ala. App. 347, 58 So. 760.

A complaint averring that plaintiff's intestate was a passenger on one of defendant's street cars, and that defendant then and there so negligently conducted said business that by reason of such negligence plaintiff's intestate received personal injuries, which caused his death, sufficiently alleges the negligence of defendant. Armstrong *v.* Montgomery St. R. Co., 26 So. 349, 123 Ala. 233.

An allegation of the complaint that the defendant "negligently and unnecessarily and suddenly increased the speed of said train, and unnecessarily and negligently jerked said coach," and thus threw plaintiff from the car and injured her, sufficiently set up an act of negligence as against a demurrer. Indianapolis, etc., R. Co. *v.* Emmerson, 52 Ind. App. 403, 98 N. E. 895.

38. These general averments of negligence and their causal connection with the injury are sufficient as against a demurrer, unless the specific averments overcome their effect. Pittsburgh, etc., R. Co. *v.* Richardson, 40 Ind. App. 503, 82 N. E. 536; Standard Forging Co. *v.* Saffel (Ind.), 96 N. E. 321; Cincinnati, etc., R. Co. *v.* Worthington, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355; Indianapolis, etc., R. Co. *v.* Emmerson, 52 Ind. App. 403, 98 N. E. 895.

39. Plaintiff alleged that, while a passenger for hire on one of defendant's cars, its servants so carelessly operated the car and other cars on its railway that the car in which plaintiff was riding was struck by another car coming from the opposite direction. Held, that the complaint alleged negligence generally, so that a charge that plaintiff should be strictly confined to the specific acts of negligence pleaded was properly refused. Russell *v.* Seattle, etc., R. Co., 92 Pac. 288, 47 Wash. 500.

40. A petition in an action for injury to a street railway passenger that, after he had boarded the step of the car, the motorman released the brakes, causing the car to jump forward with a jerk, and throw such passenger, alleges a physical impossibility, since a sudden jerk of a car can not be produced by merely throwing off the brakes, and is therefore demurrable. Rome R., etc., Co. *v.* Keel, 60 S. E. 468, 3 Ga. App. 769.

41. A complaint for injuries to a street car passenger, alleging the relation of the parties, and then charging that defendant was negligent, in that, while the car on which plaintiff was riding was crowded, plaintiff and others were obliged to stand on the running board and the car was negligently run at such a high rate of speed that it swayed, rocked, or lunged, so that plaintiff was thrown or knocked off and injured, stated a cause of action and was not demurrable. Birmingham R., etc., Co. *v.* Hunnicutt, 3 Ala. App. 448, 57 So. 262.

42. Sufficiently specific.—Braunstein *v.* People's R. Co., 1 Boyce's (24 Del.), 310, 77 Atl. 738.

43. A complaint charged that defend-

Jerks and Jolts.—The obligations imposed upon the carrier are fixed by law where the relation of passenger and carrier is shown, so that where the complaint shows such relation, a further allegation of the violent starting, stopping, increasing the speed or decreasing the speed of the vehicle in a negligent manner sufficiently shows liability for resulting injuries.[44] The implication in such case is that the carrier's servant voluntarily controlled the movement of the car.[45] An allegation that defendant, while operating its car at a rapid rate of speed, suddenly and without waring stopped it so as to cause a violent and sudden shock sufficient to throw plaintiff against the car and onto the street, stated a prima facie case of negligence.[46] And such a complaint is good as against a demurrer based on the theory that no rate of speed, however high, could be said to be negligence per se as to passengers in the train.[47] The same rule applies to an allegation of the sudden and violent starting of the vehicle.[48] It applies where the jerk or jolt is caused by coupling cars of the parts or train in such a manner as to result in injury to a passenger.[49]

Derailment.—A complaint alleging injury to a person while a passenger on defendant's vehicle, through the derailment thereof, caused by the negligence of defendant and its servants, is sufficient, without pointing out the specific facts going to establish the negligence, a prima facie case of negligence being made out by showing the derailment.[50] In such cases the burden is on the carrier to

ant's street car which killed deceased was being run fifteen miles per hour contrary to defendant's rules, and "that said rate of fifteen miles per hour at which rate said car which so struck deceased was moving at that time was an unreasonable, highly dangerous, and negligent rate of speed," and contrary to a city ordinance, etc. Held that, eliminating the charged violation of the rules and ordinance, sufficient remained to charge common law negligence. Moore *v.* Metropolitan St. R. Co., 126 S. W. 181, 142 Mo. App. 290.

Right to prove rule of company as to speed though not pleaded.—In an action for injuries received while a passenger on defendant's train, it was not necessary to plead a rule of the company requiring engineers to use extra precaution and run slowly after a heavy rain, in order to let in proof of such rule and its violation. Gulf, etc., R. Co. *v.* Bell, 58 S. W. 614, 24 Tex. Civ. App. 579.

44. Violation legal duty.—Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, rehearing denied in 93 N. E. 1028.

In an action against a railroad company for injuries, the petition alleged that "the defendant, by and through its servants, agents, and employees in charge and managing said train, negligently and unskillfully ran and managed the same in such a way as to cause the said train, and the car in which the plaintiff was being conveyed, to check its speed very suddenly," throwing the plaintiff out of the car upon the track, "by means and by reason of which said cars and train ran upon and over the left arm and left leg of plaintiff." Held to charge the negligence of the defendant with sufficient certainty. Coudy *v.* St. Louis, etc., R. Co., 85 Mo. 79.

A petition alleging that an accident to plaintiff occurred on or about the sixth day of February, 1903, while on one of defendant's trains as a passenger, and that by reason of the carelessness of defendant's employees, engaged in handling the train, in stopping so suddenly, or jerking the car on which plaintiff was a passenger, he was violently thrown down and sustained permanent injury, etc., is sufficient as against a general exception. Missouri, etc., R. Co. *v.* Moody, 79 S. W. 856, 35 Tex. Civ. App. 46.

45. The declaration alleging that defendant first slackened the speed of its electric car, and then carelessly and negligently suddenly started and moved it forward with great unnecessary and unreasonable force and swiftness, with certain consequences to plaintiff, is not open to the objection of not stating by what means it was started; the implication being that defendant's servant voluntarily controlled its movement. Schultz *v.* Michigan United R. Co., 123 N. W. 594, 158 Mich. 665.

46. Prima facie case of negligence.—Latimer *v.* Metropolitan St. R. Co., 126 Mo. App. 70, 103 S. W. 1102; Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26.

47. Good as against demurrer.—Baltimore, etc., R. Co. *v.* Harbin, 67 N. E. 109, 160 Ind. 441.

48. Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195.

49. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

50. Derailment.—Sherman *v.* Southern Pac. Co., 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287; Galveston, etc., R. Co. *v.* Contreras, 72 S. W. 1051, 31 Tex. Civ. App. 489; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23

show that the derailment did not occur from the negligence of its servants.[51]

Collisions.—It may be regarded as a general rule that simply to aver that a collision occurred, injuring the passenger, through the negligence of the carrier, is usually sufficient.[52] And to aver that a collision occurred through the carrier's negligence in particular respects is clearly sufficient.[53] A charge of

Am. St. Rep. 345, 11 L. R. A. 486; Galveston, etc., R. Co. *v.* Garcia, 100 S. W. 198, 45 Tex. Civ. App. 229.

An allegation that, while plaintiff was a passenger on defendant's train, the car in which she was thrown from the track and dragged along on its side, averred facts raising a presumption of negligence by the company. Southern Pac. Co. *v.* Hogan, 108 Pac. 240, 13 Ariz. 34, 29 L. R. A., N. S., 813.

In an action against a railroad company for injuries, the complaint alleged that "without any fault, carelessness, or negligence" on the part of the plaintiff, the car in which he was riding was thrown from the track "by and through the fault, carelessness, and negligence" of the defendant, causing the injury sued for. Held a sufficient allegation of negligence. Cincinnati, etc., R. Co. *v.* Chester, 57 Ind. 297.

In an action by a passenger against a street railroad company for injuries received through a derailment of the car, it is sufficient to allege that the derailment was caused by the negligence of the company or its servants without more particular specification. Hebert *v.* Portland R. Co., 69 Atl. 266, 103 Me. 315, 13 Am. & Eng. Ann. Cas. 886.

In an action against a street railroad company for personal injuries to a passenger in a collision between a car and a metal tower erected in a public square near the track, where the petition alleged that plaintiff became a passenger for hire, that defendant's employees operated the train over the line of railway across the square, and by reason of carelessness and negligence the train left the track and collided with the tower, and plaintiff was injured, etc., it did not attempt to set out specific acts of negligence, but sufficiently alleged general negligence. Wolven *v.* Springfield Tract. Co., 128 S. W. 512, 143 Mo. App. 643.

In an action for personal injuries to a passenger from the derailment of a railroad train, the petition need not allege that the injury was the result of the wrongful act or omission of the carrier, since negligence is presumed. Chicago, etc., R. Co. *v.* Young, 79 N. W. 556, 58 Neb. 678.

In an action for injuries sustained in a railroad accident, an averment that the car in which plaintiff was riding was derailed through the negligence of the railway company and its servants, whereby the plaintiff was injured, is sufficiently specific. Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486.

Allegations that plaintiff's father was killed while a passenger on defendant's train, by reason of the derailment of the train, caused by the negligence of the servants and agents of defendant in charge thereof is sufficiently specific. Galveston, etc., R. Co. *v.* Contreras, 72 S. W. 1051, 31 Tex. Civ. App. 489.

Allegations that while plaintiff was lawfully riding on defendant's passenger train, which was in the exclusive charge of its agents and servants, the car was derailed and overturned "by the gross negligence, carelessness, and default of the defendant company, its agents, servants, and employees," are sufficient, without alleging any particular acts of negligence. Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104.

51. Burden on carrier.—Bryce *v.* Southern R. Co., 129 Fed. 966; Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202.

52. New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670; Rapid Trans. R. Co. *v.* Smith (Tex. Civ. App.), 82 S. W. 788, judgment reversed in 98 Tex. 553, 86 S. W. 322.

In an action by a passenger of a sight seeing automobile, injured in collision of the automobile and a street car, the petition held to state a cause of action against the owen of the automobile as a joint tortfeasor. McFadden *v.* Metropolitan St. R. Co., 143 S. W. 884, 161 Mo. App. 652.

53. *Alabama.*—Kansas, etc., R. Co. *v.* Butler, 143 Ala. 262, 38 So. 1024.

Indiana.—New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670; citing Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Indianapolis St. R. Co. *v.* Schmidt, 163 Ind. 360, 71 N. E. 201.

Missouri.—Shuler *v.* Omaha, etc., R. Co., 87 Mo. App. 618.

Texas.—Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61, affirmed in 93 Tex. 600, no op.

In an action by a passenger for personal injuries sustained in a collision of two of defendant's trains, a complaint which alleges that the collision occurred wholly on account of the negligence of the defendants in the construction, equipment, operation, and control of the railway, and the trains thereon, sufficiently charges acts of negligence. New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670.

A complaint for injuries received in a collision at a crossing, which alleges that the electric car and the locomotive approached the crossing in full view of each other, and neither tried to avoid a

negligence in a declaration is general and will support the application of the doctrine of res ipsa liquitur where such charge is substantially that the plaintiff was a passenger, and that the defendant, through its servants in charge of a car, so recklessly, carelessly, and negligently ran, operated, and managed the car that, in consequence thereof, it was brought into violent collision with a road vehicle,[54] or with another vehicle belonging to the same carrier.[55] Under such a complaint proof of anyone of the averred acts of negligence, it seems, would be sufficient, there being no apparent connections between such negligent acts as averred.[56] This holding is controlled by the well-established rule that different negligent acts may be averred in one paragraph and that proof of any one of them is sufficient to sustain the action.[57] Where the declaration predicates the negligence upon the wrongful and careless causing of a collision, such fact must be sufficiently alleged and should not be to depend upon the rate of speed, etc.[58]

collision, need not, in order to charge the street railway company with negligence, aver that those in charge of the locomotive gave the statutory signals on approaching the crossing. Hammond, etc., R. Co. *v.* Spyzehalski, 46 N. E. 47, 17 Ind. App. 7.

An allegation that defendant, through its employees, negligently, etc., pushed a car against an engine, and that the collision and sudden stopping of the car threw plaintiff violently onto the car floor, whereby he was injured, etc., held not objectionable as failing to show that the alleged injury was the result of defendant's negligence. Indianapolis, etc., R. Co. *v.* Tucker (Ind. App.), 98 N. E. 431.

Where the complaint, in an action for injuries to a street car passenger in a collision between two cars, alleged that the motorman and conductor of one of the cars wrongfully, carelessly, and improperly caused it to be brought in contact with a certain other car running on another street in a different direction, so that the front end of such other car came in contact with and collided with the car on which plaintiff was riding, such allegations sufficiently charged negligence in the operation of the car. Chicago City R. Co. *v.* Pural, 79 N. E. 686, 224 Ill. 324, affirming judgment 127 Ill. App. 652.

A declaration in an action against a street railway company for injuries to a passenger, alleging that plaintiff was a passenger on defendant's railway, and that it was its duty to carry plaintiff safely, that defendant failed to perform such duty, but permitted the car on which plaintiff was a passenger to collide with a certain other car of defendant, and as a result of such collision plaintiff was thrown with great violence against a seat of the car on which she was a passenger, and was injured, stated a sufficient cause of action, especially when challenged by a motion in arrest of judgment. Greinke *v.* Chicago City R. Co., 85 N. E. 327, 234 Ill. 564, affirming judgment in 136 Ill. App. 77.

A petition, alleging in general terms that defendant's servants negligently operated the street car on which plaintiff was a passenger, and as a result of such negligence it ran against a wagon in the street and plaintiff was thereby injured, charges general negligence and is sufficient. Monday *v.* St. Joseph R., etc., Co., 119 S. W. 24, 136 Mo. App. 692.

A declaration alleged that a carrier, disregarding its duties, negligently permitted the train on which the plaintiff was a passenger to stand on a track where it was in danger of a collision; that the carrier negligently permitted another train to collide with the train on which plaintiff was a passenger; and that the carrier had knowledge of the danger in time to stop the other train, and prevent the collision, but failed to do so; and that the plaintiff was injured. Held, that the declaration described the plaintiff's cause of action with sufficient particularity. Birckhead *v.* Chesapeake, etc., R. Co., 29 S. E. 678, 95 Va. 648.

54. What constitutes general allegation.—Chicago Union Tract. Co. *v.* Mee, 136 Ill. App. 98.

55. In an action against a railroad company by a passenger for injuries in a collision, allegations that, through the negligence of defendant's agents, and in disregard of plaintiff's rights and safety and defendant's duty to plaintiff, the trains were permitted to collide, etc., were sufficiently definite, without a more precise specification as to the acts of negligence of which defendant was guilty. Estes *v.* Missouri Pac. R. Co., 85 S. W. 627, 110 Mo. App. 725.

56. New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670, in which it was said that Southern R. Co. *v.* Jones, 33 Ind. App. 333, 71 N. E. 275, was not analogous.

57. Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Diamond Block Coal Co. *v.* Edmondson, 14 Ind. App. 594, 43 N. E. 242; New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. 804.

58. In an action by a passenger to recover for injuries caused by a collision,

Imminent Collision.—A complaint in an action for damages against a street railway company which averred that the car on which plaintiff was a passenger was "about to collide with" a locomotive sufficiently alleged that a collision was imminent.[59]

Construction of Pleading.—The words "operated the train" have been held to mean "controlled the movement and speed of the train."[60]

§ 3121. Protection of Passenger.—Where the complaint sets out the carrier's duty to protect the passenger from the wrongful acts of third persons and fellow passengers,[61] and alleges a negligent breach of such duty resulting in the passenger's injury and to his damage, it is sufficient.[62] Where suit is brought against a carrier for permitting other passengers to insult plaintiff with offensive language, it is sufficient to allege that the language used was profane, vulgar, obscene, and indecent, without setting out the specific language used.[63] In a complaint against a carrier for ejection of a passenger by third persons, the absence of direct averments of negligence of defendant or facts which in law amount thereto is fatal.[64] But the fact that an assault committed on a passenger was committed in self-defense, and was brought on by the misconduct of the person assaulted, is defensive matter, and it is not necessary that the complaint in an action against the carrier for the assault should allege that the assault was not committed in self-defense, or that it was unlawfully made, but it is sufficient if it avers an assault.[65]

§ 3122. Assaults and Insults by Servants.—In actions for assaults and insults at the hands of servants of carriers, the pleading states a cause of action, where it avers in sufficient term a wanton assault or insult,[66] upon a pas-

an averment that "the motormen and conductors wrongfully, negligently, knowingly, improperly, and carelessly caused it to be run and moved in an eastern direction at a high rate of speed, wrongfully, carelessly, and improperly caused it to go and to be brought into contact with a certain other car running at a high rate of speed in and along said Wentworth avenue in a northern direction, so that the front end of said Wentworth avenue car came in contact and collided with said Thirty-first street car," is not alone a charge of negligence as to the speed of the car, but is also a charge that the defendant wrongfully, carelessly, and improperly caused the collision referred to. Chicago City R. Co. *v.* Pural, 127 Ill. App. 652, judgment affirmed in 79 N. E. 686, 224 Ill. 324.

59. Imminent collision.—Selma St., etc., R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598.

60. Construction of pleading.—Alabama, etc., R. Co. *v.* Gilbert, 6 Ala. App. 372, 60 So. 542.

61. Holly *v.* Atlanta St. Railroad, 61 Ga. 215, 34 Am. Rep. 97.

62. Protection of passengers.—Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241; Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394.

Where, in an action by a passenger against a carrier for assault committed upon him by other passengers, the complaint alleged that the conductor or other servants of the carrier knew of the impending danger to the plaintiff, and knowingly failed or refused to interfere to protect him, an allegation that "such negligence on the part of the servants of the defendant resulted in the injuries to plaintiff" sufficiently averred that the servants could have prevented the injury complained of. Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

Where a passenger on a street car was injured because of a fight between other passengers, a declaration alleging negligence of the company in failing to have a conductor to preserve order, and negligence of the driver in failing to suppress the fight or eject the combatants, is good on demurrer. Holly *v.* Atlanta St. Railroad, 61 Ga. 215, 34 Am. Rep. 97.

63. Specific language, insults, etc.—St. Louis, etc., R. Co. *v.* Wright, 75 S. W. 565, 33 Tex. Civ. App. 80.

64. Ejection by third persons.—Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394.

65. Culberson *v.* Empire Coal Co., 156 Ala. 416, 47 So. 237.

66. An allegation in the complaint in a passenger's action for assault that the conductor wantonly assaulted plaintiff by grasping her by the arm and shoulders was equivalent to an allegation that he wantonly grasped her by the arm and shoulder, and sufficiently charged wanton assault. Birmingham R., etc., Co. *v.* Parker, 161 Ala. 248, 50 So. 55. See Pelot *v.* Atlantic, etc., R. Co., 60 Fla. 159, 53 So. 937.

In Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281, where a declaration alleged that a conductor called a passenger out

senger[67] by an employee of the carrier acting within the line of his employment,[68] without setting out the specific acts of assault or the specific language used.[69] But a count of a declaration which seeks to make the carrier liable from the mere fact that plaintiff, while a passenger of defendant, was assaulted, arrested, and imprisoned "by an officer or agent of said defendant and in its employ," is insufficient.[70] A passenger, in an action for damages for an assault by the conductor, need not plead the insulting language of the conductor towards him, as matters going merely in aggravation or extenuation, and having effect to enhance or diminish the damages, need not be pleaded.[71] Facts, which do not set up a separate and distinct assault, may be alleged in aggravation of the assault.[72] Such facts need not constitute the assault alleged, nor even any part of it, but they may give a character and meaning to the assault alleged and be properly considered in relation thereto.[73]

§ 3123. Alleging Act to Be That of Carrier.—A complaint which avers that the train was in the exclusive control of defendant's employees, and that the conductor who had charge negligently caused the injury to plaintiff by causing the train to move while she was on the platform and by jerking her to the ground, sufficiently shows that the act was done by the company; the conductor, while in charge of the train, being the agent of the company so for as concerns the rights of parties alighting from the train.[74]

§ 3124. Allegations as to Agent or Servant at Fault.—In an action

of the train of which he had charge and beat him, it was held to set out a cause of action, and was not subject to a general demurrer. Savannah Elect. Co. *v.* Wheeler, 128 Ga. 550, 58 S. E. 38, 10 L. R. A., N. S., 1176.

67. Allegation as to relation.—See ante, "Allegation as to Contract or Relation," § 3105.

68. Allegation as to agent or servant.—See post, "Allegations as to Agent or Servant at Fault," § 3124.

In an action by a passenger against a steamboat corporation to recover for personal injuries, the complaint alleged that the plaintiff, without any want of care on his part, was "violently pushed, pulled, and thrown through" a certain hatchway, which had been left open through the carelessness of the defendant company and its agents and servants, whereby he was injured, etc. Held, that it did not sufficiently allege that the violence was the act of the defendant's employees, and not of some other party. Evansville, etc., Steam Packet Co. *v.* Wildman, 63 Ind. 370.

69. Specific acts or language.—In an action by a passenger against a carrier for permitting other passengers to insult plaintiff with offensive language, it was sufficient to allege that the language used was profane, vulgar, obscene, and indecent, without setting out the specific language used. St. Louis, etc., R. Co. *v.* Wright, 75 S. W. 565, 33 Tex. Civ. App. 80.

70. Count insufficient.—Philadelphia, etc., R. Co. *v.* Green, 110 Md. 32, 71 Atl. 986.

71. Matters of aggravation or extenuation.—Houston, etc., R. Co. *v.* Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902.

72. An allegation in the complaint in a passenger's action that the conductor wantonly assaulted plaintiff by grasping her by the arm and shoulder, by winking and smiling at her, did not mean that the conductor grasped plaintiff by winking and smiling at her, and only charged one assault; the smiling and winking only being alleged in aggravation. Birmingham R., etc., Co. *v.* Parker, 161 Ala. 248, 50 So. 55.

73. Birmingham R., etc., Co. *v.* Parker, 161 Ala. 248, 50 So. 55.

74. Alleging act to be that of carrier.—Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

The negligence of the conductor of a train of cars in putting or assisting a person off the cars is the negligence of the corporation owning or operating the road; and an allegation of such negligence of a conductor is sufficient charge of negligence against the railroad company. Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37.

If the conductor was the one in charge of the train, as the complaint avers, and the demurrer admits, he was the agent of the company so far as concerned the rights of passengers in alighting from the train. Upon this subject the cases are numerous and harmonious. The general rule is thus stated by Campbell, J., in Great Western R. Co. *v.* Miller, 19 Mich. 305: "He represents them in his whole management of his train." Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 14 N. E. 352; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450; Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 5 S. Ct. 184, 28 L. Ed. 787; Rauch *v.* Lloyd, 31 Pa. 358, 72 Am. Dec. 747; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

against a carrier for injury caused by negligence, for an assault by the carrier's employee or for insults offered by such employee, the complaint must sufficiently charge that the person at fault was in the carrier's employment at the time, and this may be sufficiently done without characterizing his employment or setting forth the detail of the nature of his services.[75] In an action for injury to a passenger on a street car, plaintiff's failure to name the agent or servant whose negligence caused the injury does not render the complaint insufficient.[76] All that is necessary in such a case is that the complaint allege the negligence of the carrier's servants or agents.[77] Where the complaint charges an assault, it is not necessary to aver that the assault was committed by certain agents of the carrier, even though such be the fact.[78] But where the complaint specifies the agent guilty of negligence, such allegation must be proven as pleaded.[79]

Authority of Agent or Servant.—The complaint, however, should allege or otherwise show the servant's authority; in other words, the acts should be shown or appear to be within the line of the servants employment,[80] but his

75. Allegation as to servant or employee at fault.—Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448.

A complaint in an action to recover for a death by drowning while a passenger in defendant's stagecoach alleged that "said defendants, and their said agents and servants, who had the charge and control of said coach, by their own gross carelessness, etc., drove, and allowed such coach to be driven, out of the highway and usual road, and suffered the same, through like gross negligence, etc., to run into and become submerged in the Mississippi river." Held, the allegations were sufficient to include a ferry company and the ferryman, whose duty it was to transport the coach over the river, and who directed the driver to drive on the boat, and their acts and omissions. McLean *v.* Burbank, 12 Minn. 530, Gil. 438.

The petition, in an action against a railway company, alleged that plaintiff, a passenger on defendant's train, on reaching his stopping place, was directed by "the conductor, or some other employee of said defendant," to jump from the train, which he did, and was thereby injured. Held, that the omission to state that such other employee was authorized by defendant to give such directions to passengers was not a defect. Wilburn *v.* St. Louis, etc., R. Co., 36 Mo. App. 203.

76. Agent or servant at fault.—Birmingham R., etc., Co. *v.* Goldstein (Ala.), 61 So. 281.

It is not necessary to allege the name of the carrier's employee whose negligence caused the injury. Armstrong *v.* Montgomery St. R. Co., 26 So. 349, 123 Ala. 233.

In an action for injuries to a passenger, an allegation of the petition that plaintiff, before entering the train, asked the employees of defendant in charge of and operating the train if it would stop at B., was sufficient designation of the employees. International, etc., R. Co. *v.* Hessler (Tex. Civ. App.), 95 S. W. 40.

77. Count, alleging that defendant's servants or agents wantonly or willfully injured plaintiff, and that his injuries were the proximate consequences of the wantonness or willfulness "of the defendant, its servants or agents, as aforesaid," held to sufficiently show that the wantonness and willfulness complained of was that of the servants or agents. Birmingham R., etc., Co. *v.* Taylor, 60 So. 979, 6 Ala. App. 661.

78. Chicago Terminal Transfer R. Co. *v.* Young, 118 Ill. App. 226.

79. Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

A complaint against an electric railway company for injury to a passenger, alleging that the defendant, "by its servants or agents, the conductor who was in charge of said train, acting within the general line of his employment," ordered him from a safe place in the forward car to the rear car, and that while attempting to comply with the order and standing on the rear platform of the first car, he was thrown to the ground by a sudden jerking of the train, negligently caused "by the servants in charge of" the train, is not susceptible of a construction charging negligence to any one excepting the conductor. Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

80. Allegation as to authority.—Alabama, etc., R. Co. *v.* Pouncey, 7 Ala. App. 548, 61 So. 601; Smith *v.* Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753.

Where the declaration against a railroad company relied solely on the negligence of a flagman in directing plaintiff to alight from a moving train in the dark, at an unsafe place, but failed to allege that the flagman had authority to give such a direction, either from the company or the conductor, or that it was within the scope of his duties to give the same, though the evidence showed the flagman to be so authorized, a verdict for plaintiff could not stand. Savannah, etc., R. Co. *v.* Wall, 96 Ga. 328, 23 S. E. 197.

Allegations held sufficient.—Southern R. Co. *v.* Crone, 51 Ind. App. 300, 99 N.

particular duties need not be specified or characterized.[81] The negligent act, when considered in relation to the facts alleged, may be such as will be presumed to be within the scope of the servant's authority without an express allegation of the fact.[82] And a petition in an action for injuries to a passenger, which charges facts showing the existence of the relation of carrier and passenger at the time of the injury, sufficiently alleges the liability of the carrier, and it need not in terms charge that the act of the agent of the carrier causing the injury was within the scope of his authority.[83] Nor is it necessary in a count in the complaint in an action against a carrier for an assault committed by one of its servants to aver that it was committed within the scope of the servant's

E. 762; Williams *v.* Louisville, etc., R. Co., 43 So. 576, 150 Ala. 324, 10 L. R. A., N. S., 413; Austin *v.* St. Louis, etc., R. Co., 149 Mo. App. 397, 130 S. W. 385.

A complaint alleging that defendant's servant, acting within the line of his duty, wantonly caused plaintiff's minor son to fall from the car, sufficiently averred that the servant was acting within the scope of his authority. Birmingham R., etc., Co. *v.* Chastain, 158 Ala. 421, 48 So. 85.

A complaint in an action for injuries to a passenger on a street car in a collision with a train on a railroad crossing which alleges that "defendant by and through its servants" in charge of the car negligently ran it on the railroad track and collided with a freight car thereon, causing injury to the passenger, shows that defendant's servants had charge of the car and were acting in the line of their employment at the time of the injury. Indianapolis Tract., etc., Co. *v.* Formes, 40 Ind. App. 202, 80 N. E. 872.

A count showing that plaintiff, while in defendant's waiting room, was assaulted by an employee of defendant in charge of the waiting room, shows that the wrong was done by the carrier's servant acting within the scope of his duties. Philadelphia, etc., R. Co. *v.* Green, 71 Atl. 986, 110 Md. 32.

81. Lampkin *v.* Louisville, etc., R. Co., 106 Ala. 287, 17 So. 448.

An averment, in a complaint against a street railway company for injuries to a passenger, that the defendant, through and by its servants in charge of the car, negligently ran the car, etc., sufficiently alleged that the servant in charge of the car was acting in the scope of his employment. Indianapolis St. R. Co. *v.* Schmidt, 71 N. E. 201, 163 Ind. 360.

82. Where a railway conductor negligently failed to notify plaintiff when the car arrived at his destination, as he had promised to do, and, because of such negligence, plaintiff was carried by to a place where it was dangerous for him to alight and attempt to walk back in the darkness, but where he was directed by the conductor to alight, and then directed as to his course to reach his destination, and plaintiff's injury was traceable, in natural sequence, to the conductor's negligent act in carrying plaintiff by the regular stopping place, such act would be presumed to be within the scope of his authority, without an express allegation to that effect. Indianapolis, etc., R. Co. *v.* Barnes, 74 N. E. 583, 35 Ind. App. 485.

83. Where relation shown.—Austin *v.* St. Louis, etc., R. Co., 149 Mo. App. 397, 130 S. W. 385.

Where, in an action for injuries to a passenger, the relation of passenger and carrier is averred, it was not essential that the negligence imputed to defendant's servants should be alleged to have been the result of acts within the scope of their duties. Birmingham R., etc., Co. *v.* Harden, 156 Ala. 244, 47 So. 327.

A train, having stopped at the station to which plaintiff had taken passage, was ordered to start again before she could alight, though after she had reached the platform of the car. The conductor, while the train was in motion, pulled her from the platform to the ground, causing her great injury. Held that, in an action against the railway company for the tort of the conductor, it was not necessary, in order to fix the liability of the defendant, to allege that it authorized this particular act, nor that the conductor was acting within the scope of his authority. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

A complaint in an action against a railway company for injuries received by a passenger, which alleges that upon the arrival of a train at a depot plantiff, as a passenger, undertook and did get on the platform of one of the cars of the train to enter the same, and that without fault or neglect on his part, on account of the negligence of one of the company's agents, he was pushed from the platform of the train as the same was starting, and without any negligence on his part fell between the cars of the train and was injured, and that all the injuries were caused by the carelessness of defendant in pushing plaintiff off the train and negligently running over him with the train, is sufficient as against the objection that it fails to allege expressly or by facts necessarily sustaining the inference that the wrongful act was committed by an agent or servant of the company in the course or within the scope of his employment. Louisville, etc., R. Co. *v.* Kendall, 36 N. E. 415, 138 Ind. 313.

duty.[84] As the duty to protect passengers from violence and assaults are among the recognized duties of the carrier's agents and servants, it need not be alleged to be within the line of his duty.[85] A complaint in an action by a passenger against a railroad for injuries which allege that defendant's brakeman advised, directed, and assisted plaintiff to alight from a moving train, whereby plaintiff sustained injuries, is sufficient as against an objection that it did not show that the brakeman was acting within the scope of his employment, there being an allegation that it was a duty of the brakeman to look after the safe debarkation of passengers.[86]

In Action against Joint Defendants.—In an action against two railways for compelling plaintiff to leave a waiting room, a description of the employee who forced her to leave as "the employee in charge of said waiting room," was subject to special demurrer for not alleging whether he was the employee of one railway or the other or both.[87]

Knowledge of Agent or Servant.—An allegation that defendant's brakeman "permitted" the injury of a passenger embraces the element of knowledge of the danger threatened or of the facts from which it might have been anticipated; the verb "permit" importing knowledge of the act permitted.[88]

§ 3125. Violation of Statute or Ordinance.—Failure to Maintain Depot, etc.—In order to maintain an action against a railroad company under a statute for damages resulting from a failure to establish and maintain a depot sufficient for the accommodation of passengers in a given town, it is necessary that the complaint should aver that the defendant's road was being operated through the corporate limits of the particular town, and that said town came within the meaning of the statute.[89]

Failure to Keep Depot Open.—Where the word "schedule," as used in a statute requiring a railroad company to keep open its depots for a specified period preceding the arrival of passenger trains allowed "by schedule" to stop, implies that the operation of a train is governed by a rule, an allegation, in a complaint in an action against a railroad company for injuries sustained by an intended passenger by reason of being compelled to wait out of doors for a train, that the train was due "to arrive and stop for the taking on of passengers" at a time stated, does not show a violation of the statute.[90]

Rate of Speed.—In an action for injuries to a passenger, a complaint alleging negligence, in that defendant ran its train at a high rate of speed, within the corporate limits of a certain city, in violation of an ordinance of that city

84. In action for assault.—Birmingham R., etc., Co. *v.* Mason, 137 Ala. 342, 34 So. 207.

85. In an action by a passenger to recover of a railroad company for being assaulted by a conductor before reaching his destination, an omission of the declaration to allege that the conductor was acting within the scope of his business is not a ground for a general demurrer. Peeples *v.* Brunswick, etc., R. Co., 60 Ga. 281.

In an action against a carrier for injuries to plaintiff, a passenger, through being shot by a fellow passenger, a complaint alleging that defendant's brakeman was in charge of the car in which plaintiff was riding at the time of the assault, and that he could have prevented the assault, but negligently permitted it, was not open to the objection that there was no averment that the brakeman was at the time acting within the scope of his employment; the duty to protect passengers from the assaults of other passengers being among the recognized duties of brakemen. Pittsburgh, etc., R. Co. *v.* Richardson, 82 N. E. 536, 40 Ind. App. 503.

86. Sufficient allegation as to duty.—Pittsburgh, etc., R. Co. *v.* Gray (Ind.), 59 N. E. 1000.

87. Suit against two defendants.—Riley *v.* Wrightsville, etc., R. Co., 133 Ga. 413, 65 S. E. 890, 24 L. R. A., N. S., 379, 18 Am. & Eng. Ann. Cas. 208.

88. Knowledge of agent or servant.—Pittsburgh, etc., R. Co. *v.* Richardson, 40 Ind. App. 503, 82 N. E. 536.

89. Violation of statute or ordinance.—Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676; Alabama Acts of 1896, 97, p. 956.

90. Failure to keep depot open.—Draper *v.* Evansville, etc., R. Co., 165 Ind. 117, 74 N. E. 889; Burns Anno. St. 1901, § 5188.

regulating the speed of trains, is insufficient where it fails to charge that the ordinance was in force at the time of the injury.[91]

§ 3126. Connection between Negligence and Cause of Injury.—In an action against a carrier for personal injury resulting from the carrier's negligent breach of duty, the pleading must allege the injury to have been the proximate result of such breach of duty.[92] In such cases the complaint is bad in substance if it omits to charge defendant with some act of negligence as creating the cause of injury. An act of negligence unconnected with the injury is necessarily harmless, but negligence and consequent injury must concur in the creation of the cause of action. And from a construction of the complaint when construed consistently with prescribed canons it must be possible to collect therefrom this essential element of an actionable wrong.[93] It has been held

91. Rate of speed.—Southern R. Co. *v.* Jones, 33 Ind. App. 333, 71 N. E. 275.

92. Showing connection between effect and alleged cause.—Shrum *v.* Cincinnati, etc., R. Co., 8 N. P. 26, 10 O. Dec. 244; Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037; Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028.

In an action against a street railroad for injuries to a passenger, a complaint which charges the negligence to the act of the conductor in signaling the motorman to go ahead while the plaintiff was on the side board or step preparatory to alighting, and avers the act of the motorman in starting the car with a sudden jerk as being the proximate cause of the injury, but does not aver that the start was negligently made, is bad and subject to demurrer because the negligence averred was not the proximate cause of the injury. Mobile, etc., R. Co. *v.* Bell, 153 Ala. 90, 45 So. 56.

A complaint in an action for injuries to a street car passenger while alighting, which alleges that the motorman, after slowing the car down in obedience to a signal to stop, negligently, without warning, applied power, and moved the car forward with a sudden jerk, throwing plaintiff from the car, charges as the proximate cause of the injury the negligent application of power to the car to move it with a sudden jerk, so that the reason of the motorman's act in applying the power is but one element of the negligence charged. Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028.

A complaint in a single paragraph alleged that the plaintiff, a passenger attempting to board defendant's train, was frightened by the negligence of defendant in starting its train in such a manner as to endanger the life of her daughter in her presence, and in preventing her from getting on the train, and that the fright and shock, in connection with the worry caused by being left at the station, permanently injured her health. Held that, as the theory of the complaint, as determined from its leading allegation, was to recover for an injury caused by fright only, not connected with any physical injury to the plaintiff, the complaint failed to show that the negligence of the defendant was the proximate cause of the injury, and did not state a cause of action. Cleveland, etc., R. Co. *v.* Stewart, 56 N. E. 917, 24 Ind. App. 374.

Where the complaint alleged the negligent delay of the train on which the plaintiff was a passenger for several hours, and that such train was negligently stopped for over half an hour on a high trestle, where plaintiff, on account of the darkness and the poor lights furnished by defendant on the train, missed his footing, and fell to the ground, a demurrer for failure to state a cause of action was properly sustained, since the complaint failed to show defendant's negligence to be the proximate cause of the injury. Jarrell *v.* Charleston, etc., R. Co., 36 S. E. 910, 58 S. C. 491.

Where independent cause set up.—Where, in an action for injuries to a passenger on a freight train, the complaint charged as negligence the use of defective brakes, and the running of the cars at a high rate of speed in violation of a city ordinance, jointly, and neither of such acts independent of the other was charged to be the proximate cause of plaintiff's injury, and it might properly have been inferred from the proof that if the car in which plaintiff was riding had not been going at an unlawful rate of speed the brakes would have been sufficient, or if the brakes had not been defective the high speed could have been checked, it was essential to the sufficiency of the complaint that both acts of negligence should have been sufficiently charged. Southern R. Co. *v.* Jones, 71 N. E. 275, 33 Ind. App. 333.

93. Allegation of proximate cause—Connection between injury and negligence.—Fahr *v.* Manhattan R. Co., 9 Misc. Rep. 57, 29 N. Y. S. 1, 59 N. Y. St. Rep. 683.

Plaintiff was injured while attempting to board a train as it was moving from the station, and in an action therefor the only negligence alleged was that the gate at the station was open, when it should have been closed before the train started.

that it is unnecessary to formally charge the injury as the proximate result of the negligence, where such fact is sufficiently charged in other parts of the complaint.[94] Thus, it is said that so far as pleading proximate cause in an action for injury to a passenger, it is enough that the facts averred lead, with

Held, that the complaint was insufficient in substance, as it did not show that the alleged negligence caused the injury. Fahr *v.* Manhattan R. Co., 9 Misc. Rep. 57, 29 N. Y. S. 1, 59 N. Y. St. Rep. 683.

A complaint, in an action against a street railway company for injuries to a passenger while alighting from a car, in consequence of the distance from the step of the car to the street, which alleged that an excavation in the street existed at the point where the passenger attempted to alight, that the company and its servants knew of its existence, and that in attempting to alight the passenger "fell heavily upon the earth," did not show that the company was negligent by reason of the excavation in the street; there being no connection between the injury and the excavation. Indianapolis Tract., etc., Co. *v.* Pressell, 77 N. E. 357, 39 Ind. App. 472.

A paragraph of a complaint admitting that plaintiff's intestate jumped from defendant's train, and alighted on the platform, but was run against by a fellow passenger and fell under the train and was killed, is insufficient in failing to state affirmatively that defendant's failure to stop the train was the proximate cause of decedent's death. Reibel *v.* Cincinnati, etc., R. Co., 114 Ind. 476, 17 N. E. 107.

Where the complaint failed to show that plaintiff's fall from the train was caused by an act of defendant, there is no presumption of negligence by the defendant from the mere fact of the fall. Jarrell *v.* Charleston, etc., R. Co., 36 S. E. 910, 58 S. C. 491.

94. A complaint, in an action against a railway company for the death of a passenger, which alleges that he was, through the carelessness of the company's servants, thrown from the train and so injured as to cause his death, sufficiently shows the negligence of the company and the infliction of decedent's injuries, and that the injuries resulted from the company's negligence, as against a demurrer on the grounds that it does not show the causal connection between decedent's death and the company's negligence, that it does not show the injuries sustained by decedent, and that it does not show wherein the company or its agents were negligent. Kansas, etc., R. Co. *v.* Matthews, 39 So. 207, 142 Ala. 208.

A complaint alleged in one paragraph that plaintiff was a passenger on defendant's street car; that a trailer was attached thereto; that plaintiff notified the conductor of his desire to alight at a certain crossing; that the car stopped at the crossing, and he attempted to alight, but, while descending, the car negligently started with a sudden jerk, the force of which threw plaintiff down with one foot upon the rail, and while in this position the rear car passed over his foot, causing the injury complained of. A second paragraph charged the same facts down to the allegation as to stopping the car at the crossing, but charged that, when the crossing was reached, the speed was slackened so that the car was moving not faster than two miles an hour; that the step of the car projected within a foot of the ground; that the conductor instructed plaintiff to alight while the car was moving at that rate, and that plaintiff attempted to do so, and while he had one foot on the ground alongside and underneath the step the conductor negligently, and with knowledge of plaintiff's position, increased the speed of the car with a sudden jerk, and by such jerk threw plaintiff to the ground underneath the rear car, and that, while in that position, before he could remove his body, the car wheels ran over his leg, causing the injury complained of. Held, that both paragraphs sufficiently showed that the alleged negligent acts complained of were the proximate cause of the injury, and it was unnecessary to formally charge that such was the fact. Hammond, etc., R. Co. *v.* Antonia, 83 N. E. 766, 41 Ind. App. 335.

A declaration against a railroad company for injury to a passenger who fell from the platform of a crowded car, which place he had sought to relieve his faintness, alleged that while he was standing at said door holding on to the hand railing he became unconscious by reason of the foul air, and fell from said train while the same was running at a high rate of speed, and struck with great force on the ground. Held a sufficient averment that the speed of the train caused him to fall therefrom. Morgan *v.* Lake Shore, etc., R. Co., 101 N. W. 836, 138 Mich. 636, 70 L. R. A. 609.

A petition by a passenger traveling under a live stock contract, authorizing him to alight at intermediate stations to look over his stock, alleged that the train stopped at night; that the conductor, who was on the caboose with plaintiff, told him that it was at a certain station; that plaintiff, relying on such information, attempted to alight, when the train suddenly started, throwing him from the train, which was not at a station, but over a trestle, and injuring him; and that the negligence of the conductor was the proximate cause of the injury. Held, that it could not be said, as a matter of law, that the conductor should not have anticipated that plaintiff would attempt to alight in reliance on his statement, and hence negligence of the conductor prox-

requisite certainty, to the conclusion that the injury proximately resulted from the negligence charged.[95] This applies to a declaration alleging that the servants of a street railway company negligently permitted a car, on which plaintiff was riding as a passenger, to come to a sudden stop, so that one passengers was thrown against plaintiff, causing her injury,[96] or where it avers a negligent failure to stop at the usual and proper stopping place.[97] It also applies where the pleading attributes the injury or death to the negligent construction of a bridge.[98] A complaint which alleges that the plaintiff was riding on the train at the time of the accident is not defective in that it does not show where plaintiff was at the time of the accident, in the absence of a motion by defendant to have the complaint made more specific.[99] In an action for injuries to one who accompanied a shipment of horses, an allegation that he was on the train at the time of the accident, was a sufficient statement as to where he was, in the absence of a motion to have the complaint made more definite.[1]

imately causing the injury was alleged. International, etc., R. Co. *v.* Downing, 41 S. W. 190, 16 Tex. Civ. App. 643.

Where, in an action for injuries to a passenger by the fall of an elevator, the petition, after specifically alleging wherein the elevator and its appurtenances were defective, alleged that as the proximate result of such defects—specifically naming a number of them, and among them the negligence of the defendant in failing to keep the elevator and its appurtenances or their respective part, in repair—added the phrase, "and by reason of the other negligence herein alleged" the elevator on a specified date fell with great force while plaintiff was a passenger, seriously and permanently injuring her, such allegations were sufficient to allege the causal connection between the acts of negligence specified and the injuries complained of. Alexander *v.* McGaffey, 39 Tex. Civ. App. 8, 88 S. W. 462.

95. Facts leading to conclusions.—Birmingham R., etc., Co. *v.* Fisher, 173 Ala. 623, 55 So. 995.

A petition in an action for injuries to a passenger on a freight train, which alleges the wrecking of a part of the train, and which avers that the conductor thereafter requested the passenger to leave the caboose and go forward with him to assist in saving property, that the passenger attempted to leave the caboose which had stopped on a high embankment, and that he being unacquainted with the surroundings fell down the embankment and was injured, sufficiently charges that the injuries were the proximate result of the negligence of the conductor during the continuance of the relation of passenger and carrier. Austin *v.* St. Louis, etc., R. Co., 149 Mo. App. 397, 130 S. W. 385.

In an action against a street railway company for injuries to a passenger, the complaint alleged that defendant negligently ran its car at a dangerously high rate of speed into a switch, off the track, and against a pole, throwing plaintiff to the floor and against a stove, injuring him. Held to sufficiently allege that defendant's negligence was the proximate cause of the injury. Indianapolis St. R. Co. *v.* Schmidt, 71 N. E. 201, 163 Ind. 360.

An averment that in the nighttime, on approaching, but before reaching, a station, the porter announced it, and opened the door for passengers to alight; that the train had not in fact reached the station, but was on a trestle, through which plaintiff fell into the water in alighting; and that the conductor would not allow him a stopover, and in continuing his journey he caught cold, resulting in sickness and disability,—sufficiently alleges that the injury occurred through the carrier's negligence. Missouri, etc., R. Co. *v.* Overfield, 47 S. W. 684, 19 Tex. Civ. App. 440.

96. Sudden stopping of vehicle.—McCauley *v.* Rhode Island Co., 25 R. I. 558, 57 Atl. 376.

97. Failure to put off at usual place.—Allegations that plaintiff was negligently caused to alight before her station was reached, leaving her in the dark without protection or assistance to reach the station, to which she was compelled to walk, and that the child in arms and baggage were too heavy for her, resulting in her reaching the station in an exhausted, frightened, and nervous condition and sustaining special physical injury, sufficiently show that her injury was proximately caused by the carrier's wrongful act. Pullman Co. *v.* Hoyle, 52 Tex. Civ. App. 334, 115 S. W. 315.

98. A complaint which states that A. was a passenger on one of the defendant railroad company's trains, and that, by reason of the company's negligence in constructing a bridge, the train went down through the bridge into the river, and A. was killed, sufficiently charges the negligence as the proximate cause of the injury. Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

99. Connection between negligence and injury.—Southern R. Co. *v.* Roach (Ind. App.), 77 N. E. 606.

1. Southern R. Co. *v.* Roach, 38 Ind. App. 211, 78 N. E. 201.

Averment of Different Causes of Injury.—A petition which avers different acts of negligence is not defective in that it alleges that each act of negligence contributed to the injury as it need not allege which act was the direct or sole cause in order to place liability on defendant.[2]

§ 3127. Allegations as to Injury Sustained.—In an action against a carrier for damages resulting from the negligent injury of a passenger, the complaint must set forth sufficiently and definitely the injury or injuries sustained.[3]

Allegations as to Known Facts of Injury and Their Consequences.—In an action against a railroad for damages for personal injuries, the actual known facts of injury and their consequences should be alleged to admit their proof.[4]

§ 3128. Negativing Assumed Risks.—Assumed Risks.—Where under a valid contract the plaintiff had assumed certain risks incident to the mode of travel, his complaint, in an action for injuries, is not sufficient unless he alleges negligence, the risk of which he did not by contract assume.[5]

2. The petition in a street car passenger's action for personal injuries alleged that the conductor signaled the motorman as the car approached a street, and that it had come to a position of rest to discharge passengers, and while plaintiff was alighting, she using due care and diligence, and before she had a reasonable time to alight, the car was carelessly and negligently started forward, throwing plaintiff violently into the street, "which said negligence directly contributed to cause plaintiff's injuries, and by reason of which" she was injured as described, and the petition further alleged the negligent violation of an ordinance requiring motormen on west bound cars to bring the car to a full stop at the corner on the west side of intersecting streets whenever signaled by the conductor, and requiring the cars to remain stationary long enough to allow passengers to safely alight, which negligence directly contributed to cause plaintiff's injuries. Held, that the petition was not defective, in that it alleged that each negligent act averred contributed to the accident, as the petition need not allege which was the direct or sole cause of the injury in order to make defendant liable. Parker *v.* United R. Co. (Mo. App.), 133 S. W. 137.

3. Averment as to nature of injuries.—In an action for damages for physical injuries arising from a collision by reason of which a tank of cold water was precipitated upon a passenger, from the effects of which such passenger died in a short time, a motion to require the petition to state what the injuries from the water consisted of should be sustained. Wittman *v.* C. H. & D. R. Co., 1 Iddings T. R. D. 115.

A statement that by a collision the lumbar region of plaintiff's body struck the top of the stove, scalding and burning such lumbar region, is a sufficient and definite statement of the injuries received. Douglas, etc., R. Co. *v.* Swindle, 59 S. E. 600, 2 Ga. App. 550.

Allegations in a petition against a carrier for injuries to plaintiff's wife that she had sustained "great injury to her left shoulder and arm," and had lost "the entire use of her left arm," were sufficient as a basis for the introduction of evidence, and, if the carrier regarded them as lacking in detail or otherwise, it should have tested their sufficiency by proper exceptions thereto. Texas, etc., R. Co. *v.* Boleman (Tex. Civ. App.), 112 S. W. 805.

Allegations in a petition against a carrier for injuries to plaintiff's wife that she had sustained "great injury to her left shoulder and arm," and had lost "the entire use of her left arm," were sufficiently comprehensive to permit of a recovery for a diseased condition of her shoulder joint resulting from the injury. Texas, etc., R. Co. *v.* Boleman (Tex. Civ. App.), 112 S. W. 805.

A petition in an action for injuries to plaintiff's wife is sufficiently definite where it alleges a collision of defendant's cars, and that plaintiff's wife suffered a miscarriage as a result of "the jolt, jar, and shock" by such collision. Rapid Trans. R. Co. *v.* Smith (Tex. Civ. App.), 82 S. W. 788, judgment reversed in 86 S. W. 322, 98 Tex. 553.

4. Known facts and consequences.—San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

Where petition in an action against a railroad for damages for injuries to express messenger alleged injuries generally, and was not excepted to on ground that it was not sufficiently definite in stating injuries, it is error to admit evidence of particular injuries sustained. San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

5. A complaint for injuries to a passenger while riding in a freight car that defendant negligently, etc., through its agents and employees, pushed the car on the track, and negligently, etc., pushed the car against a locomotive on the track, throwing plaintiff violently onto the floor

§ 3129. Negativing Contributory Negligence.—In some jurisdictions it is essential in the petition, complaint or declaration in an action against a carrier for injury to a passenger, to expressly negative contributory negligence on the part of the plaintiff, or it must clearly appear, from the facts alleged, that such was the case.[6] But in most of the states it is only essential to allege facts indicating that the injury resulted from the negligence on part of the passenger,[7] unless the petition, from its averments, would establish, if unexplained, a prima facie case of negligence of the party injured,[8] in which case, i. e. where the petition itself shows contributory negligence as a matter of law, it can not stand as against a general demurrer.[9] This principle has been applied to a dec-

of the car, held to allege an act of switching in an unusual and negligent manner, the risk of which plaintiff did not assume. Indianapolis, etc., R. Co. *v.* Tucker (Ind. App.), 98 N. E. 431.

6. Negativing contributory negligence.—Michigan, etc., R. Co. *v.* Lantz, 29 Ind. 528; Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Toledo, etc., R. Co. *v.* Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477. See Lake Erie, etc., R. Co. *v.* Arnold, 26 Ind. App. 190, 59 N. E. 394; Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028.

Iowa.—Baker *v.* Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667.

Kentucky.—Durham *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 757, 29 S. W. 737.

A complaint, in an action for injuries caused by the failure of defendant to stop its train long enough to permit plaintiff to alight in safety, which alleges that, on reaching the car door, plaintiff saw that the train was in motion; that she proceeded rapidly out on the platform; that finding the car moving still more rapidly, and seeing no one to assist her, and though her arms were full of bundles, yet, fearing she would be carried past the station, she proceeded down the steps of the car, towards the platform, when she was thrown off—shows contributory negligence, and is demurrable. Toledo, etc., R. Co. *v.* Wingate, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477.

A complaint alleged that, when the train on which plaintiff was a passenger arrived at the station, his place of destination, at which he had never been before, it was dark and stormy; that the train slackened its speed so that he could have safely alighted had there been a suitable place to receive him; that the conductor ordered him to alight; and that, relying on such order, he did so; but, by reason of there being no suitable place for his reception, he fell, and was thrown under the train. Held, that it was demurrable, as not showing that the plaintiff was himself without fault or negligence. Cincinnati, etc., R. Co. *v.* Peters, 80 Ind. 168.

A complaint against a common carrier for injuries to a passenger from being thrown from a vehicle, which did not expressly aver that the passenger was free from contributory negligence, but alleged that, by reason of the negligence of defendant's servant in the management of the horses and vehicle, the passenger was violently thrown therefrom, was insufficient. Wahl *v.* Shoulder, 14 Ind. App. 665, 43 N. E. 458.

A complaint in an action against a street railroad alleged that plaintiff signaled the motorman to stop the car; that its speed was greatly slackened, so that, when it reached the place where plaintiff was standing, it was running very slowly; that he took hold of the handle of the car and attempted to step on the car; and that suddenly the motorman negligently and carelessly started the car, without any warning or notice, and without any fault or negligence on plaintiff's part, thereby throwing him to the ground and causing the injuries described. Held, that the complaint is demurrable, as not alleging that plaintiff was free from contributory negligence, since it does not allege that he was without fault in attempting to board the car while it was moving, even though slowly, or that he was free from negligence in the manner, in which he took hold of the handle. Citizens' St. R. Co. *v.* Wagner, 57 N. E. 49, 24 Ind. App. 556.

7. Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242; Cincinnati St. R. Co. *v.* Fullbright, 8 O. Dec. 361, 7 Wkly. L. Bull. 187; Potter *v.* Chicago, etc., R. Co., 20 Wis. 533, 91 Am. Dec. 444.

8. In a suit for damages against a railway company on account of the alleged negligence of its agents, it is not necessary that the partition should negative, either by facts stated or by direct averment, the existence of contributive negligence on the part of plaintiff; an exception to this rule exists when the petition, from its averments, would establish, if unexplained, a prima facie case of negligence of the party injured. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

9. A complaint alleged that plaintiff was a passenger to C.; that, as the train approached C.; it slackened speed, but did not stop; that he was directed by the brakeman to jump; that the train was running at a highter speed than he thought, of which he was ignorant because it was dark, and, because he relied on the direction of the brakeman, he jumped. Held, that the allegations

laration which failed to negative contributory negligence, in that it did not definitely aver that the train had stopped as a matter of fact. The demurrer was sustained on the ground that a passenger who steps from a moving train does so at his peril. The passenger's mistake as to the stopping of the vehicle, though innocently made, is not a matter upon which the carrier's liability can be predicated and a definite and specific averment that it had as a matter of fact stopped is essential to a cause of action.[10] It has also been applied where the pleading shows that the passenger put his arm out of the train window, thereby receiving injury.[11] But it should not be strictly applied, as there is great danger that it may be carried too far.[12] Where the allegations taken in connection with each other leave room for doubt as to the existence of contributory

showed that the proximate cause of the injury was his own voluntary act, so that the burden of alleging freedom from negligence was on him. Badovinac *v.* Northern Pac. R. Co., 39 Mont. 454, 104 Pac. 543.

A complaint alleged that plaintiff was a passenger to C.; that as the train approached C. it slackened speed, but did not stop; that he was directed by the brakeman to jump; that the train was running at a higher speed than he thought, of which he was ignorant because he relied on the direction of the brakeman he jumped. Held, that the allegations of the complaint were insufficient to show his freedom from negligence, and hence the complaint did not state a cause of action. Badovinac *v.* Northern Pac. R. Co., 104 Pac. 543, 39 Mont. 454.

Where the complaint alleged that defendant negligently stopped the train on which plaintiff was a passenger for over half an hour on a high trestle, and that while there, on account of the darkness and poor lights furnished by defendant on the train, plaintiff missed his footing, and fell to the ground, but did not allege plaintiff's ignorances that the train was on the trestle, a demurrer for failure to state a cause of action was properly sustained, since the complaint showed contributory negligence by plaintiff which would defeat a recovery. Jarrell *v.* Charleston, etc., R. Co., 36 S. E. 910, 58 S. C. 491.

In an action for injuries to plaintiff while alighting from defendant's train, a petition alleging that with the consent of defendant and its conductor plaintiff was riding in a caboose, ingress to and egress from which was much more difficult than from a regular caboose, which fact, as well as the fact that plaintiff was to alight therefrom in the nighttime at a certain station, was known to those in charge of the train; that plaintiff was assured by the conductor that the train would stop at the station long enough for him to alight; that when the train stopped, and while plaintiff was undertaking in a prompt and prudent manner to alight, with the knowledge of the conductor, but before he had time to do so in safety, the train was carelessly and recklessly started in wanton disregard of plaintiff's safety, which caused plaintiff to fall, in doing which his foot was run over by the wheels of the caboose, etc.—did not show contributory negligence as against a general demurrer. Gulf, etc., R. Co. *v.* Walters, 49 Tex. Civ. App. 71, 107 S. W. 369.

10. Averment as to stopping of train.—Townsend *v.* Nashville, etc., R. Co., 106 Tenn. 162, 61 S. W. 56; East Tennessee, etc., R. Co. *v.* Massengill, 83 Tenn. (15 Lea) 328.

A declaration alleged that plaintiff was standing on the platform of one of defendant's trains when it went into the depot sheds, having been unable to secure a seat; that the whistle was blown and the station announced, and the train slowed up for passengers to alight, so that, when it came to the usual place of stopping, plaintiff, thinking it had stopped, and being impliedly invited to alight by the conduct of the trainmen, stepped off, and as he did so the cars lurched forward, throwing him down. Held, that a demurrer to the declaration was properly sustained, because of the absence of a definite averment that the train had stopped as a matter of fact. Townsend *v.* Nashville, etc., R. Co., 61 S. W. 56, 106 Tenn. 162.

11. The declaration, in an action against a railway company for injuries sustained by a passenger by reason of his arm coming in contact with a bridge through which the train passed, which alleges that plaintiff put his hand out of the window three inches and it struck against the bridge, is bad on demurrer. Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91.

12. A declaration in an action by a passenger against a railroad company, seeking to recover damages for personal injuries, is not demurrable because alleging that, while the cars were standing still, and plaintiff was on the platform connecting the passenger cars, defendant negligently and carelessly did the things occasioning the injury. Atlantic, etc., R. Co. *v.* Crossby, 53 Fla. 400, 43 So. 318. See on this question Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195.

negligence, the question should be one of fact and not of law,[13] and this is particularly true where there is a general averment that the plaintiff was without fault,[14] or that the injury was caused without want of ordinary care on the

13. Harmon *v.* United R. Co., 163 Mo. App. 442, 143 S. W. 1114; Munro *v.* St. Louis, etc., R. Co. (Mo. App.), 135 S. W. 1016; Cooper *v.* Atlantic, etc., R. Co., 69 S. C. 479, 48 S. E. 458.

Instances.—The complaint alleged that, after the train on which plaintiff was a passenger blew for the station, plaintiff started to go into another coach to get a bundle; that the door of the car was open, ready for passengers to get out, and a violent jerk of the train caused him to place his hand against the door, which swung to and cut off his finger; that defendant's agents negligently failed to push the door far enough back to catch; and that the roadbed was defective in specified particulars, which contributed to the jerk of the train. Held, that the petition was good as against the general demurrer. Branan *v.* Southern R. Co., 135 Ga. 24, 68 S. E. 793.

The complaint against a street-car company for personal injuries to a passenger showed that plaintiff, wishing to make a transfer from one car to another, was directed to leave the car at the rear, and that as he did so he was injured by another car being driven against him. Held, that the averment in the complaint that plaintiff was in full view of the driver on the car which injured him does not sufficiently show plaintiff to have been guilty of contributory negligence in not forseeing the danger to require reversal, where the complaint is questioned for the first time on appeal. Citizens' St. R. Co. *v.* Merl, 134 Ind. 609, 33 N. E. 1014.

In a suit by a passenger for personal injury against a railroad company, a complaint alleging the injury was the result of an act of the company's servant, performed in "a wilful, reckless, and unlawful manner," is good on demurrer, though it fails to aver absence of contributory negligence. Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46.

In an action against a street railway company, which had agreed to keep the streets in repair, for injuries received by stepping into a hole negligently left in a crossing, the petition is not subject to an exception of no cause of action, where it alleges that the injury resulted while plaintiff was alighting from the car, moving slowly and with slackening speed, preparatory to stopping, and that plaintiff was an active and vigorous person, accustomed to alight in this way, and where it shows no unfavorable conditions tending to render the act exceptionally hazardous. Ober *v.* Crescent City R. Co., 44 La. Ann. 1059, 11 So. 818, 32 Am. St. Rep. 366.

A declaration in an action against a street railway, alleging that defendant negligently permitted a live electric wire resembling a rope to be suspended from the roof of the car whereon plaintiff was a passenger, and at the rear platform, and that, believing such wire to be rope, plaintiff's hand came in contract therewith, that he received a shock of electricity "and was unable to release his hands from contract with the wire until relieved by the power being shut off," and that, without any fault or negligence on his part, he was injured, etc., was sufficient to support a judgment based thereon. Hopkins *v.* Michigan Tract. Co., 107 N. W. 909, 144 Mich. 359.

In an action against a street railway company for personal injuries, a complaint alleging that plaintiff, while a passenger on defendant's car, requested to be put off at a certain point, and, in expectation that the car would stop as requested, got on the rear step so as to be ready to alight, and that the car, instead of stopping, was so negligently run as to throw him to the ground, and injure him, is not demurrable on the ground that it shows contributory negligence on plaintiff's part. Bowie *v.* Greenville St. R. Co., 69 Miss. 196, 10 So. 574.

A petition in an action for injuries to a passenger's arm while it was projected from a window of the car alleging that while he "was sitting in said car with his arm on the window sill it was thrown out of the window by a sudden jerk or movement of the car," states a good cause of action, when taken in connection with allegations as to the dangerous construction of parallel tracks and the proximity of the cars to each other. Cincinnati, etc., Railway *v.* Burkhardt, 30 O. C. C. 699, 11 O. C. C., N. S., 543.

A declaration alleging that the car on which plaintiff was riding was negligently brought to a sudden stop, so that a passenger who was obliged to stand because the seats of the car were occupied was necessarily, by reason of such negligence, thrown against the plaintiff, sufficiently negatives any inference that the throwing of the passenger was the result of any intervening action of his own. McCauley *v.* Rhode Island Co., 57 Atl. 376, 25 R. I. 558.

Allegations that elevator had stopped.—Ohio Valley, etc., Co. *v.* Wernke, 42 Ind. App. 326, 84 N. E. 999.

14. General averment of absence of fault.—Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. Rep. 303; Kentucky, etc., Bridge Co. *v.* McKinney, 9 Ind. App. 213, 36 N. E.

plaintiff's part.[15] It seems to be unnecessary for the plaintiff to allege that he exercised "due care."[16] Where it does not appear from the petition that the passenger could have avoided the injury by the use of ordinary care, the petition is good,[17] as where the injury resulted from a collision, wreck, etc.[18] The rule requiring an averment that the train had stopped does not apply where the passenger is injured while in the coach, after having left his seat for the purpose of alighting.[19] Nor does it apply where the train suddenly starts while the passenger is engaged in alighting.[20] So it has been held in an action by a passenger for an injury from the sudden movement of the train, that the petition did not show contributory negligence, though it appeared thereby that at the time of the injury plaintiff had risen from his seat and started to go out upon the platform of the train at an intermediate station, and did not explain his purpose in so doing.[21] Where the trend of the allegations of fact, in a petition for injury to a street railway passenger, was to the effect that he was in the exercise of due care for his own safety, an allegation that the injury was not due to any act of negligence of his was sufficient as a conclusion, or, at least, the pleading was not wholly wanting in an allegation on that subject; and if the street railway com-

448; Citizens' St. R. Co. *v.* Huffer, 26 Ind. App. 575, 60 N. E. 316.

In an action against a railroad company for personal injuries, caused by a truck upsetting on a passenger while he was on defendant's depot platform waiting for a train, an allegation that plaintiff was injured without fault on his part is equivalent to an allegation of freedom from contributory negligence. Evansville, etc., R. Co. *v.* Weikle, 6 Ind. App. 340, 33 N. E. 639.

In an action against a street car company plaintiff alleged that he signaled those in charge of the car that he wished to take passage; that as they neared the crossing the cars slowed up for the purpose, as plaintiff believed, of allowing him to get on; that as plaintiff undertook to get on, which he could have done easily, the speed of the car was greatly increased "suddenly, and with a violent, quick jerk," thus throwing plaintiff to the ground, and injuring him. Held, that such allegations do not show contributory negligence sufficient to overthrow a general allegation that plaintiff was "without fault or negligence." Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

15. A complaint in an action by a passenger for injuries, alleging that the injury was caused without want of ordinary care on plaintiff's part, sufficiently avers that the injury was caused without the fault or negligence of plaintiff. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

16. Allegation of exercise of "due care" unnecessary.—In an action against a carrier for injuries occasioned by its negligence, the complaint need not aver the exercise of due care by the plaintiff, for it is to be presumed under the circumstances stated, and the natural order of things, that a person uses ordinary care. Cincinnati St. R. Co. *v.* Fullbright, 7 Wkly. L. Bull. 187, 8 O. Dec. 361.

17. In an action for injuries sustained by a passenger in a car with which a train about to be coupled to collided, allegations of the declaration that plaintiff was standing on the front platform of the car, whither he had gone to get the conductor to have the seats turned, and that when he saw the train rapidly approaching he hurried back ino the car to warn a lady, and get a seat, to provide against the imminent shock, but that before he could do so he was thrown forward by the force of the collision, do not show that plaintiff could have avoided the injury by the use of ordinary care. Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

18. In an action by a railway passenger against the company for injury resultng from a broken rail, throwing the car from the track, the complaint need not expressly aver that the plaintiff was without fault, if its averments show that the injury was occasioned solely by the carelessness of the defendant. Michigan, etc., R. Co. *v.* Lantz, 29 Ind. 528.

19. Rule not applicable.—Chicago, etc., R. Co. *v.* Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313.

20. Plaintiff alleged that his wife, while a passenger on defendant's train, prepared to alight as the train neared her destination, and that immediately after the train stopped, and without delay, she proceeded to alight, and while leaving the train, and without any warning, it moved suddenly forward, throwing her to the depot platform by the negligence of defendant and its employees, etc. Held, that the petition was not demurrable, though alleging that the train was in motion when the plaintiff's wife attempted to alight. San Antonio, etc., R. Co. *v.* Jackson, 38 Tex. Civ App. 201, 85 S. W. 445.

21. Contributory negligence not shown.—Kansas, etc., R. Co. *v.* Young, 111 S. W. 764, 50 Tex. Civ. App. 610.

pany desired more, it should have moved therefor.[22] And it has been held that it is enough for a complaint, in an action against a railroad company for an injury to a passenger, to allege that the injury happened through the negligence of the defendant, without alleging also that the plaintiff was free from negligence on his part.[23] The averments may of themselves be sufficient to excuse the passenger of contributory negligence.[24]

Responsibility of Child.—A petition does not show on its face that the passenger, who was a boy, was guilty of contributory negligence, since whether the mind of a boy of that age is mature enough to make him responsible is a question for the jury.[25]

Inability to Care for Self.—Where the declaration avers that, when defendant's servants deposited plaintiff on their platform, he was wholly incapable of exercising in his own behalf any care whatever, and that this was well known to defendant's servants, and that the plaintiff was injured because they failed to perform the duty they owed him, it states a cause of action without alleging due care on the part of plaintiff.[26]

Crowded Vehicle.—A declaration, which alleges that a street car company carelessly and negligently permitted its cars, exits, and running board to be greatly crowded with passengers, whereby plaintiff while attempting to alight was thrown and injured, states a cause of action as it does not, upon proper construction present the question of contributory negligence for the fair inference is that the car was permitted to become crowded after the plaintiff got aboard.[27] Nor can it be said, in light of the law of contributory negligence, that the passenger, by entering a vehicle more or less crowded, his fare being accepted, thereby initiating the relation of carrier and passenger, ipso facto was chargeable with contributory negligence.[28]

Necessity for Riding on Platform.—The declaration for injury to a passenger on a street car by being thrown from it by a sudden jolt while standing on the rear platform need not show it was necessary for plaintiff to stand there; it not being negligence per se for a passenger on a street car, though it is propelled by electricity, to ride on the platform.[29]

Acts in Emergency—Imminent Danger.—In an action against a railroad company for injuries sustained from jumping from a car while it was in motion, it is sufficient to allege that, through the negligence and unskillfulness of the company's servants in conducting the car, the life and limbs of the plaintiff were in danger, and that to escape from the danger he was obliged to jump from the car, whereby he was wounded, without alleging specifically the cir-

22. Allegation sufficient.—Burger *v.* Omaha, etc., R. Co., 139 Iowa 645, 117 N. W. 35.

23. Alleging injury as result of defendants negligence sufficient.—Potter *v.* Chicago, etc., R. Co., 20 Wis. 533, 91 Am. Dec. 444.

24. A declaration against a railroad company for personal injuries alleged that plaintiff had a ticket over defendant's road, and boarded a freight train, which did not carry passengers, in the belief that the ticket was good on such train; that the conductor refused to stop the train, and ordered him to get off while it was running at a high rate of speed; that the conductor, in violent language, threatened to eject plaintiff from the train if he did not obey the order, and had force at his command to execute such threat; and that plaintiff believed that resistance would result in greater injury than leaving the train; and that he jumped, and was injured. Held, that there was a sufficient allegation of compulsion to excuse plaintiff from the charge of contributory negligence in jumping. Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

25. Question as to responsibility of boy for jury.—Avey *v.* Galveston, etc., R. Co., 81 Tex. 243, 16 S. W. 1015, 26 Am. St. Rep. 809.

26. Inability to care for self.—Burke *v.* Chicago, etc., R. Co., 108 Ill. App. 565.

27. Crowded vehicle.—Dunham *v.* Public Service Corp., 69 Atl. 1012, 76 N. J. L. 452.

28. Not ipso facto chargeable with negligence.—Dunham *v.* Public Service Corp., 76 N. J. L. 452, 69 Atl. 1012.

29. Pleading necessity for riding on platform.—Brunnchow *v.* Rhode Island Co., 26 R. I. 211, 58 Atl. 656.

cumstances which rendered it dangerous for him to remain in the car.[30] The pleading should show that the appearance was such as to convince a reasonable person of the imminence of the danger.[31]

Slipping into Elevator Shaft.—The complaint of one, who in going to her room in an apartment house stepped through the open door of the elevator, when the car was not there, does not show contributory negligence as a matter of law, its alleging darkness, preventing her seeing beyond the door, and a custom, known to her, for the door to be open when the car was there.[32]

Averment as Aiding Defense of Contributory Negligence.—The fact that a passenger in his action against a company states in his complaint defendant's negligence to have been in directing him to get on the train while in motion, thereby requiring him, perhaps, to prove more than if he had simply alleged negligence by reason of defendant's failure to stop at the platform, does not help defendant in sustaining the defense of contributory negligence.[33]

After Verdict.—Although a declaration, in an action by a passenger against a railroad company for injuries caused by the company's negligence, contains no averment that plaintiff was without fault, or that he exercised proper care to avoid the injury, it is sufficient, at least after verdict.[34]

§§ 3130-3136. Actions for Ejectment—§ 3130. In General.—The declaration or complaint in an action for being ejected by the carrier from the vehicle of transportation must, as in other suits, sufficiently allege every element essential to his cause of action.[35] But where the petition fails in some particular, the subsequent pleadings may be sufficient to complete the case in that aspect and from all necessary issues.[36]

Allegation of Ejection.—The petition must allege facts showing an ejection.[37]

§§ 3131-3133. Allegations as to Breach of Duty—§ 3131. Unauthorized and Wrongful Ejectment.—If the gist of the plaintiff's action is that he was ejected in violation of his rights as a passenger he must aver facts showing the existence of those rights, and the violation thereof whereon his action is founded.[38] Thus, he must show that he was rightfully a passenger on the

30. Acts in emergency.—Eldridge *v.* Long Island R. Co., 3 N. Y. Super. Ct. 89.

31. Imminence of danger.—A complaint for personal injury, alleging that defendant's agent negligently caused another car "to appear to be in imminent danger" of colliding with the car on which plaintiff was a passenger, whereupon she jumped, is defective in not showing that the appearance was such as to convince a reasonable person of the imminence of the danger. Birmingham R., etc., Co. *v.* Butler, 33 So. 33, 135 Ala. 388.

32. Tippecanoe Loan, etc., Co. *v.* Jester (Ind.), 101 N. E. 915.

33. Averment as aiding defense of contributory negligence.—Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

34. After verdict.—Illinois Cent. R. Co. *v.* Simmons, 38 Ill. 242.

35. Allegation of every element.—See Lindsay *v.* Oregon, etc., R. Co., 13 Idaho 477, 90 Pac. 984, 12 L. R. A., N. S., 184.

36. In an action for the wrongful ejection of a passenger, the pleadings held to raise an issue notwithstanding the allegations of the petition. Illinois Cent. R. Co. *v.* Williams, 143 S. W. 760, 147 Ky. 52.

37. Allegation of ejection.—Where a complaint charged that the conductor of defendant's street car, on which plaintiff was riding, unlawfully threatened to eject plaintiff therefrom, and did wrongfully, unlawfully beat and assault her, by reason whereof she was injured and greatly bruised, etc., but did not allege that she was actually put off the car, it stated a cause of action for assault and battery only, and not for ejection. Ray *v.* United Tract. Co., 89 N. Y. S. 49, 96 App. Div. 48.

38. Birmingham R., etc., Co. *v.* Tate, 7 Ala. App. 517, 61 So. 32.

In an action against a railroad company by a passenger for the alleged wrongful ejection from one of the defendant's trains, a complaint is sufficient and states a good cause of action which avers that the defendant was operating a railroad upon which passenger trains were run; that the plaintiff purchased from the defendant, for a reward a ticket which entitled him to be carried as a passenger on one of the defendant's trains; and that after having purchased said ticket he boarded the train, to be carried to a station on the defendant's road, and, although the plaintiff tendered to the conductor on said train the ticket so

vehicle from which he was ejected.[39] And in order to do this, he must show that he had a right to be on such vehicle as a passenger,[40] that such vehicle was the one properly to carry him to his destination,[41] that he had paid or was willing to pay the proper and necessary fare,[42] or had made other proper arrange-

purchased, the said conductor, in breach of the duty owing the plaintiff as a passenger, wrongfully and forcibly ejected him from the train. McGhee *v.* Cashin, 30 So. 367, 130 Ala. 561.

A complaint alleging, in effect, that plaintiffs purchased a ticket entitling them to passage over defendant's road to a certain point; and took seats in a car, and were wrongfully ejected before reaching such point, is sufficient. Chicago, etc., R. Co. *v.* Spirk, 70 N. W. 926, 51 Neb. 167.

Where a complaint alleged that defendant willfully and recklessly failed and refused to furnish transportation, and that plaintiff was ejected from the train, and that such ejectment was due to the unlawful, willful, and reckless conduct of defendant, the latter words refer to conduct other than failure to transport. Bussey *v.* Charleston, etc., Railway, 55 S. E. 163, 75 S. C. 116.

In an action for being ejected from a railroad car, it is not sufficient to aver generally that the party was wrongfully ejected, but it must be sufficiently set forth that his expulsion was improper, and wrongful; i. e., being rightfully in the car but illegally expelled. Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10.

39. Allegation of relation of carrier and passenger necessary.—Pittsburgh, etc., R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035.

40. Rightfully a passenger.—Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10.

41. White *v.* Evansville, etc., R. Co., 133 Ind. 480, 33 N. E. 273.

The petition of a passenger claiming a wrongful ejection other than the manner of the ejection must allege that the train under the rules of the carrier was required to stop at the station named in her ticket. Drew *v.* Wabash R. Co., 129 Mo. App. 459, 107 S. W. 478; Turner *v.* McCook, 77 Mo. App. 196.

In an action for damages for wrongful expulsion from a railroad train, the complaint alleged that plaintiff tendered the regular cash fare from L., where she entered the car, to T., a station to which the train would run; but the conductor refused to accept such amount, and demanded an additional sum, whereupon she tendered the regular cash fare from L. to D., the next station, which the conductor refused to accept, but stopped the train, and ejected plaintiff. Held, that it did not appear from the complaint that such expulsion was wrongful, as it was not shown that the regulations of defendant provided for the discharge of passengers either at T. or at D. Lake Erie, etc., R. Co. *v.* Lucas, 47 N. E. 842, 18 Ind. App. 239.

42. In an action against a railroad company for wrongful expulsion from its train, an allegation in the declaration, that plaintiff became a passenger to be carried from a certain station to a certain other station for a certain reward paid to defendant, is sufficient as against a motion for a compulsory amendment of the declaration seeking to have it stated whether plaintiff was on such train as a passenger by being the holder of a ticket purchased. Seaboard, etc., Railway *v.* Scarborough (Fla.), 42 So. 706.

In an action by a passenger ejected from a train for refusal to pay fare, petition showed that failure to purchase a ticket was not due to any fault of defendant, and that, when the conductor asked him to pay four cents a mile, the regular fare being three cents a mile, which plaintiff refused to pay, it not appearing that the fare at four cents a mile was illegal or that it was not the fixed rate when cash fare is tendered by a passenger, shows no ground of action. Allison *v.* Georgia R., etc., Co., 65 S. E. 85, 132 Ga. 834.

In an action against a railroad company for an illegal expulsion from its train, an allegation in the petition that the price of the ticket was seventy cents, and that the plaintiff, in the train, when a ticket or fare was demanded by the conductor, tendered this amount, which was refused, and the conductor demanded $1.05, and on his failure to pay it compelled him to leave the train, shows prima facie a good cause of action. It will not, on demurrer, be presumed that the company had made a distinction between ticket fare and train fare, and that the sum exacted was train fare, as fixed by the company. Avey *v.* Atchison, etc., R. Co., 11 Kan. 448.

In an action for damages caused by being ejected from defendant's train, the complaint alleged "that the plaintiff explained the case to the said conductor, telling him that he knew where his ticket was; that he could and would get it as soon as he reached W., and there deliver it to him, or that he would deposit with him [the said conductor] money of the value of the ticket, to be returned if he should produce the misplaced ticket at W., as agreed; that the money was tendered the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination." Held, that this was an al-

ments or contract with reference thereto,[43] and that he had complied with all reasonable rules and regulations of the carrier, such as the tender of his ticket, etc.[44] In an action against a carrier for ejecting a passenger, where the complaint alleges that plaintiff "was admitted as a passenger" on one of defendant's cars, it sufficiently shows him to have been a passenger, without further stating the circumstances under which he became such.[45] In an action for being ejected from a railroad car plaintiff must make it appear that his expulsion was improper and wrongful; that, being rightfully in the car, he was illegally expelled. It is not sufficient to aver generally that he was wrongfully ejected.[46] He need not, however, aver a consciousness on the part of the carrier, of the result of the wrongful ejection, in the absence of a charge that the carrier inflicted the injury.[47] Where the ejection of the passenger is attributed to the negligence of the carrier's agent, such negligence may be pleaded in general terms as in other cases of suits against carriers arising out of negligence.[48]

Invalid Ticket or Misdirection by Agent.—In accordance with the general rule of substantive law,[49] a complaint which shows that the passenger's ticket was invalid, is insufficient as a complaint for wrongful ejection,[50] although it may be a good statement of a cause of action arising out of the negligence of some servant or agent,[51] and the same rule seems to apply where the plaintiff enters the wrong train in following directions given by a proper agent or servant.[52]

Waiver of Invalidity of Ticket.—In an action for ejecting a person from a railway train, a waiver of a defense that the ticket presented was, by its terms, good only on the date of sale, must be pleaded.[53] And where a waiver of con-

legation that plaintiff made two offers: First, to deposit the value of the ticket, and, on the conductor's refusal to accept it, second, an unconditional tender; and the complaint stated a good cause of action. Knowles *v.* Norfolk, etc., R. Co., 102 N. C. 59, 9 S. E. 7.

43. Other contract or arrangement.—Pittsburgh, etc., R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035.

44. White *v.* Evansville, etc., R. Co., 133 Ind. 480, 33 N. E. 273.

45. Allegations of status as passenger.—Ohio, etc., R. Co. *v.* Craucher, 132 Ind. 275, 31 N. E. 941.

46. General averment insufficient.—Barnum *v.* Baltimore, etc., R. Co., 5 W. Va. 10.

47. A complaint in an action against a carrier, charging the wrongful ejection of plaintiff's intestate from a moving train and averring his consequent injury and death, states a good cause of action for the wrongful ejection of the intestate, and, as it does not charge the defendant with inflicting the injury, it is not necessary to aver a consciousness of the result of the wrongful ejection, Louisville, etc., R. Co. *v.* Perkins, 39 So. 305, 144 Ala. 325.

48. Ejection attributed to negligence.—In an action against a carrier for wrongful ejection of plaintiff from its car, a count alleging that defendant's agent, acting within the scope of his authority, so negligently conducted himself in and about the carriage of plaintiff as defendant's passenger that as a proximate consequence thereof plaintiff was ejected from said train, was not subject to demurrer for failure to show the facts wherein defendant's servants negligently conducted themselves, and wherein plaintiff's ejectment was wrongful. Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 46 So. 747.

A complaint against a street railway company, averring that plaintiff was ejected from a car through a conductor's negligence in incorrectly punching a transfer given plaintiff to show his right to ride on the car from which he was ejected, sufficiently avers the negligence charged. Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671.

Under Rev. St. 1887, § 4168, subd. 2, the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, and in an action for damages it is sufficient to allege in general terms that the injury to the passenger complained of was occasioned by the negligence of the servant or employee of the carrier in charge of the train. Lindsay *v.* Oregon, etc., R. Co., 90 Pac. 984, 13 Idaho 477, 12 L. R. A., N. S., 184.

49. Invalid ticket.—See ante, "Defective or Invalid Tickets," §§ 2979-3012.

50. McGhee *v.* Reynolds, 129 Ala. 540, 29 So. 961.

51. See ante, "Fraud, Mistake or Negligence as to Ticket or Transfers," § 3097.

52. Misdirection.—Alabama, etc., R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

53. Waiver of invalidity of ticket.—Trezona *v.* Chicago, etc., R. Co., 77 N. W. 486, 107 Iowa 22, 43 L. R. A. 136.

ditions in the ticket is relied on, the facts on which such waiver is based must be pleaded.[54]

Description of Ticket in Petition.—When the petition, in an action against a railway company for damages alleged to have been sustained by the plaintiff's unlawful expulsion from a train, insufficiently describes the ticket presented to the conductor as the evidence of the plaintiff's claim of right to passage, in not stating the printing or stamps thereon or the conditions or dates, it is erroneous to overrule a special demurrer properly pointing out the defectiveness of the petition in this respect.[55]

Surplusage.—Where a petition in an action for wrongful ejection of a passenger from a train alleged a violation of the contract of carriage, and also tortious acts of the conductor, the latter allegations may be treated as surplusage.[56]

Assigning Specific Legal Character to Act.—Where a complaint charges that defendant railroad company "wrongfully and unlawfully" required plaintiff to alight from the train, such words did not assign specific legal character to the acts of defendants, and must be disregarded.[57]

§ 3132. Use of Unnecessary Force.—If the gist of the plaintiff's action is the assault and use of unnecessary force, the complaint should set forth facts sufficient to show that unnecessary force was used.[58] But such facts may be implied from the general intent as gathered from the allegations as a whole.[59] But where the complaint alleges that the conductor assaulted plaintiff and forcibly ejected him from a car while the same was in motion, it is not necessary to allege negligence on the part of the defendant.[60]

§ 3133. Ejection at Improper Place.—A declaration must allege facts either as to the weather or character of the grounds in and about a station, or that it was severely cold, or that the ground was covered with snow, or that the character of the place was such as made it dangerous, in order to state a cause

54. Facts showing waiver of condition by agent.—Where a husband signed his own name to his wife's railroad ticket, which provided that it must be signed by the person intending to use it, on being told by the agent that he could sign it, he must plead such facts in an action by him for damages sustained by his wife from the company's refusal to accept the ticket. Mexican Cent. R. Co. *v.* Goodman (Tex. Civ. App.), 43 S. W. 580.

55. Description of ticket in petition.—Southern R. Co. *v.* Dyson, 34 S. E. 997, 109 Ga. 103.

56. Surplusage.—Chase *v.* Atchison, etc., R. Co., 79 Pac. 153, 70 Kan. 546.

57. Assigning specific legal character to act.—Aaron *v.* Southern Railway, 46 S. E. 556, 68 S. C. 98.

58. Use of unnecessary force.—Birmingham R., etc., Co. *v.* Tate, 7 Ala. App. 517, 61 So. 32; White *v.* Evansville, etc., R. Co., 133 Ind. 480, 33 N. E. 273; Louisville, etc., R. Co. *v.* Setser, 149 Ky. 162, 147 S. W. 956.

In an action against a carrier, allegations of the complaint that on a certain day plaintiff purchased a ticket entitling him to ride as a passenger between two certain points, and that he boarded a train at one of the points to go to the other, and, while riding thereon, defendant, by its servants, wrongfully and purposely assaulted him and ejected him from the car, and in so doing he was thrown from and run over by the car, causing injuries set out in detail, sufficiently showed plaintiff, was ejected with unnecessary force, to his injury. Pittsburgh, etc., R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035.

In an action against a carrier for ejection from its train, which was authorized, where it is claimed that unnecessary force was used, it is not enough to aver that force was used, but facts must be averred showing use of unnecessary force. Chicago, etc., R. Co. *v.* Bills, 104 Ind. 13, 3 N. E. 611.

59. The allegation that the conductor "forced the plaintiff off the train," and that he was "put off," and "that by said wrongful act of ejecting plaintiff from said train he has sustained serious damage," convey the idea that actual violence was used, and are sufficient to allow proof of rudeness on the part of the conductor, and the charge of the court on the question of punitive damages was proper. Knowles *v.* Norfolk, etc., R. Co., 102 N. C. 59, 9 S. E. 7.

60. Negligence not necessary.—Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

of action for ejectment from a train at an improper place.[61] Where the petition sets forth the above facts and further alleges that the agent in whose care the person ejected was placed knowingly permitted him to wander off and be injured, a cause of action is sufficiently stated.[62]

Identification of Place of Ejection.—In an action against a railroad for death caused by the ejection of a person from a train while in a helpless condition, an allegation in the petition that the deceased was ejected from a designated train near a trestle and almost in the yards of the railroad company in or near a swamp in a certain city, was a sufficient identification of the place of expulsion.[63]

§ 3134. Allegations as to Servant at Fault.—The declaration need not name the agent or servant at fault, it being sufficient if he is otherwise designated.[64] Thus, a complaint alleging that, owing to the negligence of one of defendant's conductors in issuing a worthless transfer, plaintiff, a passenger, was ejected from another of defendant's cars by the conductor thereof on tendering to the latter such transfer, sufficiently designated the conductor, without naming him.[65] In an action by a passenger against the company to recover for her being wantonly put off a train by the acting conductor, a failure of her petition to state that he was an agent or servant of the company is not a fatal defect.[66]

§ 3135. Connection between Ejection and Injury.—The declaration in an action for damages for death or injury resulting from the ejection of the person killed or injured, will be insufficient in the absence of averments showing a connection between the ejecting and injury or death.[67] So where the pe-

61. Ejection at improper place.—Bragg *v.* Norfolk, etc., R. Co., 110 Va. 867, 67 S. E. 593. See Louisville, etc., R. Co. *v.* Setser, 149 Ky. 162, 147 S. W. 956.

A complaint in an action for injuries to a passenger which alleges that the conductor negligently required the passenger to leave the train at a place highly dangerous for her to do so on his refusal to accept her ticket, and which sets forth the facts as to the dangers of the place for an old and infirm person to disembark, states a cause of action as against a demurrer. Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

62. A count in a declaration, stating that intestate was ejected from a train when night was rapidly approaching, the climatic conditions severe, the ground covered with fifteen inches of snow, and that the conductor and other servants of defendant, on account of interstate's condition and surroundings, attempted to place him in care of a station agent, who, knowing decedent's condition, neglected to care for him, but permitted and actually saw him wander off alone down the railroad track, held to state a cause of action for ejectment from a train at an improper place. Bragg *v.* Norfolk, etc., R. Co., 110 Va. 867, 67 S. E. 593.

63. Identification of place of ejection.—Macon, etc., R. Co. *v.* Moore, 125 Ga. 810, 54 S. E. 706.

64. Designation of servant at fault.—Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

65. Allegation as to servant at fault.—Montgomery Tract. Co. *v.* Fitzpatrick, 149 Ala. 511, 43 So. 136, 9 L. R. A., N. S., 851.

66. Allegation that party at fault was carrier's servant.—Texas, etc., R. Co. *v.* Casey, 52 Tex. 112.

67. A declaration alleged that defendant's servants, after accepting intestate on its car as a passenger, put him off at a station five miles from his destination on a stormy night and where he could obtain no shelter, knowing that he was intoxicated and unable to care for himself, and that in attempting to walk home along defendant's track he fell from its bridge and received injuries from which he died. Held insufficient, since it fails to establish a connection between the alleged wrongful act of ejectment and the injury received by falling from the bridge. Keeshan *v.* Elgin, etc., Tract. Co., 82 N. E. 360, 229 Ill. 533, affirming judgment 132 Ill. App. 416.

A complaint in an action for injuries to a passenger which alleges that plaintiff claims a specified sum as damages, and that while he was a passenger a servant of the carrier while acting as conductor or motorman assaulted plaintiff by pointing a pistol at him, compelling him to leave the car, states a cause of action as against a demurrer. Birmingham R., etc., Co. *v.* Tate, 7 Ala. App. 517, 61 So. 32.

tition alleges that he was run over by another train some three or four miles from the place of expulsion, it is subject to special demurrer, as the statement of the distance negatives liability on the part of defendant.[68]

§ 3136. Negativing Contributory Negligence.—A complaint by a passenger against a railroad company for damages for wrongfully ejecting him from the train need not allege that, at the time of his expulsion, he was complying with all the reasonable rules of the company, nor that he was not about to violate any such rule.[69] Nor need the complaint in an action for the unlawful and forcible ejection of a passenger allege that plaintiff was without fault,[70] and the allegations as to compulsion may be sufficient to overcome a failure to negative contributory negligence charged in jumping from a moving vehicle.[71]

§§ 3137-3138. Pleading Damages—§ 3137. In General.—Allegations as to Damages in General.—Where the facts alleged are sufficient to entitle the complainant to nominal damages, the complaint is good as against a demurrer on the ground that no damages are alleged.[72]

Compensatory Damages.—Where there is an allegation not only of negligence in carrying plaintiff past his destination, but also of negligence in leaving the enbankment, compensatory damages are in issue.[73]

Elements of Damage.—Where, in an action against a carrier for ejecting plaintiff from its car, a count alleged that as a proximate consequence of the ejection the plaintiff was wrenched and made sick and sore, the allegations of damages were sufficient as against demurrer.[74]

Special Damages.—Special damages whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge and come prepared to meet it.[75] But in some cases of tort it is held that such damages need not be specifically alleged.[76] Special damage as contradistinguished from general damage is that which is the natural,

68. Negativing liability.—Seaboard Air Line Railway *v.* Smith, 59 S. E. 199, 3 Ga. App. 1.

69. Allegation as to compliance with rules.—South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

70. Action for forcible ejection.—Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890; Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

71. Allegations curing defect.—A declaration against a railroad company for personal injuries alleged that plaintiff had a ticket over defendant's road, and boarded a freight train, which did not carry passengers, in the belief that the ticket was good on such train; that the conductor refused to stop the train, and ordered him to get off while it was running at a high rate of speed; and that the conductor, in violent language, threatened to eject plaintiff from the train if he did not obey the order, and had force at his command to execute such threats; and that upon belief that resistance would result in greater injury than leaving the train, he jumped off and was injured. The court held, that there was sufficient allegation of compulsion to excuse plaintiff from the charge of contributory negligence in jumping off. Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777.

72. Allegation of nominal damages.—Where a declaration alleges that the defendant railroad company sold the plaintiff a 1,000-mile ticket, and through its negligence failed to place his right name thereon, and its conductor refused to receive such ticket, and that the plaintiff exercised due care, it is error to sustain a demurrer for the reason that no damages are alleged, since the facts alleged are sufficient to entitle the plaintiff to nominal damages. Holden *v.* Rutland R. Co., 47 Atl. 403, 72 Vt. 156, 82 Am. St. Rep. 926.

73. Compensatory damages.—Denver, etc., Trans. Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. 1106.

74. Allegation as to damages.—Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 46 So. 747.

75. Special damages.—Roberts *v.* Graham (U. S.), 6 Wall. 578, 18 L. Ed. 791.

76. Specific allegation necessary.—In an action of tort against a common carrier for taking plaintiff beyond his destination, and compelling him to walk back, the declaration need not specifically allege special damages in order to entitle plaintiff to recover for them. Alabama, etc., R. Co. *v.* Hanes, 69 Miss. 160, 13 So. 246.

but not the necessary, consequence of the act complained of.[77] In an action for ejection and for assault and battery, the usual rule applies that in case of damages not necessarily resulting from the act complained of, and which are consequently not implied by law, the petition must state the particular damages sustained by the plaintiff in order to authorize the introduction of testimony in regard thereto.[78] Thus, he must plead arrest and imprisonment made subsequent to the ejectment, and at the instance of the servants of the carrier.[79] So he must plead mental suffering caused by circumstances within the carrier's knowledge.[80] The facts alleged may be sufficient in such a case without expressly averring such anguish.[81] Sickness resulting from disappointment, etc., must be specially pleaded in an action based on simple negligence, as it does not usually proximately result therefrom.[82] Where the complaint in an action against a carrier is based on its failure to stop its train to permit a passenger to alight at his destination, and not on any abusive and humiliating language of the conductor, the exclusion of the language of the conductor as an independent act of damages is proper.[83] And a declaration in an action against a railway company for an assault committed by a conductor in ejecting plaintiff from a train for his refusal to pay fare, which alleges the assault and the resulting physical injuries, does not authorize a recovery for negligence of the conductor in failing to discover plaintiff's mental derangement.[84] In a suit against a common carrier for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage.[85]

77. Roberts *v.* Graham (U. S.), 6 Wall. 578, 18 L. Ed. 791.

78. Gulf, etc., R. Co. *v.* Adams, 3 Texas App. Civ. Cas., § 422, citing Texas, etc., R. Co. *v.* Curry, 64 Tex. 85.

79. Subsequent arrest, etc.—In an action for assault and battery, and ejectment from defendant's cars, plaintiff can not recover damages, for an arrest and imprisonment, made subsequent to such ejectment, at the instance of the conductor, where he did not allege the arrest and imprisonment as a ground of damages. Gulf, etc., R. Co. *v.* Adams, 3 Texas App. Civ. Cas., § 422.

80. Mental suffering.—An allegation in a complaint that plaintiff was expelled from defendant's train, that he experienced great fatigue and distress in finding his way back, and that by reason thereof and the ejection from the train he suffered great pain of mind and body, will not admit proof of the sickness of plaintiff's child, to which he was going, and plaintiff's consequent mental suffering, but such fact must be distinctly pleaded. Gulf, etc., R. Co. *v.* Hurley, 74 Tex. 593, 12 S. W. 226.

81. Facts sufficient.—Where, in an action for damages for defendant's failure to stop a train at a flag station to accept plaintiff as a passenger, plaintiff alleged that the purpose of the trip was to reach the parents of the mother of his grandchild, who was dangerously ill; that, by reason of defendant's failure to stop, plaintiff's trip was ineffective; that the child died during plaintiff's absence; and that defendant, through its employee, had knowledge of the purpose of plaintiff's trip, his relationship to the child, its severe illness, etc.—the petition alleged sufficient facts to entitle plaintiff to recover for mental anguish. International, etc., R. Co. *v.* Sammon, 79 S. W. 854, 35 Tex. Civ. App. 96.

Where plaintiff in an action against a railroad company for failing to stop its train at a flag station alleged that he was insulted, greatly annoyed, and suffered much pain and inconvenience, he may testify as to mental distress and worry suffered by him. Milhous *v.* Southern Railway, 57 S. E. 474, 76 S. C. 492.

82. Sickness, being not usually a proximate result of disappointment by reason of a carrier's neglect to stop its train for a waiting passenger, must be averred as special damages in an action founded merely on the negligence, and not on a willful omission of the carrier to stop. Illinois Cent. R. Co. *v* Siddons, 53 Ill. App. 607.

83. Abusive language.—Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236.

84. Mental derangement.—Lindsay *v.* Wabash R. Co., 104 N. W. 656, 141 Mich. 204.

85. Allegation of special damages.—Roberts *v.* Graham (U. S.), 6 Wall. 578, 18 L. Ed. 791.

In a suit for damages by a passenger against a steamboat owner, under an allegation in the declaration that, by reason of the steamer being overloaded with passengers, the plaintiff and his family "were subjected to great inconvenience and injury," the plaintiff may give in evidence his sickness caused by the want of sufficient bedclothing. Roberts *v.* Graham (U. S.), 6 Wall. 578, 18 L. Ed. 791.

Nature of Employment—Earning Capacity.—In an action against a railroad for injuries to plaintiff as passenger, petition alleging nature of his business, his customary earnings and effect of injury on earning capacity, need not state by whom he was employed nor more specifically the character of employment.[86]

Failure to Consummate Business Transaction.—Where, in an action for breach of a contract of carriage, plaintiff claimed special damage on the ground that because of his failure to reach a certain town at the time he would have reached it, had defendant performed its duty, he had failed to consummate a deal by which he would have realized a large profit, failure to name the parties with whom the deal was to be made rendered the petition defective.[87]

Pleading Notice to Carrier.—A complaint in an action by a passenger for the failure of the carrier to stop the train at the station of his destination, which alleges that the passenger gave the ticket collector money and told him to stop the train at the station, and permit him to alight to attend to his business there, is sufficient to permit testimony of notice to the carrier of the passenger's business engagement.[88]

§ 3138. Punitive Damages.—The rule is that punitive damages need not be demanded eo nomine, still the facts showing a right to recover such damages must be set out in the declaration or complaint.[89]

Averment to Authorize Award of Exemplary Damages.—In an action against a railroad for physical injuries, the petition need not state that the negligence was gross, to authorize the giving of exemplary damages. The averment that the train was "so negligently and carelessly" run and managed as to cause injury complained of is sufficient to warrant the exercise of such power by the jury.[90]

§ 3139. Plea or Answer.—A plea or answer which does not deny the allegations of the complaint, or set up a defense to the same or confess them and set up matter in avoidance, is subject to demurrer,[91] and an answer which

86. Nature of employment—Earning capacity, etc.—Campbell *v.* Fisher (Tex. Civ. App.), 24 S. W. 661, affirmed in 93 Tex. 701, no op.

87. Failure to consummate business transaction.—Townsend *v.* Texas, etc., R. Co., 88 S. W. 302, 40 Tex. Civ. App. 71.

88. Pleading notice to carrier.—Martin *v.* Southern Railway, 71 S. E. 236, 89 S. C. 32.

89. Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606; Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931.

Under the rule that, though punitive damages need not be demanded in name in the declaration, facts showing a right to recover such damages must be pleaded, a declaration for injuries to a passenger alleging gross insults by the motorman and conductor of defendant's car, culminating in assault on plaintiff by another of defendant's servants, failing to allege that such wrongful acts were either participated in, authorized, or ratified by defendant company, was insufficient to authorize a recovery of punitive damages. Norfolk, etc., Tract. Co. *v.* Miller, 174 Fed. 607, 98 C. C. A. 453.

Where, in an action against a railway company for carrying plaintiff beyond his destination, the only damages alleged were the incurring by plaintiff of an hotel bill, and payment of fare to return to his place of original destination, punitive damages can not be recovered. Carter *v.* Illinois Cent. R. Co., 17 Ky. L. Rep. 1352, 34 S. W. 907.

90. Averments necessary to recover exemplary damages.—A plaintiff alleging that he was a passenger on a train on a dark night, and that a stoppage was negligently effected by the conductor over a deep culvert, into which he fell and was injured, may recover exemplary damages without alleging that the conductor was grossly negligent. Cincinnati, etc., R. Co. *v.* Sleeper, 5 O. Dec. 196.

91. Plea or answer demurrable.—An answer to a complaint by a passenger against a common carrier for injuries caused by the negligent discharge of a pistol by the car porter, which alleges merely that the porter received the pistol from another passenger, in violation of the company's rules and directions to receive no package, baggage, or article of luggage from passengers, is demurrable. Heenrich *v.* Pullman Palace Car Co., 20 Fed. 100.

Plaintiff alleged that defendant railway company was accustomed to carry pas-

fails to make particular averments of facts necessary to render a defense complete and effective is demurrable. Thus, where a rule of the carrier is set up as a defense, the plea should negative the disuse or waiver of such rule.[92] So where the defendant pleads justification in ejecting a passenger, he must set forth the circumstances on which the justification is based, and such as will raise the issue of using no more force than was necessary.[93] As to what constitutes a defense in personal injury cases, see ante, "Rights, Duties and Liabilities of Carrier during Transportation," chapter 23.

Denial of Liability as Carrier.—A plea or answer which denies liability as a carrier of passengers or which avers that the defendant is not a carrier of passengers is sufficient,[94] as against a complaint alleging simple negli-

sengers on a certain freight train; that he purchased a ticket to ride thereon, and was assured by the ticket agent that he could ride thereon; and that he was wrongfully ejected by the conductor. Defendant pleaded that the coach on which plaintiff attempted to ride was being transported in connection with a freight train, but not for the transportation of passengers; that defendant's rules prohibited the carrying of passengers on such train; that the conductor had no knowledge of the alleged statements of the ticket agent; and that the ticket was unlimited, and could be used on any passenger train. Held, that such pleas did not deny the allegations of the complaint, nor were they good as pleas in confession and avoidance, and a demurrer thereto was properly sustained. Nashville, etc., R. Co. *v.* Bates, 32 So. 589, 133 Ala. 447.

A plea setting up in substance merely that the conductor at the time he was ejecting the passenger was acting as a police officer of the state was insufficient. Moore *v.* Nashville, etc., Railway, 34 So. 617, 137 Ala. 495.

Plea failing to allege fault of plaintiff.—A plea in an action for breach of contract to carry plaintiff and companions in an automobile from one place to another and return, which alleges that, after the breaking down of the automobile, plaintiff left the disabled car, and could not be found when defendant reached the car with another automobile, but which fails to aver that plaintiff was at fault in leaving the broken-down car before another car came, or that defendant exercised proper care in sending relief after notice, is bad on demurrer. Taxicab Co. *v.* Grant, 3 Ala. App. 393, 57 So. 141.

Sufficiency of plea to raise issue.—In an action against a street railroad company for ejection of a passenger, defendant's plea alleged that plaintiff tendered to the conductor a coin, as a fare, so worn that the conductor could not tell whether it had originally been a coin of the United States government or not, and that, when the conductor declined to receive the coin, plaintiff declined to pay his fare with any other money, and was ejected. Held that, irrespective of whether the plea was a good defense, it put in issue the condition of the coin. Mobile St. R. Co. *v.* Watters, 33 So. 42, 136 Ala. 227.

92. Omission of essential averments.—In an action against a railroad company by a passenger to recover damages for the plaintiff's alleged wrongful ejection from a train of the defendant, where the complaint alleges that the plaintiff offered the conductor an "unlimited ticket," which plaintiff had bought from the defendant's agent, and that the conductor refused to receive said ticket, and then wrongfully and rudely ejected plaintiff, pleas of the defendant which aver that, at the time the ticket was purchased by the plaintiff and presented to the conductor, the defendant had a rule that such ticket should be good for a continuous passage, beginning on the day of sale, which rule was known to plaintiff, and, further, that notice of such rule was indorsed upon said ticket, but which did not negative the disuse or waiver of the rule by the defendant in the sale of the ticket alleged in the complaint to have been unlimited, present an insufficient answer to the complaint, and are subject to demurrer for failing to negative such disuse or waiver. Louisville, etc., R. Co. *v.* Bizzell, 30 So. 777, 131 Ala. 429.

93. Plea of justification.—Moore *v.* Nashville, etc., Railway, 137 Ala. 495, 34 So. 617.

Where the complaint alleged as assault by kicking and striking the plaintiff, and then throwing him to the ground from a swiftly-moving car, a plea in justification, alleging that he was a trespasser stealing a ride, and was ejected by the use of only necessary force, is demurrable, unless it sets forth circumstances showing that defendant's acts were reasonably necessary. Wright *v.* Union R. Co., 45 Atl. 548, 21 R. I. 554.

94. In an action against a company owning a tug boat, where the petition alleges that defendant was a common carrier of passengers, and that the child of plaintiffs was killed while a passenger on the boat, an answer averring that the boat was not a passenger boat, and that the employees of the company were for-

gence.[95]

Impertinent Matter.—Matter set up by plea which is of no pertinency to the allegations of the complaint and which is not induced by other allegations of defense should be stricken out.[96]

Effect of Answer as Admission of Status of Carrier.—See post, "As to Relation of Carrier and Passenger," § 3165.

General Issue—General Denial.—In an action to recover for personal injuries to a passenger by alleged negligence of defendant railroad, special pleas that the injury complained of was caused entirely by the fault, negligence, and carelessness of plaintiff, and by no carelessness, negligence, or fault on the part of defendant, simply amount to the general issue.[97] Where the complaint alleges a contract to transport plaintiff between certain places, an answer which admits the sale of the tickets which entitled plaintiff to such transportation, and denies that defendants violated the contract, and further denies all other allegations in the complaint, amounts to a general denial; and under it evidence is admissible to show that the failure of defendant to proceed beyond a certain point was caused by the refusal of a connecting line to send forward a train on account of a riot.[98]

Defense of Justification.—The rule seems to be that the defense of justification is not open under a general denial,[99] but such a defense should be set by plea in avoidance.[1]

bidden to carry any one as a passenger, is sufficient. Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

95. Complaint alleging simple negligence.—Where a complaint for causing the death of a passenger does not charge that the defendant was a common carrier, but only that it operated a train on a railway, and that decedent was being carried by defendant as a passenger, pleas alleging that the deceased voluntarily, without invitation, and without compensation to the defendant, boarded the car on which he was riding show a complete defense to counts of the complaint, based on simple negligence. Lawrence *v.* Kaul Lumber Co., 171 Ala. 300, 55 So. 111.

In pleas alleging that decedent, without invitation from defendant, boarded the car on which he was riding, the word "invitation" is a term of considerable breadth, including not only express invitation, but the invitation that may be implied from custom, usage, or conduct on the part of the carrier, or of its servants, if notorious or actually known to the carrier or its alter ego. Lawrence *v.* Kaul Lumber Co., 171 Ala. 300, 55 So. 111.

96. Impertinent matter.—In an action for personal injuries to passenger, a plea that the car was equipped with bell and cord attached so that passengers could notify the motorman when they wished the car stopped should be stricken out, in the absence of an averment that the passenger did not pull the cord or ring the bell. Armstrong *v.* Montgomery St. R. Co., 26 So. 349, 123 Ala. 233.

97. General issue.—Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; Southern R. Co. *v.* Lynn, 128 Ala. 297, 29 So. 573.

98. Answer amounting to general denial.—Simms *v.* Pullman, etc., Car Co., Fed. Cas. No. 12,869a.

99. Defense of justification.—Snow *v.* Chatfield (Mass.), 11 Gray 12; Levi *v.* Brooks, 121 Mass. 501; Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667; Hathaway *v.* Hatchard, 160 Mass. 296, 35 N. E. 857; Lambert *v.* Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; Dixon *v.* New England Railroad, 179 Mass. 242, 60 N. E. 581.

1. Southern R. Co. *v.* Lynn, 128 Ala. 297, 29 So. 573.

Where, in an action for an assault on a passenger by a street car conductor, defendant intended to rely on a defense that plaintiff was rightfully ejected with no more force than was necessary, such defense should be pleaded in avoidance, and was not available under an answer which, after denying that the assault was committed while plaintiff was a passenger, alleged that, if an assault was committed, the conductor was not acting within the scope of his employment, or, if so, the force used was not excessive, but justifiable in self-defense to repel an attack by plaintiff. Jackson *v.* Old Colony St. R. Co., 92 N. E. 725, 206 Mass. 477, 30 L. R. A., N. S., 1046, 19 Am. & Eng. Ann. Cas. 615.

In an action against a railroad company by a passenger to recover damages for being wrongfully ejected from defendant's train, where the only pleas interposed were the general issue and a special plea setting up that the defendant was ejected on account of boisterous conduct, and the evidence showed that the plaintiff had paid his fare, and that

Special Plea of Matter of Defense.—In an action for personal injuries to plaintiff while traveling as a passenger on defendant's road, unless the facts alleged in plaintiff's complaint are of such a character as to show that he assumed the risk, or that the liability of defendant was limited by some special contract defendant, if it relies upon such an agreement or contract, must specially plead it as a defense.[2]

Pleading Rules and Regulations.—Where, in an action for personal injuries sustained by a passenger, the carrier desires to avail itself of its rules and regulations relating to passengers and a violation thereof by the passenger, the same must be pleaded.[3] Where a violation of a carrier's rule is relied on as a defense to an action for ejection of a passenger, the rule must be brought forward by special plea.[4] The plea is sufficient if it alleges the existing of the rule at the time of the injury, and a violation thereof by the person injured, to which the injury is proximately attributed.[5] In an action against a carrier for wrongful ejection of a passenger, a plea attempting to justify the ejection by alleging that plaintiff changed cars during the journey and refused to pay a second fare, after changing, was insufficient on demurrer where it failed to show a rule of defendant requiring collection of a second fare in such cases.[6] But a plea alleging a rule prohibiting passengers from riding on different cars of the same train without paying fare on each car was not objectionable for failure to show that reasonable accommodations were furnished plaintiff on the car on which he paid his fare; the carrier's failure to do so, if any, being matter for replication.[7]

Plea of Contributory Negligence—Necessity for Plea.—If contributory negligence be relied on as a defense, it must be pleaded unless it appears from the pleading of the plaintiff.[8]

in order for the plaintiff to reach his destination it was necessary for him to change cars from the main line to the branch line, all question as to the duty of plaintiff, after having paid his fare from the place where he boarded the defendant's train on the main line to his destination to the conductor of the train on the main line, to obtain a check or other evidence of such payment from the conductor, is foreign to the issues presented in the pleadings, and evidence in reference thereto is inadmissible; and written charges requested by the defendant predicated upon the theory that it was plaintiff's duty to have gotten such check, or other evidence of payment, are properly refused. Such facts, to be available as a defense, should be presented under a proper plea. Southern R. Co. *v.* Lynn, 29 So. 573, 128 Ala. 297.

In an action for damages for wrongful ejection from defendant's train while a passenger thereon, the plaintiff alleged that he was willing to pay the proper fare, and was wrongfully put off without being allowed to pay it. The answer simply denied the wrongful ejection. Held, that evidence that plaintiff was drunk at the time of his ejection was not admissible in justification. Raynor *v.* Wilmington, etc., R. Co., 39 S. E. 821, 129 N. C. 195.

2. Special plea of matter of defense.—Pittsburgh, etc., R. Co. *v.* Higgs, 76 N. E. 299, 165 Ind. 694, 4 L. R. A., N. S., 1081.

When, in an action against a street railway company for damages for an injury to a passenger, an agreement by the plaintiff to take the risk is relied upon as a defense, it must be specially pleaded. Citizens' St. R. Co. *v.* Twiname, 111 Ind. 587, 13 N. E. 55.

3. Pleading rules and regulations.—Lane *v.* Choctaw, etc., R. Co. (Okla.), 91 Pac. 883.

4. Rule matter for special plea.—Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 44 So. 960, 13 L. R. A., N. S., 445.

5. Allegations as to promulgation of rules of carrier.—Missouri, etc., R. Co. *v.* Avis, 100 Tex. 33, 93 S. W. 424.

6. Pleading rule of company.—Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 46 So. 747.

7. Matter proper for replication.—Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 44 So. 960, 13 L. R. A., N. S., 445.

8. Necessity for pleading contributory negligence of passenger.—Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731; Missouri, etc., R. Co. *v.* Foster (Tex. Civ. App.), 87 S. W. 879, affirmed in 101 Tex. 649, no op.

The defense of contributory negligence not having been pleaded by defendant, and not being developed by plaintiff's case is not available. St. Louis, etc., R. Co. *v.* Gammage (Tex. Civ. App.), 96 S. W. 645, affirmed in 101 Tex. 655, no op.

Sufficiency.—A plea setting up contributory negligence as a defense is not subject to demurrer for not responding to the complaint, unless the complaint alleges wantonness and wilfulness.[9] A plea which fails to show that any negligence of plaintiff proximately contributed to the breaking down of the car, and which shows that the results were attributable to the act of defendant, is bad on demurrer.[10] Where the complaint avers that the plaintiff was ejected without fault or negligence on his part, this question is put in issue by a denial thereof in the answer.[11]

Plea of Non Est Factum.—See post, "Matters to Be Proven," § 3149.

§ 3140. Replication.—In an action for wrongful ejection a replication which confesses the facts set up by the plea in defense and seeks to avoid that defense by setting up certain other facts, to be sufficient must set up facts legally sufficient to show that the ejection was actionable in spite of the facts set up by plea.[12]

Failure to Reply.—The plaintiff, it seems, should reply to all affirmative averments in defense or justification; otherwise, he will be held to have admitted them.[13] In an action against a railroad for injuries resulting from plain-

9. Where a count in a complaint in an action for injuries to a passenger charged simple negligence, it was error to sustain demurrers to pleas setting up contributory negligence as an answer to the count, on the ground that the pleas were interposed to a count for willfulness or wantonness. Birmingham R., etc., Co. *v.* Wright, 153 Ala. 90, 44 So. 1037.

10. Plea insufficient.—Taxicab Co. *v.* Grant, 3 Ala. App. 393, 57 So. 141.

11. Answer denying allegations raises issues.—Where plaintiff alleged that he was ejected from defendant's street car without any fault on his part, which was denied by the answer, it was error to exclude evidence that complaint was made to the conductor by a passenger in the car as to the language plaintiff used before ejection, on the ground that the only defense pleaded was that plaintiff was not a passenger by reason of his failure to pay fare. Bough *v.* Metropolitan St. R. Co., 81 N. Y. S. 771, 82 App. Div. 215, 13 N. Y. Ann. Cas. 56. See Bogardus *v.* Metropolitan St. R. Co., 70 N. Y. S. 1094, 62 App. Div. 376.

12. Where, in an action by a passenger for ejection from a train, the defendant's plea averred that, when the conductor demanded of plaintiff his ticket or fare, plaintiff refused and willfully failed to present or tender any ticket or fare and the conductor thereupon ejected him, plaintiff's replication alleging that, when the conductor demanded his ticket or fare, he had misplaced his ticket in his clothing, and the conductor ejected him without giving him a reasonable time within which to produce the ticket, was insufficient. Louisville, etc., R. Co. *v.* Mason, 4 Ala. App. 353, 58 So. 963.

In an action for assault in removing plaintiff from the station house of a railroad company, where the defendant pleaded the refusal of plaintiff to leave on request, the replication must state that the plaintiff was in the station house intending to take the train, which was expected soon to leave, but it is not necessary that it should state that plaintiff had such intention at the time he entered the station. Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

Plaintiff claimed damages for wrongful ejection from defendant's cars. Defendant pleaded that plaintiff had offered an excursion ticket good only on another day passed. Plaintiff replied that defendant often carried plaintiff, holding such ticket, on days other than the day of issue. He also alleged that he showed such excursion ticket to one of defendant's servants, who suffered and allowed plaintiff to enter the car. Held, that the replication was demurrable in setting up two answers to the plea, and failing to allege that the license was for a consideration, or was given by an authorized agent. McElroy *v.* Railroad Co. (Pa.), 7 Phila. 206.

13. Where the answer to a petition alleging an assault and battery on plaintiff by the agents of a railroad company for ejecting him from a train of its cars for refusing to pay his fare otherwise than by an expired ticket admits the assault and battery, and justifies it, such answer must be replied to, before plaintiff can be permitted to prove that excessive force was used in ejecting him, where such answer avers that there was not. Powell *v.* Pittsburg, etc., R. Co., 5 O. Dec. 89, 2 Am. L. Rep. 403.

Where the defendant, by its answer to a petition alleging an assault and battery upon plaintiff by the agents of a railroad company, for ejecting him from a train of its cars for refusing to pay his fare otherwise than by an expired ticket, admits the assault and battery, but justifies it on the ground that the plaintiff refused to pay his fare otherwise than by the offer of such ticket, and that no more

tiff being kicked off the train by the brakeman, an allegation in the answer that plaintiff swung himself off the train is not an affirmative averment requiring a reply, being merely in emphasis of the denial that he was kicked off.[14]

Pleading Waiver of Matter Set Up by Plea in Defenses.—See ante, "Unauthorized and Wrongful Ejectment," § 3131.

§ 3141. Special Demurrer, Exceptions or Motion.—A special demurrer is very valuable to a party, where his opponent has put loose and indefinite allegations in his pleadings.[15] Such a demurrer is frequently helpful to the court itself in that it is available to compel the pleader to set out his case with such fullness as to disclose whether he really has the right that he has asserted in general terms.[16]

Motion to Make More Specific.—Where it is desired that the complaint be made more specific in the averments as to particulars of the negligence, the carrier should make a motion to that effect.[17]

Striking Foreign and Irrelevant Matter.—Allegations of matter which is foreign and irrelevant to the cause of action made should be stricken on motion or special demurrer. Thus, where the cause is for a trespass in using

force, was used than was necessary to eject him from the cars, the only issue presented for trial is the legal construction and effect of such ticket. Powell *v.* Pittsburg, etc., R. Co., 5 O. Dec. 89, 2 Am. L. Rep. 403.

14. Failure to reply.—Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72.

15. An allegation in a petition for injuries to plaintiff while alighting from defendant's train that his fall was due wholly to defendant's negligence is subject to special demurrer in failing to allege wherein the negligence of defendant consisted. Charleston, etc., R. Co. *v.* Boyd, 62 S. E. 714, 5 Ga. App. 137.

In an action for injuries to a passenger when alighting from a train, the petition is subject to special demurrer where it fails to aver how far the train was from the station when plaintiff went out on the platform to alight. Charleston, etc., R. Co. *v.* Boyd, 62 S. E. 714, 5 Ga. App. 137.

The petition failing to show whether the plaintiff was a passenger upon a freight or passenger train, the defendant was entitled, upon special demurrer to this portion of the petition, to have information in regard to that particular feature of the case. An allegation that "the attention of the agent of the company was called to the condition of the car, and requests made to have the same heated," was open to special demurrer on the ground that this allegation "fails to show what agent of the company had his attention called to the condition of the car, and whether said agent was connected with the operation of the train or had anything to do therewith." The defendant was entitled to more specific information than was contained in the allegation quoted; and the plaintiff should have shown, in the event she could not be more specific, whether or not the agent referred to was in any way connected with the operation of the train. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

16. Charleston, etc., R. Co. *v.* Boyd, 5 Ga. App. 137, 62 S. E. 714.

17. Lake Erie, etc., R. Co. *v.* Beals, 50 Ind. App. 450, 98 N. E. 453; South Chicago City R. Co. *v.* Zerler, 31 Ind. App. 488, 65 N. E. 599; Southern R. Co. *v.* Roach, 38 Ind. App. 211, 78 N. E. 201.

In an action for damages for injury to the person, the complaint averred that the defendant, a railroad company, did not use due care, diligence, and skill in carrying the plaintiff; but, on the contrary, the track of the railroad was in bad condition and repair, and the defendant by its servants, etc., negligently, unskillfully, and carelessly ran its train of cars, whereby, etc. Held that, if defendant desired a more particular description of the condition of the track, a motion to make the averment more specific should have been made. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

In an action against a carrier for injury to plaintiff while a passenger, where the petition charged that after plaintiff had paid his fare the "car proceeded to a point near the new city hospital, where it was stopped by a blockade, and plaintiff, with other fellow passengers, was transferred to" another line operated by defendant, and that after plaintiff had entered the car on that line, "and was lawfully on the car, the conductor in charge assaulted him," it was error to deny defendant's motion to make the petition more specific as to the manner in which the transfer to the second car was effected, and the facts under which he claimed to be lawfully on the car. Ruebsam *v.* St. Louis Trans. Co., 83 S. W. 984, 108 Mo. App. 437.

unnecessary force in ejecting a passenger, allegation as to the purchase, etc., of a ticket, the station agent's conduct and statements, etc., is foreign.[18] But if the allegation is germane to the cause as stated, a special demurrer will not lie.[19]

§ 3142. Amendment.—It is a familiar and well-settled rule that the declaration or complaint will not be permitted to be amended in such a way as to set up a new cause and different cause of action.[20] Where it was alleged that plaintiff was injured through a wreck caused by defendant's negligence in running its train, and that the train was wrecked by the giving way of a bridge, an amended petition which makes no change in the allegations except that the defect was in the approach to the bridge, instead of the bridge itself, does not state a new cause of action.[21]

Amendment Setting Forth Fuller Statement.—It being apparent from the original declaration that the cause of action was the expulsion of a passenger from the cars because he refused to pay an alleged overcharge, consisting of the difference between the ticket rate and the conductor's rate, an amendment showing more fully why a ticket was not, and could not be, procured was allowable; and, the explanation being that there was no agent at the station to furnish a ticket, the declaration as amended was sufficient.[22] And in an action against a carrier for an assault committed by the conductor upon a person seeking to secure passage upon the carrier's train where the action is ex delicto, amendments describing the tort more accurately should be allowed.[23]

Connecting Negligence and Injury.—In an action against a street railway company for injuries to a passenger by a jerk of a car, an amendment alleging that the jerk was caused by defendant's servants and agents in charge of the

18. In such a case, a count of the complaint containing the allegations as above set out, relating to the purchase of the ticket and the conditions contained therein, and the efforts to have same signed, dated, and stamped, and the refusal of the defendant's station agent to sign, date, and stamp said ticket, and his statement that the ticket was all right, and she could use it for return passage, then averred that after being so instructed by defendant's agent she boarded one of the defendant's trains as a passenger, and without any knowledge that she had no right to ride on said train by the use of said ticket, and while on said train, without any resistance on her part, she was rudely and forcibly ejected by defendant's conductor from said train, and "that said force and violence upon the part of said conductor was unnecessary to eject her from said train; that she had offered no resistance to his demands for her to leave the train, but had only besought him to allow her to remain; * * * that, notwithstanding all this, the said conductor wantonly, willfully, or intentionally forcibly ejected the plaintiff as aforesaid," causing the injuries complained of. Held, that said count states a cause of action in trespass, and claims a recovery for damages for the alleged excessive force used by the conductor in ejecting plaintiff from the train; and that, therefore, all of the averments in said count as to plaintiff presenting the ticket to the defendant's station agent, and the latter's statement and conduct in that connection, are foreign to the trespass sued on, and should, upon defendant's motion, have been stricken from said count. McGhee *v.* Reynolds, 29 So. 961, 129 Ala. 540.

19. A special demurrer will not lie to a paragraph of the petition which sets forth the means adopted by the plaintiff to mitigate his suffering, it being competent for him to allege and prove that he resorted to the expedients in his power to avoid or lessen the injuries resulting from the alleged negligence of the defendant. Atlantic, etc., R. Co. *v.* Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A., N. S., 769, 9 Am. & Eng. Ann. Cas. 553.

Allegation held proper as explaining plaintiff's act.—Missouri Pac. R. Co. *v.* Callahan (Tex.), 12 S. W. 833.

20. Amendment of petition or complaint—New cause not stated.—Missouri Pac. R. Co. *v.* Foreman (Tex. Civ. App.), 46 S. W. 834, affirmed in 93 Tex. 647, no op.; Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

21. Mexican Cent. R. Co. *v.* Mitten, 13 Tex. Civ. App. 653, 36 S. W. 282.

22. Explanatory amendments.—Georgia R., etc., Co. *v.* Murden, 83 Ga. 753, 10 S. E. 364.

23. Describing tort more accurately.—Turner *v.* Western, etc., Railroad, 69 Ga. 827.

car was not objectionable as not connecting defendant with the negligence.[24]

Amendment Claiming Exemplary Damages.—In an action for injuries to a passenger, it is not error to allow an amendment claiming exemplary damages in which it is alleged that the act complained of amounted to wilful misconduct, or that the entire want of care raised the presumption of conscious indifference to consequence.[25]

Proving Particular Acts of Negligence Alleged in Original Petition.—Under an amended petition, pleading negligence generally, plaintiff may prove the particular acts of negligence alleged in the original petition; such amendment is not subject to demurrer on the ground that it introduces a new cause of action, barred by limitation, since it can not be assumed, in advance, that evidence will be introduced of negligence not originally alleged.[26]

§ 3143. Aider by Subsequent Pleadings and Cure of Error.—The declaration or complaint may in some cases be aided by the subsequent pleading. Thus, where the denial in the answer is so expressed as to show that the allegations of the complaint are construed by defendant to imply a charge of rudeness on the part of the conductor, which is therefore denied, the doctrine of aider by answer applies, and the right to recover punitive damages for the rudeness, if proved, is established.[27]

Cure of Error.—The failure to object to the insufficiency of a declaration or complaint for failure to state a cause of action does not, it seems, cure the insufficiency even after verdict and judgment,[28] but other objections to the complaint on the ground that it did not charge that defendant was a carrier of passengers, that there was no allegation that defendant owned the car, that it was not alleged that the car was a passenger car, or one used to carry passengers, so that it did not allege that the car was under the control of defendant, and that it did not appear that plaintiff paid or offered to pay any fare, were untenable, if it can not be said that there is a total absence of allegations of the existence of any of them.[29] Mere uncertainty and inadequacy of averment, such as might have been amended and cured upon motion seasonably made, will be deemed to have been waived in such a case.[30] Although the declaration does not set out the payment of any passage money, nor any promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger for certain rewards to the defendants, and thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed, and if the breach is well assigned, and the cause goes on to plea, issue, trial, and verdict, the defect in the declaration is cured.[31]

§§ 3144-3162. Issues, Proof and Variance—§§ 3144-3148. Issues —§ 3144. In General.—Nothing can be made a basis for recovery which is

24. **Connecting negligence and injury.**—Georgia R., etc., Co. *v.* Reeves, 51 S. E. 610, 123 Ga. 697.

25. **Amendment claiming exemplary damages.**—Southern R. Co. *v.* Jordan, 59 S. E. 802, 129 Ga. 665.

26. **Proving particular acts of negligence alleged in original bill.**—San Antonio Tract. Co. *v.* Williams, 34 Tex. Civ. App. 372, 78 S. W. 977, affirmed in 98 Tex. 631, no op.

27. **Aider by answer.**—Knowles *v.* Norfolk, etc., R. Co., 102 N. C. 59, 9 S. E. 7. See ante, "In General," § 3130.

28. Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978.

29. Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978.

30. South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396; Lengelsen *v.* McGregor, 162 Ind. 258, 67 N. E. 524, 70 N. E. 248; Indianapolis St. R. Co. *v.* Ray, 167 Ind. 236, 78 N. E. 978.

Defects cured by statute of jeofails.—Stockton *v.* Bishop (U. S.), 4 How. 155, 11 L. Ed. 918. Judiciary Acts of 1789, § 32.

31. In an action by a passenger against a carrier for unlawful ejection, the petition failed to allege that plaintiff had purchased a railroad ticket or offered to pay his fare, or that he went upon the train as a passenger. Held, that the defect was cured by a verdict for plaintiff, there being no demurrer to the petition. Cincinnati, etc., R. Co. *v.* Barkley, 13 Ky. L. Rep. 331.

not counted on in the pleading.[32]

Nature of Action.—Where a passenger's cause of action is not a tort, but a breach of the contract to carry, he can not show that he was ejected from the train with insult and abuse, or that the conductor was intoxicated.[33]

As Dependent on Allegation of Relation.—An allegation that the deceased, a shipper of stock, had the right to be carried with his stock to the stock yard, and that he was rightfully, and by the direction of defendant's servant's, upon the engine in transit to his destination, is broad enough to admit of any legimate proof tending to show the right of the deceased to be on the engine.[34]

As Dependent on Allegations of Negligence or Cause of Injury.—It is generally held that a general allegation of negligence, such as negligence in and about the carrying of the passenger, is sufficiently broad to cover the omission of any duty which the carrier owed to the passengers, whether in respect of the care necessary in the act of transportation,[35] the location and condition of the track and roadbed,[36] the management and control of the vehicle,[37] including speed, jerks, jolts, etc.,[38] the taking on or letting off the passenger,[39] the suitable

32. Basis of recovery.—Moore *v.* Nashville, etc., Railway, 137 Ala. 495, 34 So. 617; Richmond R., etc., Co. *v.* West, 100 Va. 184, 40 S. E. 643. See post, "Variance," §§ 3152-3162.

Where plaintiff alleges that in stepping off the end of a platform at a station he stepped into a deep ditch and on the edge of a drainage tile carelessly left exposed, whereby he was injured, he can not recover on evidence that defendant railroad company failed to properly light its platform or steps leading thereto. St. Louis, etc., R. Co. *v.* Elrod, 78 Kan. 868, 98 Pac. 215.

Where, in an action against a railroad company, plaintiff alleges that his damage was the result of specific acts of negligence, he can not recover for negligence outside such acts, since he must stand on the cause of action stated. Pierce *v.* Great Falls, etc., R. Co., 56 Pac. 867, 22 Mont. 445.

33. Nature of action.—Stone *v.* Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

34. Scope of allegation.—Lake Shore, etc., R. Co. *v.* Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

35. Issue as to care required.—In an action for injuries to a passenger by the premature starting of a street car as she was attempting to alight, an allegation that it then and there became and was the duty of the defendant to use due care that the plaintiff should be safely conveyed on her journey, was sufficient to present the question of defendant's negligence in not properly supervising the car and in looking after passengers at the point where plaintiff attempted to alight, to see whether any of them wanted to alight or not, and whether defendant's employees did everything that reasonable prudence required of them at the time, etc. Camden, etc., R. Co. *v.* Rice, 137 Fed. 326, 69 C. C. A. 656.

36. Ohio, etc., R. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16; Tate *v.* Wabash R. Co., 159 Mo. App. 475, 141 S. W. 459.

37. In an action against a street railway company for injuries to a passenger, under an allegation that defendant "so carelessly, negligently, and unskillfully managed and directed said car as to run said car upon and over the plaintiff," evidence of negligence in not stopping the car at a proper time is admissible. Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679.

Under a pleading alleging the negligence of a carrier generally, held, that proof was admissible to show that the train did not stop long enough to permit plaintiff to board the train. Indianapolis Southern R. Co. *v.* Wall (Ind. App.), 101 N. E. 680.

In an action for injuries received while a passenger on defendant's train, it was not necessary to plead a rule of the company requiring engineers to use extra precaution and run slowly after a heavy rain, in order to let in proof of such rule and its violation. Gulf, etc., R. Co. *v.* Bell, 58 S. W. 614, 24 Tex. Civ. App. 579.

38. Speed, etc.—Tate *v.* Wabash R. Co., 159 Mo. App. 475, 141 S. W. 459.

39. Taking on or letting off.—In an action for injury to a passenger while alighting from a street car, plaintiff's omission to plead that the car stopped at a regular station did not restrict proof to a stop at a point other than a regular stopping place. Murphy *v.* Metropolitan St. R. Co., 102 S. W. 64, 125 Mo. App. 269.

An averment that "plaintiff was engaged in or about boarding" the train when injured covers every reasonably necessary act of plaintiff in going up the steps, walking across the platform, entering the door, and going down the aisle to the nearest unoccupied seat, and taking a seat. Birmingham, etc., R. Co. *v.* Norris, 59 So. 66, 4 Ala. App. 363.

and safe means of carriage, vehicles, appliances,[40] roadway,[41] or the like, of the employment of competent, skillful and careful servants in the transportation,[42] or of the negligence of its servants in the performance of [43] or failure to perform [44] its duties as a carrier. Where the allegation is general in its nature, the doctrine of res ipsa loquitur is available.[45] Where the charge of negligence, in a complaint is general, as where it alleges that plaintiff's injuries were caused by defendant's negligent conduct of its business while carrying her as a passenger, proof of any actionable negligence of defendant or any of its employees in such respect is sufficient,[46] or if negligence is alleged in

40. Vehicle, appliances, etc.—Under the allegation of the complaint that defendant so negligently and unskillfully conducted itself in the management of its car that, through its negligence and that of its servants in guiding the car, plaintiff was injured, statements of the motorman are admissible that the brake rod was too long, so that, when the brake chain was wound around the brake staff to its full length, the rod did not take up all the slack, and therefore the brake did not press firmly against the wheels. Cogswell *v.* West, etc., R. Co., 5 Wash. 46, 31 Pac. 411.

41. In an action against a railroad company for personal injuries causing death, the complaint in the first count ascribed the accident to a loose wheel, and in the second alleged that defendant "did not use due and proper skill in and about the carrying of deceased, but so negligently and unskillfully conducted itself in that behalf, and in conducting, managing, and directing the coach and the engine by which deceased was carried, that she was cast, with violence," etc. Held, that if the accident was caused by a sunken joint in the track; plaintiff would not be prevented by his pleadings from a recovery. Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902.

Where the complaint only charges defendant railway company with negligently performing its duty to a passenger, whereby the car in which he was ran off the track and he was injured, evidence is admissible of defects in the track that may have caused the accident. Richmond, etc., R. Co. *v.* Vance, 93 Ala. 144, 9 So. 574, 30 Am. St. Rep. 41.

42. Under an allegation in the complaint that defendant negligently "conducted itself in and about the carrying" of deceased, it may be proved that defendant was negligent in the employment of the engineer, or in retaining him in its service. Kansas, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

Under an allegation that defendant railroad company negligently "conducted itself in and about the carrying" of a passenger, evidence of negligence in employing the engineer or in retaining him is admissible. Kansas, etc., R. Co. *v.* Sanders, 98 Ala. 293, 13 So. 57.

Under a general averment that "the injury complained of was the result of negligence or want of skill of defendant's employees in the management and running of a train," etc., evidence is admissible that defendant did not have on the train a sufficient number of brakemen and servants to control it. South, etc., R. Co. *v.* Thompson, 62 Ala. 494.

43. Includes negligence of servant.—In an action for injuries to a passenger, an allegation of negligence on the part of the carrier is sufficient to embrace the negligence of the carrier's servants. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

44. Failure to perform duty.—Under the declaration, in an action for injury from the starting of a passenger elevator, alleging that plaintiff was injured "by reason of the negligence of defendant and her servants in managing, operating and controlling said passenger elevator," absence of the elevator boy from the elevator, when his presence in it was required in properly managing, operating, and controlling it, may be relied on in making out defendant's negligence. Toohy *v.* McLean, 85 N. E. 578, 199 Mass. 466.

45. Allegations that defendant's servant in charge of the car in which plaintiff was a passenger negligently caused the car to be struck by and collide with a railroad engine were general in their nature, so that the doctrine of res ipsa loquitur was available. Nagel *v.* United R. Co., 152 S. W. 621, 169 Mo. App. 284.

46. General allegation of negligence.—Mobile, etc., R. Co. *v.* Barber, 2 Ala. App. 507, 56 So. 858.

Under a complaint for injury to a passenger, describing how she was injured, alleging negligence generally, she can show any actionable negligence as a carrier. Birmingham R., etc., Co. *v.* Jordan, 170 Ala. 530, 54 So. 280.

A complaint by a passenger alleged that his train was stopped on the main track, and was run into by a following freight train; that the employees in charge of the passenger train carelessly failed to give proper signals; that the employees in charge of the freight train failed to check the train as they might have done; "wherefore plaintiff further alleges that the defendant's employees and servants were guilty of negligence." Held sufficient to admit proof of negligence on the part of employees on both trains. Gulf, etc., R. Co. *v.* Brown, 40 S. W. 608, 16 Tex. Civ. App. 93.

general terms, relating to some particular duty in the carrying of the passengers, proof of special negligence is not necessary.[47] But if the complaint relies solely upon negligence in some particular, he can not recover for other or different causes or on the theory of res ipsa loquitur.[48] So if the allegation specifies the particular kind of negligence and avers the particulars of such negligence, the issue is so limited and the plaintiff's proof must correspond thereto,[49] even though his pleading also contain a general averment of negligence.[50] However, an allegation of negligence may be limited to negligence in a particular respect, such as in failing to provide safe means for an alighting passenger, etc., and yet be inclusive of various specific acts of negligence which relate to and are a part of the negligence alleged and which contribute one with another to constitute the whole transaction.[51] Such an allegation is sufficiently

47. Special negligence unnecessary.—Allegation, in action against a carrier for personal injuries, that "defendant carelessly and negligently operated said train in such manner that the train of cars left the track," is a general charge, under which plaintiff need prove no special negligence, but only show derailment and injury. Moore *v.* Missouri Pac. R. Co., 164 Mo. App. 34, 147 S. W. 488.

48. Particular negligence relied on.—Todd *v.* Missouri Pac. R. Co., 126 Mo. App. 684, 105 S. W. 671; Hansberger *v.* Sedalia Elect. R., etc., Co., 82 Mo. App. 566; Nies *v.* Brooklyn Heights R. Co., 74 N. Y. S. 41, 68 App. Div. 259; Christie *v.* Galveston City R. Co. (Tex. Civ. App.), 39 S. W. 638.

Where plaintiff charged that his injuries were caused solely by the sudden starting of defendant's car as he was about to board it, he was confined to that act of alleged negligence. File *v.* Wilmington City R. Co. (Del.), 80 Atl. 623.

In an action for injuries to a passenger on a street car, claimed to have been caused by the car's failure to stop long enough for the passenger to alight, the jury can not consider, on the question of negligence, the question whether the car was so constructed as would prevent the driver, who was the only employee, running the car, from properly attending to his duties. Lombard, etc., Pass. R. Co. *v.* Christian, 124 Pa. 114, 16 Atl. 628.

49. Lemay *v.* Springfield St. R. Co., 210 Mass. 63, 96 N. E. 79, 37 L. R. A., N. S., 43; Williams *v.* Chicago, etc., R. Co., 169 Mo. App. 468, 155 S. W. 64; Milligan *v.* Texas, etc., R. Co., 27 Tex. Civ. App. 600, 66 S. W. 896; Johnson *v.* Galveston, etc., R. Co., 27 Tex. Civ. App. 616, 66 S. W. 906.

In an action for injuries by reason of a street car collision, evidence that the motorman lost control of the colliding car by reason of the fact that a snap switch on the rear of the car was closed when it should have been open, was inadmissible under the declaration charging that the car was improperly equipped with a defective air brake. McAllister *v.* People's R. Co. (Del.), 54 Atl. 743, 4 Pen. 272.

In an action to recover for injuries to a passenger occasioned by the train's running against an animal and being thrown from the track, the only negligence alleged in the declaration was the careless running of the train. Held, that evidence as to the company's failure to fence the track or to use steam air brakes was inadmissible. Toledo, etc., R. Co. *v.* Foss, 88 Ill. 551.

A complaint setting forth as the negligence the act of the gripman of a street car in negligently operating the grip iron so as to cause the car to jerk with such force that it broke plaintiff's hold, and threw him on the street with great force, limits plaintiff to proof of the specific negligence averred. Bartley *v.* Metropolitan St. R. Co., 49 S. W. 840, 148 Mo. 124.

In an action for injuries to a passenger, where the petition contains a general allegation of negligence, and alleges specifically the failure of the defendant's employees to stop a train before beginning the descent of an incline where the accident occurred, in not providing suitable means nor exercising reasonable care in the use of those furnished, in the failure of the employees to be at their proper posts of duty, and in causing one train to follow another down the incline, there is no presumption of negligence from the accident, but the specific allegations must be proved. Roscoe *v.* Metropolitan St. R. Co., 101 S. W. 32, 202 Mo. 576.

50. General averment of negligence.—Though a complaint against two railroad companies for injuries to a passenger by a collision between their trains avers generally negligence in the operation of the trains, specific allegations of negligence in certain particulars confine the issue to such particular acts. Missouri, etc., R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167.

51. *Alabama.*—Louisville, etc., R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40.

Kentucky.—Ohio, etc., R. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16.

Michigan.—Dykstra *v.* Grand Rapids,

broad to cover any negligent act in the performance of that particular duty, which initiated a train of uninterrupted events resulting in the plaintiff's injury.[52] Thus, an allegation in the petition that "the car was negligently and

etc., R. Co., 130 N. W. 320, 165 Mich. 13.

Missouri.—Anderson *v.* Metropolitan St. R. Co., 159 Mo. App. 449, 141 S. W. 461.

Texas.—Judgment 49 S. W. 1106, affirmed in Houston, etc., R. Co. *v.* Summers, 92 Tex. 621, 51 S. W. 324.

A complaint in an action for injury to a passenger, thrown from the platform of a coach by the lurch of the train, which alleges negligence generally as to the manner in which the carrier conducted its business as such, is broad enough to cover negligence of the conductor in requiring the passenger to leave the coach and stand on the platform. Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

Under an allegation that the accident to a passenger was caused by the high rate of speed of a street car, he may prove that the fall was occasioned by a sudden jerk, accompanied by the high rate of speed. Samuels *v.* California St. Cable R. Co., 56 Pac. 1115, 124 Cal. 294.

Where plaintiff alleged that "the defendant, well knowing that it was dangerous to allow passengers to alight from a car on the side next to that from which another car was approaching, nevertheless took no steps to prevent passengers from alighting," evidence is admissible showing that defendant had placed no guards or other protection to prevent passengers from alighting on that side of its car next to a parallel track. Atlanta Consol. St. R. Co. *v.* Bates, 30 S. E. 41, 103 Ga. 333.

Where plaintiff alleged that, while alighting from defendant's train at a depot platform, he fell by reason of defendant's negligence in failing to provide him a safe means to alight, it being dark, and the steps of the car at a dangerous distance from the platform, plaintiff could prove the absence of a light or of any appliance defendant's trainmen were accustomed to provide for the use of passengers in alighting. Louisville, etc., R. Co. *v.* Mount, 101 S. W. 1182, 31 Ky. L. Rep. 210.

In an action for an injury to plaintiff while a passenger on defendant's train which was wrecked, where the petition alleged that the negligence consisted in keeping and maintaining an unsafe and dangerous roadbed and track, and in negligent operation of the train, such charges of negligence, though general, entitled plaintiff to show any specific negligence which made the track dangerous or anything which established a negligent operation of the train. Mefford *v.* Missouri, etc., R. Co., 97 S. W. 602, 121 Mo. App. 647.

Allegations, in an action against a carrier for injuries, that while plaintiff was lawfully riding on defendant's passenger train, which was in the exclusive charge of its agents and servants, the car was derailed and overturned "by the gross negligence, carelessness, and default of the defendant company's servants and employees," are sufficient to admit evidence that the accident resulted from the spreading of the track caused by defective ties. Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104.

52. Central, etc., R. Co. *v.* McKinney, 116 Ga. 13, 42 S. E. 229; Houston, etc., R. Co. *v.* Summers (Tex. Civ. App.), 49 S. W. 1106, affirmed in 92 Tex. 621, 51 S. W. 324.

Under an allegation that defendant maintained and operated a defective and unsafe elevator, it is competent to show that there were no safety catches on the elevator. Morris *v.* O'Brien, 81 Ill. App. 202.

In an action by a passenger against a railroad company to recover for injuries resulting from the breaking down of a bridge, it is competent to prove the rate of speed at which the train ran upon the bridge. Louisville, etc., R. Co. *v.* Pedigo, 108 Ind. 481, 8 N. E. 627.

In an action by a passenger for personal injuries, the petition alleged that the engineer negligently backed the engine against the caboose in which plaintiff was riding with such force that he was thrown against a desk and injured. Held, plaintiff could prove that the engineer failed to give warning by sounding the bell or whistle, though that specific negligence was not charged in the petition. Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

In an action by a passenger against a carrier for personal injuries, where the petition alleges that the injury was caused by the negligence and carelessness of the employees of defendant in operating its train, and that by its negligence the train was wrecked, and the car in which plaintiff was riding thrown from the track, plaintiff may show, as proof of negligence, that the employees were running a train with a greater load on some of the cars than they could bear, when the axle of one of the cars became so heated as to melt off, and its heated condition was known to the conductor, who, disregarding his duty, failed to use proper precautions to avoid the danger. Kentucky Cent. R. Co. *v.* McMurtry, 3 Ky. L. Rep. 625.

In an action by a passenger for injuries, an allegation in the declaration that plaintiff's injury was caused by means of fire being set to her clothing from an electrical heating apparatus of

carelessly put in motion" is sufficient to admit proof that "the car gave a jerk" when plaintiff was in the act of alighting.[53]

Construction Terms, Words, etc., Used.—An allegation that the "depot" was not lighted so as to enable plaintiff to get off with safety is sufficiently broad to admit proof that the pass way between the cars was not lighted; the term "depot" including the platform and approaches thereto.[54]

As Dependent on Allegations as to Injury.—Where in a personal injury action by a passenger specific injuries are alleged, recovery can not be had for injuries not so specified.[55] However, it seems that the plaintiff should not be restricted in his proof to the precise language in his pleading. Of course he can not sue for one injury and then bring in issue an altogether different injury, but technical differences should not prevail to defeat justice,[56] and any injury which comes within the allegation, if the proximate result of the negligence or act alleged, are properly in issue.[57]

As Dependent on Claim for Damages.—In an action for assault and battery, and ejectment from defendant's cars, plaintiff can not recover damages for an arrest and imprisonment, made subsequent to such ejectment, at the instance of the conductor, where he did not allege the arrest and imprisonment as a ground of damages.[58] And where the plaintiff bases his claim on an alleged unlawful removal from defendant's train, and it appears that such removal was justifiable, he can not recover damages for the unlawful manner in which it was effected.[59]

§ 3145. Issues as Affected by Plea or Answer.—Under the rule that all allegations of the declaration, which are not denied by the plea are admitted, the relation of carrier and passenger, if alleged and not denied, is not in issue and evidence relative thereto should be excluded.[60]

said car, or through the appurtenances of said car, was sufficient to warrant the admission of evidence as to the presence of fire, from whatever source it may have sprung, preceded by an explosion which set in motion a train of uninterrupted events resulting in plaintiff's injury. Steverman *v.* Boston Elev. R. Co., 91 N. E. 919, 205 Mass. 508.

In the absence of a motion to make more specific, the allegation of the complaint that defendant "negligently and carelessly started the train" allows of evidence of negligence in starting the train with a jolt or jerk. Johnson *v.* Southern R. Co., 31 S. E. 212, 53 S. C. 303, 69 Am. St. Rep. 849.

53. Particular allegations considered.—Houston, etc., R. Co. *v.* Moss (Tex. Civ. App.), 63 S. W. 894.

54. Construction of words, terms, etc.—Galveston, etc., R. Co. *v.* Thornsberry (Tex.), 17 S. W. 521.

55. Allegations as to injury.—Stevens *v.* Kansas, etc., R. Co., 105 S. W. 26, 126 Mo. App. 619.

56 Nature of issue raised or excluded.—International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000; Gulf, etc., R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151.

57. Proximate injury in issue.—A complaint alleged that, plaintiff being a passenger on defendant's railroad, by the negligence of defendant the car on which plaintiff was ran off the track with great force and violence, and that plaintiff was thereby grievously injured, specifying particular injuries. Held that, under these allegations, any injury to plaintiff's person or health of which the derailment was the proximate cause might be shown; that if plaintiff was injured while alarmed by the peril apparently occasioned thereby, but acting as a person of ordinary prudence would under like circumstances, in endeavoring to escape, and while on the platform of the car, jumping or falling off, or being jolted off by the car's motion, or pushed or crowded off by fellow passengers, any injury occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment, and that it was not necessary that the complaint should allege the fright, and the manner in which she was brought to the ground. Smith *v.* St. Paul, etc., R. Co., 30 Minn. 169, 14 N. W. 797.

58. As dependent on claim for damages.—Gulf, etc., R. Co. *v.* Adams, 3 Texas App. Civ. Cas., § 422.

59. Logan *v.* Hannibal, etc., R. Co., 77 Mo. 663.

60. Where, in an action against a railroad company for injuries to a passenger, defendant has not specially pleaded that plaintiff was not a passenger, evidence on cross-examination of the mother of plaintiff, who had testified on the direct examination that she and her daughter were passengers, as to whether

General Issue and Special Pleas—Effect of.—Generally, as to the effect of the general issue, or special pleas of defense, justification or matters in avoidance, see ante, "Pleas or Answer," § 3139.

Under Plea of General Issue—Plea of Not Guilty.—Any fact, the effect of which is to show that an essential statement in the plantiff's cause of action is untrue, may be proven under the general denial, and therefore should not be specially pleaded, and, if so pleaded, should be stricken out as redundant.[61] Under a plea of the general issue in trespass on the special case against a carrier for wrongfully ejecting plaintiff from the carrier's train, any evidence tending to show that the defendant is not guilty of the matters charged in the declaration is admissible.[62] And in an action against a carrier for injuries caused by defendant's negligence, where defendant's sole defense is the denial of the alleged negligence, proof thereof is available under the general issue.[63] Thus, the carrier may show that the injury was caused by the acts of malicious persons not connected with the carrier.[64] And where the answer is a general denial only, contributory negligence not being pleaded, defendant may introduce any evidence which goes to controvert the facts which plaintiff is bound to establish to sustain the action.[65] In an action against a railway company for death of a circus employee while riding on his employer's train, a general denial put in issue every fact essential to recovery.[66]

Allegation of Regulation.—An allegation in the declaration that plaintiff was a passenger is one of the facts stated in the inducement, and not put in issue by a plea of not guilty, a special plea being required to that effect.[67]

Issue as to Ownership.—The general issue in an action on the case for personal injuries does not put in issue the question as to the ownership of tracks and by whom the cars thereon are operated.[68] But it is held that where the

the daughter had a ticket as a passenger, was properly excluded; there being no issue in the case as to the status of plaintiff as a passenger. Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

61. Bolton *v.* Missouri Pac. R. Co., 172 Mo. 92, 72 S. W. 530, 532.

The Missouri doctrine on this point is laid down in Pattison's Mo. Code Pl., §§ 551, 556, where the Missouri decisions are collected and discussed.

In an action for injuries to one accompanying live stock on a freight train while in the car with the stock, on account of the alleged negligence of the company's servants in permitting another car to bump into it with great force, a provision in the contract of shipment requiring plaintiff to ride in the caboose, if a defense to the action, is admissible under the general denial. Bolton *v.* Missouri Pac. R. Co., 72 S. W. 530, 172 Mo. 92.

62. Under plea of general issue.—Jerome *v.* Smith, 48 Vt. 230, 21 Am. Rep. 125.

63. Action for injuries—General issue.—Tannehill *v.* Birmingham R., etc., Co., 177 Ala. 297, 58 So. 198.

Where, in an action of injuries to a passenger on a street car in a collision with a railroad train, defendant under took to show that the ngeligence of the railroad company was the sole cause of the accident, it was not necessary that defendant should plead a city ordinance regulating the speed of steam railroad trains claimed to have been violated by the railroad company at the time of the accident, in order to authorize the admission of such ordinance in evidence. Bragg *v.* Metropolitan St. R. Co., 91 S. W. 527, 192 Mo. 331.

64. Acts of third person.—Norton *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

65. Contributory negligence not pleaded.—Altwein *v.* Metropolitan St. R. Co., 86 Kan. 220, 120 Pac. 550.

66. In action for death of circus employee.—Kelley *v.* Grand Trunk Western R. Co., 46 Ind. App. 697, 93 N. E. 616.

In an action against a railway company for death of a circus employee while riding on his employer's train, the agreement between the company and the employer was admissible under the general issue to show the relations between the parties, and to show the company's duty to decedent. Kelley *v.* Grand Trunk Western R. Co., 46 Ind. App. 697, 93 N. E. 616.

67. Not put in issue by plea of not guilty.—Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

68. Ownership, etc.—Hill *v.* Chicago City R. Co., 126 Ill. App. 152.

A plea of the general issue in an action for injuries sustained by a passenger does not put in issue the ownership of the track or the control of the cars, but defendant company is required to plead

owners of an omnibus are sued for an injury caused by the driver, they may, under the general issue, prove that the omnibus was leased to a third person at the time the injury occurred. It can not be objected that such evidence is inconsistent with the denial of ownership in the general issue.[69]

Affirmative Matter in Avoidance.—In some cases it is provided by statute that affirmative matter in avoidance shall not be proved under the general issue, unless the defendant give notice thereof in writing, etc.[70]

Issues Raised by Plea.—Where a plea alleged that plaintiff negligently attempted to leave the car in an improper manner and at an improper time and place, and as a proximate result thereof was injured, it is what may be termed a "compound plea;" two or three matters of defense set up in the conjunctive form. It is settled law that, under such plea, to entitle the defendant to a verdict on the plea, it devolves upon him to reasonably satisfy the jury that the plaintiff attempted to leave the car, not only in an improper manner, or at an improper time and place, but, in the language of the plea, "in an improper manner and at an improper time and place." [71]

§ 3146. Additional Issues by Subsequent Pleadings.—Where the declaration in an action against a railroad company for injuries to a passenger alleges mere negligence, and there is a proper and sufficient plea of contributory negligence as an affirmative defense, if the plaintiff gives no counter notice of affirmative matter intended to be proven in avoidance of the special defense, no issue of gross negligence is presented.[72]

§ 3147. Under Amended Petition.—Where the original petition, in a passenger's action against a carrier, alleges generally that plaintiff's injuries were received because of negligence in operating the train, an amended petition which does not change the allegations of the original petition, but alleges additional grounds, does not preclude the plaintiff from relying on the negligent operation of the car with a defective axle on the ground that the amendede petition states the particular acts of negligence, and omits to state the negligent

the same specially. Pell *v.* Joliet, etc., R. Co., 87 N. E. 542, 238 Ill. 510, affirming judgment 142 Ill. App. 362.

69. Denial of ownership under general issue.—Hart *v.* New Orleans, etc., R. Co., 4 La. Ann. 361.

70. Affirmative matter in avoidance.—In an action against a carrier for injuries, where defendant pleaded only the general issue, and gave no notice of any affirmative matter in avoidance, a letter written by plaintiff, requesting a pass from defendant's superintendent, and the pass issued on such request, providing that the person accepting it agreed not to hold the company liable for any damage to his person or property, were properly rejected on defendant's offer, under Code 1892, § 686, providing that affirmative matter in avoidance shall not be proven under the general issue unless defendant give notice thereof in writing, etc. Yazoo, etc., R. Co. *v.* Grant, 38 So. 502, 86 Miss. 565, 109 Am. St. Rep. 723.

71. Southern R. Co. *v.* Burgess, 143 Ala. 264, 42 So. 35, 5 Am. & Eng. Ann. Cas. 724, citing Bienville Water Supply Co. *v.* Mobile, 125 Ala. 178, 27 So. 781; King *v.* People's Bank, 127 Ala. 266, 28 So. 658; Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

Where the plea did not aver that plaintiff's act of riding with his leg outside the car was of itself negligence contributing proximately to his injury, but that that act combined with and coalescing with the negligent failure on his part to give notice of the obstruction constituted contributory negligence, the negligent failure to give such notice was by the averments made material to be proved, and without a finding of that fact the defense presented by the plea could not have been established. Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6, 9, citing King *v.* People's Bank, 127 Ala. 266, 28 So. 658; Bienville Water Supply Co. *v.* Mobile, 125 Ala. 178, 27 So. 781; Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793; Highland Ave., etc., R. Co. *v.* Dusenberry, 94 Ala. 413, 10 So. 274; Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714.

72. Additional issues—Gross negligence.—Yazoo, etc., R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154.

operation of the car with a defective axle.[73]

§ 3148. Elimination of Issues by Dismissal.—Where an action for injuries to a person riding on a freight train was dismissed as to a count basing his right on the theory that he was a passenger, and the case was submitted on instructions asked by both plaintiff and defendant, which declared that the plaintiff was a trespasser, a defense that defendant was not liable, because of plaintiff's fraud in representing himself to be the owner of a mileage ticket issued to another, which he induced the conductor to accept in payment of his fare, was thereby eliminated from the case.[74] Nor can the carrier in such a case claim exemption from liability because of a release contained in such mileage ticket exempting it from liability for injuries sustained by the holder while riding on a freight train.[75]

§§ 3149-3151. Proof—§ 3149. Matters to Be Proven.—The plaintiff in a suit for personal injuries for the death of an intestate, ejectment or breach of contract, must prove every element essential to his cause of action. Thus, he must show a breach of some duty owing by the carrier to the person killed, injured or ejected and that such breach of duty was the proximate cause of the injury, death or damage.[76] In an action against a carrier for injuries to a passenger, the allegation that plaintiff was a passenger on defendant's car at the time he was injured is a material allegation, and must be proved unless admitted.[77] And in an action brought to recover for the death of an intestate, alleged to have resulted from the negligence of defendant, the allegation that deceased was being carried for hire is an essential part of plaintiff's case, and must be proved.[78] But it is an elementary proposition that a fact not made an issue by the pleadings need not be proven.[79] And if a fact pleaded is not made issuable by reason of a noncompliance with the statute, which prescribes the manner on which such fact shall be made so, there can be no occasion for the proof of that fact.[80] So where a plea of non est factum is not filed in cases required by the statute, proof in such cases is dispensed with.[81]

73. Under amended petition.—Chesapeake, etc., R. Co. *v.* Morgan, 129 Ky. 731, 112 S. W. 859.

74. Elimination of issues—Dismissal.—Merrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718.

75. Effect of exemption in ticket.—Merrielees *v.* Wabash R. Co., 163 Mo. 470, 63 S. W. 718.

76. Matters to be proven.—Adams *v.* St. Louis, etc., R. Co. (Mo.), 130 S. W. 48.

Where a passenger was thrown from the train as it passed his station, the breach of the carrier's contract to stop was not the proximate cause of the accident, and hence no recovery could be had without proof of an allegation that intestate was thrown from the train by a sudden jerk as he went to the platform prepared to alight. Boston, etc., R. Co. *v.* Miller, 121 C. C. A. 270, 203 Fed. 968.

77. Relation of carrier and passenger.—Birmingham R., etc., Co. *v.* Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A., N. S., 717.

78. Passenger for hire.—Lydon *v.* Robert Smith Ale Brew. Co., 133 Fed. 830.

79. International, etc., R. Co. *v.* Ing, 29 Tex. Civ. App. 398, 68 S. W. 722; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A 545.

80. International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; International, etc., R. Co. *v.* Ing, 29 Tex. Civ. App. 398, 68 S. W. 722; Lindsay *v.* Jeffray, 55 Tex. 626.

81. Non est factum not filed.—International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Bradford *v.* Taylor, 61 Tex. 508; City Waterworks *v.* White, 61 Tex. 536.

Where, in an action against a railroad for wrongful ejection from a train, the complaint alleged that plaintiff's ticket was issued by defendant, and the proof showed the ticket was purchased from a person who was not shown to be an agent of the defendant, defendant not having pleaded non est factum, it was not necessary for plaintiff to prove that defendant executed and issued the ticket. International, etc., R. Co. *v.* Ing, 68 S. W. 722, 29 Tex. Civ. App. 398.

The effect on a plea of non est factum and the failure to file it under the statute was referred to in Bradford *v.* Taylor, 61 Tex. 508, and in City Waterworks *v.* White, 61 Tex. 536. In the last-mentioned case, the statute providing that "a denial of the execution, by himself or by his authority, of an instrument in writing, upon which a pleading is founded, in whole or in part, and charged to have

Unnecessary Allegations,[82] mere matters of inducement,[83] or immaterial issues injected into the case,[84] need not be proven. It is only necessary that the gist of the action be proven. Specific averments as to the manner in which an injury happened,[85] the mode or means of payment of fare, or the amount thereof, etc.,[86] are not deemed essential. And if a general averment of negligence is supported by the evidence, or admitted by the defendant, specific averments are considered as immaterial to the cause.[87] Where, in an action for in-

been executed by him or his authority," etc., was discussed and construed, and the cases collated in which it had been also previously construed. In the last case cited it was held that the fact that the instrument was not free from ambiguity, and did not clearly purport to be the act of the defendant, did not take it out of the operation of the statute. International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 902, 4 L. R. A. 545.

82. Unnecessary allegations.—A petition in an action against a carrier for an assault by a brakeman, which alleged that plaintiff went on the steps of the carrier's train and that while there, preparatory to entering a coach, the brakeman struck him, knocking him off the steps and against the depot platform, injuring him, stated a cause of action for an assault committed on plaintiff, and the allegation that he was a passenger at the time was unnecessary, so that the failure to prove it did not defeat a recovery for the brakeman's act, in willfully and with unnecessary force striking plaintiff in ejecting him from the train, though the carrier was not liable for an act of the brakeman in forcibly preventing plaintiff from entering the train, unless more force was used than was reasonably necessary. Adams *v.* St. Louis, etc., R. Co. (Mo.), 130 S. W. 48.

In an action for wrongful ejection from defendant's train, it is not essential to a recovery that the plaintiff prove that the train was running at the speed alleged in his declaration. Judgment 75 Ill. App. 579, affirmed in Illinois Cent. R. Co. *v.* Davenport, 177 Ill. 110, 52 N. E. 266.

In an action for injury to a passenger on a street car, due to the starting of the car before she had reached a place of safety, it was not essential to plead or prove the manner in which the car was started, and failure to prove an allegation that the car started with a jerk was not fatal to the action. Morrow *v.* Brooklyn Heights R. Co., 119 App. Div. 22, 103 N. Y. S. 998.

83. Matter of inducement.—Plaintiff alleged that while he was standing near the front of the car the door was opened by the conductor, and that sparks escaping from the engine struck him in the eyes. Held, that the allegation that the door was opened by the conductor was not one of substance, but merely a matter of inducement, and that it was not necessary to establish such fact, or submit it as an issue to the jury. St. Louis, etc., R. Co. *v.* Parks (Tex. Civ. App.), 73 S. W. 439.

84. Immaterial issues.—In an action against a street railway for injuries to a passenger, alleged to have been caused by a sudden acceleration of the speed of the car when plaintiff was alighting, the substance of the issue which plaintiff was required to prove was merely whether she was injured by the negligence of defendant in accelerating the speed of the car when she was preparing to get off, in consequence of which she was thrown from the car, and not whether the car had passed beyond the street where plaintiff desired to alight, which was immaterial. El Paso Elect. R. Co. *v.* Harry, 37 Tex. Civ. App. 90, 83 S. W. 735.

85. Gist of action necessary.—Louisville, etc., Tract. Co. *v.* Snead (Ind. App.), 93 N. E. 177.

When the complaint alleges that plaintiff passenger was injured by the negligence of defendant, which consisted in the violent jerking of defendant's cars, caused by the sudden stopping of the train, throwing plaintiff from the platform, it is sufficient to prove the jerking, and it is immaterial whether it was done by starting or stopping the train, as alleged. Houston, etc., R. Co. *v.* Rowell (Tex. Civ. App.), 45 S. W. 763, affirmed in 46 S. W. 630, 92 Tex. 147.

86. Fare.—In an action against a carrier for personal injuries to plaintiff, the complaint alleged that defendant, in consideration of a certain sum, received plaintiff as a passenger over its road, and while so traveling the injury occurred. The evidence did not show that plaintiff paid directly to defendant the sum named, but it appeared that he purchased a through coupon ticket from another company, and that one of said coupons entitled him to be carried over defendant's road, which coupon was taken up by defendant, and that defendant was entitled to some part of the entire amount paid for the ticket. Held, that it was not necessary for plaintiff to show that defendant's share was the amount alleged. Pittsburg, etc., R. Co. *v.* Higgs, 76 N. E. 299, 165 Ind. 694, 4 L. R. A., N. S., 1081.

87. Where plaintiff, a passenger on defendant's train, alleged that she sustained injuries by reason of the derailment of the train, caused by a broken rail in a switch, and set out defendant's negligence in the construction and mainte-

juries to plaintiff's testator, received by stepping from a train before the station had been reached, it was alleged that the brakeman left the door open after calling the station, the failure of plaintiff to prove this allegation was not fatal to his action.[88] Where plaintiff alleged her injuries to have been caused by the derailment of a train because of a defective switch, the specification in the complaint of the defects in the switch, alleged as negligence, did not relieve defendant from the necessity of showing that it was properly constructed in all respects.[89] Redundant allegations need not be proven, and this is the rule where an allegation in the original petition becomes redundant by reason of an amendment.[99]

Necessary Issues Raised by Allegations.—Under an averment in a pleading that "defendant carrier, by its employees, servants, and agents, assaulted plaintiff," it is necessary to prove, not only that an agent, employee, or servant committed such assault, but, further, that such person was in the line of his duty.[91]

General Allegation of Negligence.—Where a petition for injuries to a passenger merely charges that the accident was caused by the defendant's negligence, plaintiff is not required to prove the specific cause of the accident resulting in injury.[92]

Allegations of Specific Acts of Negligence.—Where plaintiff, suing for injuries, limits his right to recover to a specific act of negligence of defendant, he can not avail himself of the general rule that a passenger is only obliged to allege generally and prove the relation of passenger and carrier and the injury, to make out a prima facie case, and that the burden then shifts to the carrier to exonerate himself.[93]

nance of the switch with great particularity, she was not required to prove more than general allegations of negligence. Terre Haute, etc., R. Co. *v.* Sheeks, 56 N. E. 434, 155 Ind. 74.

Admission of gist of action.—Where, in an action by a passenger for injuries sustained by reason of the derailment of the train, defendant admitted the derailment and the establishment of a prima facie case of negligence, the allegations of the complaint as to the manner and cause of the accident became immaterial; defendant being liable unless able to show that the derailment was not caused by any act of negligence on its part. McNeill *v.* Durham, etc., R. Co., 41 S. E. 383, 130 N. C. 256.

88. Allegation unimportant.—Wolf *v.* Chicago, etc., R. Co., 111 N. W. 514, 131 Wis. 335.

89. Specific defects not essential.—Terre Haute, etc., R. Co. *v.* Sheeks, 56 N. E. 434, 155 Ind. 74.

90. Redundant allegation.—Plaintiff in his petition alleged that the intestate, while a passenger on defendant's railway, was injured by the negligence of defendant's servants; but, it having been established that, although in one of defendant's cars, he was wrongfully traveling on another person's pass, he amended his petition by averring gross negligence of defendant's servants, leaving the other allegations to stand. Held, that the allegation that deceased was a passenger was redundant, if plaintiff relied upon the averment of gross negligence, and need not be proved. Way *v.* Chicago, etc., R. Co., 35 N. W. 525, 73 Iowa 463.

91. Issues raised by allegation.—Southern R. Co. *v.* Crone (Ind. App.), 99 N. E. 762.

92. General allegation of negligence.—Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

The negligence charged by a petition in an action for injury to a passenger by derailment of a street car, alleging that the "running gear, that is to say, the wheels, axles, and other machinery, by means of which the said car ran along the said track, were defective and out of order, and unfit for the purpose of supporting the said car on the said track," and that though defendant knew, or should by the exercise of ordinary care have known, of such defective running gear, it "ran the said car along the said track, and into said curve at a high rate of speed," was general and not specific negligence, so that there was no failure of proof by want of evidence of defect in the running gear of the car. Johnson *v.* St. Louis, etc., R. Co., 73 S. W. 173, 173 Mo. 307.

93. Specific acts of negligence.—Feary *v.* Metropolitan St. R. Co., 62 S. W. 452, 162 Mo. 75; Hamilton *v.* Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

Where, in an action to recover for injuries to a passenger, plaintiff alleges specific acts of negligence, it is not sufficient to prove the mere relation of carrier and passenger, but the specific acts of negligence must be proved. Pidgeon

Failure to Prove All Allegations.—Where plaintiff made out a prima facie case on proof of facts alleged in the complaint, he could not be defeated because he failed to prove other allegations not essential to his cause of action.[94] So if the plaintiff sets up several distinct acts of negligence, anyone of which, if proved, would entitle him to recover, he is not required to prove them all, and a charge instructing that each and all of them must be proved, is error.[95] Where complaint does not proceed on the theory that the averments are interdependent, and the cause is not tried on such theory, proof of any one of the acts of negligence is sufficient to entitle the passenger to recover.[96] So if two separate and independent acts of negligence which are not contradictory are alleged, proof of either will prevent a failure of proof.[97] But the case may be such as to re-

v. United R. Co. (Mo. App.), 133 S. W. 130.

In an action for personal injuries sustained in a railway collision, the negligence charged was that defendant "did, by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide." Held, that the rule that if, instead of pleading generally the relation of carrier and passenger, and the injury, and thus making out a prima facie case, plaintiff limits his rights to recover to a specific act of negligence, he must prove such specific negligence, did not apply, and it was not necessary for plaintiff to show which servant so in charge of the cars was negligence. Malloy *v.* St. Louis, etc., R. Co., 73 S. W. 159, 173 Mo. 75.

94. Failure to prove all allegations.—Sutton *v.* Southern Railway, 64 S. E. 401, 82 S. C. 345; Citizens' St. R. Co. *v.* Huffer, 26 Ind. App. 575, 60 N. E. 316.

Where, in an action for injuries to a passenger on a street car by the fall of a trolley pole as he was alighting, at least three of the six counts of the declaration charged general negligence, the fact that other counts of the declaration charged specific negligence with reference to the fall of the pole, which was not proved, was not material. Judgment 102 Ill. App. 202, affirmed in Chicago City R. Co. *v.* Carroll, 68 N. E. 1087, 206 Ill. 318.

95. Necessity for proof of all allegations.—Davis *v.* Missouri, etc., R. Co., 17 Tex. Civ. App. 199, 43 S. W. 44.

Where a passenger injured in a derailment alleged a number of causes of the derailment, a showing that negligent derailment was by any one of the causes alleged would warrant a finding for plaintiff. Southern R. Co. *v.* Adams (Ind. App.), 100 N. E. 773.

In an action against a railroad for injuries to a passenger, it was proper to instruct that plaintiff need not prove every act of negligence charged, but that it was sufficient if a fair preponderance of the evidence showed appellant negligent in any respect charged, and the injury was the proximate cause of such negligence, provided plaintiff was not guilty of any contributory negligence. Pittsburgh, etc., R. Co. *v.* Gray (Ind. App.), 59 N. E. 1000.

Under a complaint alleging that a collision occurred wholly on account of the negligence of defendants in the construction, equipment, operation, and control of the railway and the trains thereon, proof of any one of the several acts of negligence stated would be sufficient to warrant a recovery. New York, etc., R. Co. *v.* Callahan, 40 Ind. App. 223, 81 N. E. 670.

Where a complaint in an action by a passenger against a railroad alleges negligence of the defendant in backing the cars with unnecessary force, and in insecurely fastening a bed frame, which fell on plaintiff, plaintiff is entitled to go to the jury on the first ground of negligence without proving the second. Stoody *v.* Detroit, etc., R. Co., 83 N. W. 26, 124 Mich. 420.

Where, in an action for injury to a passenger, several grounds of negligence are alleged, it is enough to prove one of them. Harris *v.* Puget Sound Elect. Railway, 100 Pac. 838, 52 Wash. 289.

Elevator case.—Where there was evidence that defendant's employee carelessly closed the door of an elevator on plaintiff's dress, and at the same moment started the elevator, and negligence in that respect was well pleaded, it was not error to refuse to direct a verdict for defendants, in that there was a total failure of proof, though some of the grounds of negligence alleged were not proved. Hensler *v.* Stix, 88 S. W. 103, 113 Mo. App. 162.

96. Averments not interdependent.—New York, etc., R. Co. *v.* Flynn, 41 Ind. App. 501, 81 N. E. 741, rehearing denied in 82 N. E. 1009.

In an action for injuries to a passenger, where the declaration alleged several independent acts of negligence of the defendant, proof of any one of those acts causing the injury complained of is all that is necessary. Whipple *v.* Michigan Cent. R. Co., 106 N. W. 692, 143 Mich. 41.

97. Separate acts of negligence alleged.—Plaintiff alleged that, as he was entering a grip car, the motorman suddenly and negligently started the car with a quick

quire the plaintiff to prove every act set up in order to entitle him to recover.[98] This seems to be the rule where the petition does not charge several acts of negligence conjunctively, but several acts of negligence jointly, as the proximate cause of the injury.[99] The mere fact that such allegations are alleged conjunctively does not require plaintiff to prove that all the elements of negligence concurred to produce the injury.[1]

Relief of Lower Degree.—It is sometimes provided that a plaintiff shall not be compelled to prove more than is necessary to entitle him to the relief asked or any lower degree included therein.[2]

Allegations Characterizing Act.—Allegations which are important only as bearing on the acts complained of and characterize the acts or motive of the defendant's agent or servant at the time, are not essential elements in the case and need not be proven.[3]

Allegations Descriptive of Wrong.—Allegations descriptive of the wrong imputed to the defendant must be proved.[4]

motion, throwing plaintiff out of the approach to the seat, so that his body projected out beyond the side of the car, and that thereupon plaintiff was struck by a car approaching from the opposite direction and knocked to the ground by the negligence of defendant's servants in charge of such other can in failing to stop the same before striking plaintiff, after having discovered plaintiff's peril. Held, that the petition alleged two acts of negligence, which were not contradictory; hence plaintiff's failure to prove negligence on the part of the operatives of the car by which he was struck did not preclude him from recovering for the negligence of the operatives of the car on which he was riding in improperly starting the same. Spaulding *v.* Metropolitan St. R. Co., 129 Mo. App. 607, 107 S. W. 1049.

The complaint, charging in one place the injury to plaintiff, occasioned by collision of two trains, as resulting from the negligence of those in charge of the train on which he was a passenger, and in another place charging negligence of those in charge of both trains, permits a recovery on proof of negligence in the handling of the one train, so that a charge that, unless there was negligence of the servants in charge of both trains, which caused the injury, plaintiff could not recover, is properly refused. Central, etc., R. Co. *v.* Geopp, 153 Ala. 108, 45 So. 65.

98. Proof of distinct allegations required.—The petition in an action by a passenger against a railroad company for personal injuries alleged that while the train on which plaintiff was riding was standing still defendant negligently permitted another train to approach it from the rear, so as to make it appear to plaintiff that there was imminent danger of a collision, in consequence of which he attempted to leave the train, and that while so doing the train was negligently started so as to throw him to the ground. Held not to state several and distinct acts of negligence, proof of either of which would entitle plaintiff to recover, but that, to justify a recovery, plaintiff was required to prove both the acts of negligence alleged. Williams *v.* Galveston, etc., R. Co., 78 S. W. 45, 34 Tex. Civ. App. 145.

99. Acts alleged jointly.—Ratteree *v.* Galveston, etc., R. Co., 36 Tex. Civ. App. 197, 81 S. W. 566.

1. Effect of conjunctive allegations.—Duell *v.* Chicago, etc., R. Co., 115 Wis. 516, 92 N. W. 269.

2. Lower degree then asked.—Where, in an action against a carrier for an assault on a female passenger by one of the carrier's employees, the petition, in addition to charging rape, alleged an assault and battery, plaintiff was entitled to recover for the assault, though she failed to establish the alleged rape, under Code, § 3639, declaring that a party shall not be compelled to prove more than is necessary to entitle him to the relief asked, or any lower degree included therein. Garvik *v.* Burlington, etc., R. Co., 100 N. W. 498, 124 Iowa 691.

3. Allegations characterizing act.—Chicago Union Tract. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287; Illinois Cent. R. Co. *v.* Davenport, 177 Ill. 110, 52 N. E. 266.

Where plaintiff was forcibly ejected from defendant's train, in an action for injuries sustained, it was not necessary to prove that the car was moving at the rate of speed alleged, or any other rate of speed. Chicago Union Tract. Co. *v.* Brethauer, 79 N. E. 287, 223 Ill. 521, affirming judgment 125 Ill. App. 204.

4. Allegations descriptive of wrong.—A complaint, in an action against a railroad company because its gateman at a union depot misdirected plaintiff as to a train of another railroad, that plaintiff purchased a ticket over the latter road from defendant, and that defendant sold him the ticket, is descriptive of the wrong imputed to defendant, and must be proved, and is not supported by proof that the ticket agent at the depot sold

Question of Ownership.—A judgment against a taxi company for personal injury to a passenger in a collision with a street car can not be sustained, in the absence of proof of ownership of the taxicab or its operation by the company's employees.[5]

Effect of Special Plea When General Issue Made.—The plea of the general issue puts the material averments above mentioned in issue, and the fact that a specific plea of contributory negligence is filed does not waive the necessity for proof which the plea of the general issue casts on the plaintiff.[6]

§ 3150. Failure of Proof.—Under statute in some instances it is provided that where the allegation is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not a variance, but a failure of proof.[7]

§ 3151. Sufficiency of Proof.—See post, "Weight and Sufficiency of Evidence," §§ 3238-3287.

§§ 3152-3162. Variance—§ 3152. In General.—The rule is that a plaintiff must substantially prove the facts which he alleges as the basis of his cause of action. He can not allege one cause of action and recover upon proving a materially different cause,[8] and this is especially true where the proof of

tickets for all the roads entering it. Louisville, etc., R. Co. *v.* Cannon, 158 Ala. 453, 48 So. 64.

5. Question of ownership.—Stewart Taxi Service Co. *v.* Getz, 84 Atl. 338, 118 Md. 171.

6. Effect special plea when general issue made.—McGhee *v.* Cashin, 130 Ala. 561, 30 So. 367.

In an action against a street railway company for injury to passenger, by pleading, besides the general issue, contributory negligence, and by answering interrogatories filed under express authority of Code 1896, § 1850 et seq., the company did not waive the necessity for plaintiff supporting by proof averments that the car on which plaintiff was a passenger when injured was operated by the company and that the negligence imputed was that of its employees; the interrogatories and answers not being in evidence. Birmingham R., etc., Co. *v.* Haggard, 155 Ala. 343, 46 So. 519.

7. Failure of proof.—The complaint alleged plaintiff's destination as a certain street, and that while he was at his destination and in the act of getting off defendant's car it was negligently started and put in motion with a violent start, whereby he was injured. The evidence showed that the speed of the car was slackened at such point, but that it ran by there when the speed was accelerated, whereby plaintiff was thrown from the car and injured. Held, that there was a failure of proof. Knuckey *v.* Butte Elect. R. Co., 109 Pac. 979, 41 Mont. 314.

8. Correspondence between allegation and proof.—Turner *v.* McCook, 77 Mo. App. 196; Richmond R., etc., Co. *v.* West, 100 Va. 184, 40 S. E. 643; Eckles *v.* Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545.

The plaintiff must recover, if at all, upon his declaration; he can not charge one species of negligence and recover upon proof of negligence of a different character. Chicago Union Tract. Co. *v.* Lowenrosen, 125 Ill. App. 194 judgment affirmed in 78 N. E. 813, 222 Ill. 506.

Where a railroad is sued for death of a person, on the theory that he was a passenger, and that the railroad was guilty of breaches of its duty as carrier, there can be no recovery on proof that, though such person was not a passenger, the railroad failed to observe its common law duty of ordinary care towards a person on a street crossing. Judgment 89 Ill. App. 335, reversed in Chicago, etc., R. Co. *v.* Jennings, 60 N. E. 818, 190 Ill. 478, 54 L. R. A. 827.

Where a passenger is killed while trying to board the wrong train, owing to its sudden movement, no recovery therefor can be had as having been caused by the company's wrongful act, neglect, or default, under a declaration alleging that it was the company's duty to receive and transport deceased by that train. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

A. was killed by the sudden starting of a train on which he was trying to step, and which he wrongly supposed was the one which was advertised to leave at a certain hour. The train was standing at the station nearly three-quarters of an hour before the time, and had upon it, by mistake, certain placards indicating that it was the right train. Held that, this not being the train intended for the trip, a declaration that the company caused a train to be drawn to its station for the purpose of receiving upon it A. and other passengers going in the same direction was disproved by the facts, and therefore any obligation on the part of the company to "allow and permit the said deceased and all others who wished to enter upon said train to do so before the same should be started" was also dis-

the latter cause of action necessarily negatives the existence of the cause alleged.[9] Thus, if he alleges negligence or wrong in one particular and the proof does not correspond with such allegation, the case must fail.[10] Where the complaint is for wrongful ejectment and resultant injury, it is not sustained by evidence which would be sufficient to entitle plaintiff to recover for being carried past his destination.[11] Where a passenger jumped from a street car to avoid a supposed impending peril because of the explosion of the controller, but the complaint was not framed on the theory that he acted in obedience to the direction of the conductor in telling the passengers to jump, plaintiff could not recover on the theory that the railway company was liable for the result of such direction given by the conductor in the course of his employment.[12] But the variance must

proved. Flint, etc., R. Co. *v.* Stark, 38 Mich. 714.

Substantial proof of facts alleged.—A passenger, suing a street railroad company for personal injury, can only recover by substantially proving the facts alleged in his cause of action. Haralson *v.* San Antonio Tract. Co., 53 Tex. Civ. App. 253, 115 S. W. 876.

9. In Becker *v.* Lincoln, etc., Bldg. Co., 174 Mo. 246, 73 S. W. 581, it was held that the rule that plaintiff can not count on one cause of action, and recover on another especially when proof of the latter necessarily negatives the existence of the former, did not apply in that case.

10. In an action against a street railway company for killing plaintiff's intestate, all the witnesses fixed the place of the accident midway between two streets. Two witnesses for plaintiff testified that the train stopped at said place, when said witnesses and deceased, with his arms full of bundles, boarded the cars, and that the train started up with a jerk, which caused one of said witnesses to be thrown backward, striking deceased, who was then on the bottom step, and throwing him to the ground. Two witnesses for defendant and the train employees testified that the train was moving at from four to seven miles an hour when deceased attempted to board it, and that the train did not stop between said street; and one of said witnesses testified that no one was with deceased at the time he attempted to board the train. A city ordinance prohibited trains from stopping between said streets. The trainmen testified that the trucks which passed over deceased were thrown from the track. Held that, as a count in the complaint alleged that deceased was upon the platform of said train, and was thrown off before he had time to enter, there was a variance between said count and the evidence. Birmingham R., etc., Co. *v.* Clay, 108 Ala. 233, 19 So. 369.

In an action for injuries by a passenger against a railroad company, the fact that the conductor told plaintiff several times as the train was nearing a station, "We have got no time; hurry up," does not tend to support an allegation that plaintiff was compelled and forced by defendant's agents to get off the train while in motion. South, etc., R. Co. *v.* Schaufluer, 75 Ala. 136.

A complaint for injuries charged that plaintiff was "compelled and forced" to alight from defendant's car while in motion, and that the injuries were received by reason of defendant's agent's negligence in so "forcing and compelling." Held, that the allegations were not sustained by evidence that the conductor approached plaintiff in the car, and said, "We have got no time; hurry up;" and repeated that several times while plaintiff was getting out. South, etc., R. Co. *v.* Schaufluer, 75 Ala. 136.

A complaint against a carrier for malicious ejectment from its train will not permit a recovery for a negligent misdirection as to the proper train for the passenger to take. Turner *v.* McCook, 77 Mo. App. 196.

Where a petition against a street railway company for injuring a newsboy alleged that the gripman pushed plaintiff from the car, and the evidence showed that the gripman first shoved at him with a broom, and then struck at him with his hand, in neither case touching him, and that plaintiff fell from the car in dodging the threatened blow, such evidence does not correspond with the allegation, and it was error to overrule a demurrer thereto. Raming *v.* Metropolitan St. R. Co., 57 S. W. 268, 157 Mo. 477.

Where the petition, in an action against a railway company for injury to a passenger who was induced by an employee to alight at an intermediate station under belief that he had arrived at his destination, and was injured while attempting to reboard the train on discovering the mistake, did not allege that he was induced to alight through the company's negligence, he could not recover on the theory of such negligence, no matter what the proof showed. Missouri, etc., R. Co. *v.* Redus, 48 Tex. Civ. App. 322, 107 S. W. 63.

11. Wrongful ejectment alleged.—Louisville, etc., R. Co. *v.* Renicker, 8 Ind. App. 404, 35 N. E. 1047.

12. Theory of complaint binding.—Waniorek *v.* United Railroads, 17 Cal. App. 121, 118 Pac. 947.

be material,[13] and in some instances it is provided that for a variance to be material it must be such as to mislead the adverse party to his prejudice,[14] which fact must be alleged and proved by affidavit.[15] Thus, it may be laid down as a general rule that substantial correspondence between the allegations and the proof is all that is required.[16] So it is sufficient if the substance of the issue is proved,[17] although a technical variance may exist.[18] The gravaman of the ac-

13. Materiality.—Klass *v.* Metropolitan St. R. Co., 169 Mo. App. 617, 155 S. W. 57; Daley *v.* Redburn, 143 Mo. App. 653, 127 S. W. 924.

In a street car passenger's action for injuries, there was no material variance between an allegation that the pole which struck him was less than four feet from the track and evidence merely that it was in such close proximity to the track as to be likely to collide with passenger standing on the footboard. Previsich *v.* Butte Elect. R. Co., 47 Mont. 170, 131 Pac. 25.

Under Revisal 1905, § 515, a variance between the allegation of the station at which plaintiff was ejected and the proof as to such station is immaterial, where there was no controversy over the place. Edwards *v.* Southern R. Co., 162 N. C. 278, 78 S. E. 219.

Variance as to servant at fault.—Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

Variance as to venue.—Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

Immaterial because not misleading.—The variance between the complaint alleging that a passenger was injured while alighting from a car at a designated street, and the proof that the accident happened at another street, where the place of the accident was well known to the carrier, was immaterial within Rem. & Bal. Code, § 299, because not misleading; no objection to the proof having been made until the question of variance was raised in the motion for nonsuit. Breeden *v.* Seattle, etc., R. Co., 60 Wash. 522, 111 Pac. 771.

14. Must be misleading.—Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458; Robinson *v.* Helena, etc., R. Co., 38 Mont. 222, 99 Pac. 837.

15. Must be alleged and proved.—Senf *v.* St. Louis, etc., R. Co., 112 Mo. App. 74, 86 S. W. 887.

16. Substantial correspondence.—International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000.

17. Proof of substance.—Chicago City R. Co. *v.* Foster, 80 N. E. 762, 226 Ill. 288, affirming judgment in 128 Ill. App. 571; Altwein *v.* Metropolitan St. R. Co., 86 Kan. 220, 120 Pac. 550; Texas, etc., R. Co. *v.* Kirk, 62 Tex. 227; El Paso Elect. R. Co. *v.* Harry, 37 Tex. Civ. App. 90, 83 S. W. 735.

Wrongful putting off train.—Where, in an action against a carrier, the wrong complained of was causing plaintiff to get off the train, and it was proved that plaintiff was a passenger entitled to be carried to a certain station, and was wrongfully put off before reaching such station, there was no fatal variance. Louisville, etc., R. Co. *v.* Quinn, 39 So. 756, 146 Ala. 330.

Where a passenger alleged that, when his ticket was taken up by the conductor, he requested the latter to furnish him a place in the car, and the evidence showed no request of any agent for that purpose, the fact that the evidence disclosed that the tickets were taken up by an auditor or ticket agent did not constitute a material variance. Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

There was no fatal variance between an averment that the accident occurred at or near the intersection of Eleventh avenue and Twenty-fourth Street South, and proof that the accident occurred at Fourteenth street. Birmingham R., etc., Co. *v.* Lide, 177 Ala. 400, 58 So. 990.

18. Technical variance.—Where complaint alleges that plaintiff's wife, being a white woman, was refused permission to ride in the car for white people, and forced to ride in the negro coach, evidence that when plaintiff placed his wife and children in the negro coach, and found they were in the wrong coach, he had no time to change them, and his wife requested the conductor to find them seats in another car, and he failed to do so, whereby she was compelled to remain in the negro coach, did not constitute a variance, as such compulsion amounted to a refusal to allow her to ride in the car for white people. Missouri, etc., R. Co. *v.* Ball, 61 S. W. 327, 25 Tex. Civ. App. 500.

In a personal injury action against a street railway company, evidence that the car jerked, and threw plaintiff against the seat and out, and that he struck something on the way to the ground, he thought the upright post of the end of the seat, was no variance from the declaration's allegation that he was thrown against the seats and other parts of the car. Chicago Union Tract. Co. *v.* Roberts, 82 N. E. 401, 229 Ill. 481.

"Put off the train."—An allegation, in an action for damages in being set down at a wrong station, that she was "put off the train," in connection with other allegation, meant that she got off the train in response to the conductor's invitation, and there was no material variance be-

tion is the material thing in issue and not the particular acts or events which merely lead up to and give character to the breach of duty.[19] So where there is an allegation that plaintiff was "compelled to get off," proof that force was used is not essential.[20] There is no variance between the complaint alleging that a carrier negligently ran its train around a curve at a high rate of speed, so as to throw a passenger from the lower step of the platform to the ground, and proof that the engineer within the scope of his authority promsied to slow down the train to allow the passenger to alight, but failed to do so.[21] But where the complaint in an action against a railroad claims damages for a tortious expulsion of a passenger from a train in the nighttime, producing bodily harm, and the evidence makes out a case of injury from exposure caused by an unreasonable detention, and the deprivation of proper facilities for care and shelter, the variance is fatal.[22] So where the petition alleges a negligent and willful ejection there is a fatal variance where the evidence no more than shows that the servant of the carrier mistakenly put the plaintiff off at a station short of her destination.[23] Where it is alleged that the ejection was jointly committed by two of defendant's servants, if the evidence shows that one of them did not aid or assist in the ejection there is a fatal variance.[24]

Variance Affecting Only Amount of Recovery or Gravity of Negligence.—Where the variance affects only the amount of the recovery and not the right of action, it will not justify a general charge for the defendant.[25] And

tween the allegation and the proof. Southern R. Co. *v.* Melton, 158 Ala. 404, 47 So. 1008.

Misinformation by conductor.—In an action to recover because defendant railroad company, through its agent, negligently caused plaintiff, a passenger, and her children to alight at the wrong station, an allegation that the conductor said: "This is your place to get off," and took out her baggage, is supported by testimony that a flagman, assisting the conductor, induced her to get off at such station. Ford *v.* Southern Railway, 55 S. E. 448, 75 S. C. 286.

As to stopping of train.—Feagin *v.* Gulf, etc., R. Co., 45 Tex. Civ. App. 251, 100 S. W 346.

19. The gravamen of an action for injuries to a passenger, so far as payment of fare is concerned, is that he paid his fare to the carrier for the service, and the variance between an allegation that he paid it to the conductor and proof that he paid it to the ticket seller was not substantial. Cornell *v.* Chicago, etc., R. Co., 128 S. W. 1021, 143 Mo. App. 598.

20. Force not essential.—In an action by a passenger to recover damages for injuries by being carried beyond her station, where the complaint alleged that plaintiff was "compelled to get off" the train, it was proper to refuse a charge that there could be no recovery unless force was used by the conductor in getting her off. Alabama, etc., R. Co. *v.* Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17.

21. What constitutes variance.—Clark *v.* Atchison, etc., R. Co., 128 Pac. 1032, 164 Cal. 363.

22. Variance held fatal.—Harding *v.* Chicago, etc., R. Co., 56 Mich. 628, 23 N. W. 445.

23. Evidence merely showing mistake.—A petition alleged that plaintiff's wife was a passenger on defendant's train, having a ticket, and that she was negligently and willfully ejected therefrom by defendant's agents, though they knew she had such ticket, against her protest, whereby she suffered great humiliation and shame. The evidence showed that plaintiff's wife had procured a ticket requiring her to change cars at a certain place; that before she reached such place the conductor promised that she should be notified when the change was necessary; that, at a station halfway to the place at which she should have changed, the brakeman and another employee took off her basket and her child; that she asked the brakeman if it was time to get off, to which he made no reply; that she made no protest; and that the station was one at which she should not have alighted. Held, that the variance between the allegations and the proof was so great as to justify directing a verdict for defendant. Allin *v.* Gulf, etc., R. Co., 62 S. W. 1079, 26 Tex. Civ. App. 43.

24. Joint action in commission of ejection alleged.—Where plaintiff, a passenger on an electric car, alleged and proved that the ejection from the car was committed jointly by the conductor and motorman, it was not error to charge the jury to find for defendant if they believed from the evidence that the motorman did not aid or assist in ejecting her. Bowie *v.* Birmingham R., etc., Co., 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247

25. Variance affecting only amount of recovery.—It was so held in an action

as an allegation that plaintiff's condition was so feeble as to be open to ordinary observation only affects the gravity of defendant's negligence, a failure to prove the same is not fatal to the action.[26]

§ 3153. Tort and Contract.—In an action of tort by a passenger for a wrongful expulsion from a train before he reached the station for which he had purchased a ticket, he can not recover as for a breach of contract to convey him to the station.[27] And where, in an action against a railroad company for wrongfully ejecting plaintiff while a passenger, the gist of the complaint is the violation of the contract to carry, the plaintiff can not recover on the theory of the use of unnecessary violence in effecting a rightful ejectment.[28] But when the action against a carrier for injuries to a passenger sounds in tort, the allegation of the contract of carriage is regarded as a mere inducement to the action to show the right to sue as passenger.[29] And where a passenger sues in tort, proof that the transportation was had under a written contract does not constitute a fatal variance, repsonsibility therefor being imposed by law independent of the agreement.[30]

§ 3154. As to Contract of Carriage.—Where plaintiff's cause of action is based on a particular contract set out in the declaration, his proof must substantially support the allegations.[31] Where the petition sets up a special contract between the passenger and the carrier, there is a fatal variance, when the contract proven is one between the carrier and a court to transport sick people for the county authorities.[32] But where the declaration alleges a contract on the part of the defendants to carry the plaintiff a certain distance, and the evidence shows a contract to carry him only part of that distance, the plaintiff may recover according to his proof.[33]

for injuries to a passenger by a carrier's failure to stop the train at her destination where there was a variance between the complaint and the evidence as to when plaintiff told the conductor of her infirm condition. Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

26. Gravity of negligence.—Southern R. Co. *v.* Lee, 167 Ala. 268, 52 So. 648.

27. Tort and contract.—Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

28. Allegations of action in contract.—Chicago, etc., R. Co. *v.* Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444.

29 Action sounding in tort.—Canaday *v.* United R. Co., 114 S. W. 88, 134 Mo. App. 282.

A petition stating a contract of carriage, and showing that plaintiff was injured by the negligence of defendant's servants in starting its street car as she was alighting, when liberally construed in the interests of justice as required by Rev. St. 1899, § 629 (Ann. St. 1906, p. 652), states a cause of action sounding in tort rather than contract, although it alleges an express contract as an inducement, the gist of the action being defendant's breach of its public duty, and therefore evidence of an express contract is not material to the issue, and proof of an implied contract creating the relation of carrier and passenger is sufficient to sustain it. Canaday *v.* United R. Co., 114 S. W. 88, 134 Mo. App. 282.

30. Effect of proof of contract.—Judgment 74 N. E. 1014, affirmed in Lake Shore, etc, R. Co. *v.* Teeters, 77 N. E. 599, 166 Ind. 335, 5 L. R. A., N. S., 425.

31. Variance as to contract.—In an action for an injury sustained by the oversetting of the defendants' stagecoach, the declaration alleged a contract on the part of the defendants to transport the plaintiff from Albany to Boston. The evidence was that the plaintiff rode in the defendants' stage a part of the route, namely, from Worcester to Boston, which is a portion of several lines of travel. Held, that the evidence did not prove the contract set out in the declaration. Harris *v.* Rayner (Mass.), 8 Pick. 541.

32. As to contract of carriage.—A railroad company agreed with the county court to provide a car to transport sick persons to the pesthouse. Held, in an action by such a person for damages for breach of a contract, that a declaration which counts as on a special contract for carriage between plaintiff and defendant for hire is not supported by proof of a contract between the county court and the defendant company, nor by implied contract between the carrier and passenger; the variance being fatal. Jenkins *v.* Chesapeake, etc., R. Co., 57 S. E. 48, 61 W. Va. 597, 11 Am. & Eng. Ann. Cas. 967.

33. Recovery according to proof.—Bonsteel *v.* Vanderbilt (N. Y.), 21 Barb. 26.

As to Ticket Pass or Transfer.—There is no variance between the allegation that a ticket was purchased from defendant carrier, its agent or servant, and proof that the ticket was purchased from another company as an initial carrier, but was recognized as valid by defendant as a connecting carrier.[34] Where the petition alleges that plaintiff had a right to a drover's pass, but was unlawfully ejected, while the proof shows that the agent gave plaintiff a bill of lading for his cattle in lieu of a live stock contract, and stated that he could ride with his cattle on the bill of lading, but that the conductor would not recognize the bill of lading as transportation, there is a fatal variance.[35] Where the form of action is in contract for wrongful ejection in violation of plaintiff's contractual rights, there is no fatal variance when the evidence shows that the ticket was rendered valueless by the negligence of the ticket agent.[36]

Demand for Transfer.—There is no material variance between an allegation that "after having paid his fare the passenger demanded a transfer" and proof that he made the demand "at the time he paid his fare."[37]

§ 3155. As to Status of Plaintiff.—Where the complaint alleges the relation of carrier and passenger, the relation as alleged is a material averment and, if the proof conclusively shows the relation of master and servant,[38] or that of a mere trespasser,[39] the plaintiff can not recover and a general affirmative charge should be given for the defendant. Where plaintiff's declaration charges that he was lawfully riding on the train as a passenger, and that the conductor unlawfully put him off, and his evidence is to the effect that he was riding on a freight train without a proper permit from the superintendent, as required by a rule of the company, on account of the fault of the station agent, the variance is fatal.[40] But here as in other cases the variance must be material to defeat a recovery.[41] Where the action is for intentional assault or injury, if

34. Allegation as to ticket or pass.—Alabama, etc., R. Co. *v.* Brady, 160 Ala. 615, 49 So. 351.

35. Chesapeake, etc., R. Co. *v.* Collinsworth, 152 Ky. 197, 153 S. W. 241.

36. Negligence of ticket agent.—A petition alleged the purchase of a ticket by plaintiff which entitled him to ride on defendant's train, and that defendant's conductor willfully, wrongfully, and in violation of plaintiff's rights as a passenger forced him to leave the train. The evidence showed the purchase of the ticket as alleged, but that, through the negligence of the ticket agent or of a prior conductor than the one who ejected plaintiff, it was so punched as to render it valueless for use at the time that plaintiff was ejected. Held, that since the cause of action as set up in the petition was in contract, and not in tort, there was no fatal variance between the proof and petition. Southern R. Co. *v.* Hawkins, 89 S. W. 258, 121 Ky. 415, 28 Ky. L. Rep. 364.

37. Demand for transfer.—Wasserman *v.* New York City R. Co. (App. Term), 104 N. Y. S. 398.

38. Affirmative charge should be given.—Birmingham R., etc., Co. *v.* Stanfield, 161 Ala. 488, 50 So. 51.

39. Relation of trespasser.—Where the plaintiff in his petition alleged that he was a passenger who had paid his fare, and predicated his right to recover on the violation by the company of the extraordinary care due to passengers, he could not recover if it was shown by the evidence that he was a mere trespasser. Purvis *v.* Atlanta, etc., R. Co., 72 S. E. 343, 136 Ga. 852.

On a petition alleging only an injury to a passenger because of a carrier's negligence, it is error to submit to the jury the question of plaintiff's right to recover as a trespasser, for gross negligence. Fitzgibbon *v.* Chicago, etc., R. Co., 79 N. W. 477, 108 Iowa 614.

In an action against a carrier to recover for the death of one alleged to have been a passenger, there can be no recovery on the ground of ordinary negligence of defendant in injuring a person not a passenger. Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458, rehearing denied in 109 Pac. 1025.

40. Variance as to status.—Thomas *v.* Chicago, etc., R. Co., 72 Mich. 355, 40 N. W. 463.

41. Materiality of variance.—Any variance between a complaint for injury to a passenger while alighting at C., averring that he was a passenger on the train and paid his fare to C., and proof that he was a passenger and paid his fare to L., a station one mile beyond C., is immaterial; the passenger, after paying the conductor his fare, being told by him that the train did not stop at L., and he then having proposed to get off at C., to which the conductor assented. Southern R. Co. *v.* Lollar, 33 So. 32, 135 Ala. 375.

the allegation is that plaintiff was a passenger the fact that the evidence shows him to have been a trespasser does not constitute a material variance, the action being one sounding in tort.[42]

§§ 3156-3159. As to Negligence or Cause of Injury—§ 3156. In General.—To entitle a passenger to recover for injuries, it must appear that the negligence proved was that alleged in the declaration.[43] Where the proof does not tend to make a case within the declaration, there is at least a fatal variance if not a failure of proof.[44] The character of an action is fixed by the allegations in the pleadings, and not by facts subsequently disclosed by the evidence; and hence, where plaintiff, in an action against a railroad for injuries, seeks to recover on the ground that the rails had not been properly spiked to the ties and the ground properly tamped, he can not recover on other grounds.[45] Where the negligent act or omission relied on is shown by the evidence not to have existed and resulted as alleged, there is a clear and fatal variance,[46] and

42. A complaint alleged that plaintiff was a passenger on defendant's train, and that the agents of defendant in charge of the train willfully, maliciously, forcibly, and violently, and while the train was running at a rapid rate of speed, kicked and ejected him from the steps of the car, on the ground, and under the cars, whereby he sustained personal injuries. Held, that the cause thus pleaded was one in tort; the gravamen of the complaint being an intentional and personal assault and battery; and the fact that the evidence showed that plaintiff was a trespasser and not a passenger wrongfully assaulted being proved as alleged did not constitute a material variance. Mykleby *v.* Chicago, etc., R. Co., 39 Minn. 54, 38 N. W. 763.

Where, in an action for injuries to a person in her removal from a railroad train for failure to pay fare, the essence of the complaint was the excessive force and violence used in the expulsion, a variance, if any, between the petition, alleging her to have been a passenger, and the proof, that she was an intruder only, was immaterial. Randell *v.* Chicago, etc., R. Co., 76 S. W. 493, 102 Mo. App. 342.

There may be a recovery by one, whether he was a passenger or merely a licensee or trespasser, under allegations that he had become a passenger; that defendant failed to stop the train at his destination long enough to permit him to alight safely; that, as he was trying to alight, the train was negligently started; and that he then attempted to get back in the car, and was seized by the conductor, and wrongfully, negligently, and violently pulled from the car, and thrown to the ground and injured. Fremont, etc., R. Co. *v.* Root, 69 N. W. 397, 49 Neb. 900.

43. Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001; Coyle *v.* People's R. Co. (Del.), 80 Atl. 638; Braunstein *v.* People's R. Co., 2 Boyce's (25 Del.) 55, 8 Atl. 609; Glass *v.* Chicago, etc., R. Co., 144 Ill. App. 116; Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666; Beave *v.* St. Louis Trans. Co., 212 Mo. 331, 111 S. W. 52.

A passenger, suing for a personal injury negligently inflicted, must show by a preponderance of the evidence that the negligence which caused the injury is the negligence alleged. Waller *v.* Wilmington City R. Co. (Del.), 5 Pen. 374, 61 Atl. 874.

One suing for injuries received, caused by the sudden starting of the car before he had been given an opportunity to board it, may not recover on proof that he had succeeded in boarding the car and fell from the rear platform while standing there engaging in conversation. Formiller *v.* Detroit United Railway, 164 Mich. 653, 130 N. W. 347.

44. Dolbee *v.* Detroit, etc., Railway, 144 Mich. 656, 108 N. W. 99.

45. Pleading determines character of action.—Norton *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

46. Negligence relied on not proven.—An electric railway passenger, suing for injury on the theory that the conductor was negligent in causing a sudden jerk or jar of the car, or its negligently high speed, could not recover if the speed or jar was caused by the motorman without any signal or co-operation by the conductor. Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915.

Where the complaint in an action against a street railway for injuries to a passenger alleged that he was thrown from defendant's car and injured by the car colliding with a wagon, and the uncontradicted evidence was that he stepped or was pushed from the car before the collision occurred, there was a clear variance. Chicago Union Tract. Co. *v.* Hampe, 81 N. E. 1027, 228 Ill. 346; Coyne *v.* United R. Co., 121 Mo. App. 114, 98 S. W. 110.

In an action for injuries to a passenger, where the plaintiff predicated his case on the negligence of a porter in removing a stool for passengers to alight on, just as he was stepping from the car,

if it is proven that the injury was proximately caused by some other or different act than the act of negligence solely relied on, the variance is fatal.[47] Thus, where the only ground of recovery for injury to a passenger alleged was the starting of the car after it had stopped to permit him to alight, there could be no recovery on evidence that the car had not stopped, but was moving slowly, when the passenger attempted to alight.[48] Variance as to place of injury,[49] vehicle used by plaintiff,[50] cause of injury,[51] manner in which injury was re-

and the answer contained a general denial, the defendant was entitled to a verdict, if the moving of the stool was not the cause of the accident. St. Louis, etc., R. Co. *v.* Johnson, 100 Tex. 237, 97 S. W. 1039.

A declaration in an action against a street railroad company which alleges that after plaintiff had boarded one of defendant's cars as a passenger, and was standing on the step, defendant's employees negligently ran another car against him by which he was injured, is not supported by evidence that the car on which plaintiff was standing was moving while the other car was standing still at the time of the injury, and an instruction permitting a recovery on such state of facts was erroneous. Norfolk, etc., Terminal Co. *v.* Rotolo, 179 Fed. 639, 103 C. C. A. 197.

47. *Alabama.*—Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195; Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

Kansas.—Altwein *v.* Metropolitan St. R. Co., 86 Kan. 220, 120 Pac. 550.

Missouri.—Kennedy *v.* Metropolitan St. R. Co., 128 Mo. App. 297, 107 S. W. 16.

Texas.—Allin *v.* Gulf, etc., R. Co., 26 Tex. Civ. App. 43, 62 S. W. 1079; St. Louis, etc., R. Co. *v.* Johnson, 100 Tex. 237, 97 S. W. 1039; Missouri, etc., R. Co. *v.* Redus, 48 Tex. Civ. App. 322, 107 S. W. 63.

The complaint for injury to a passenger by being thrown from the platform of a car at the station which was her destination being based on a sudden jerk before the train came to a standstill, she can not recover on evidence that the train came to a stop a reasonable time for her to alight before the jerk. Southern R. Co. *v.* Hundley, 151 Ala. 378, 44 So. 195.

A declaration, in an action against an electric railroad company for injuries to a passenger in a collision between the car on which the passenger was riding and a train at a railroad crossing, which alleges negligent management of the car and want of proper care to safely carry the passenger, does not support a recovery on proof that the equipment of the car was out of repair. Schlauder *v.* Chicago, etc., Tract. Co., 97 N. E. 233, 253 Ill. 154, reversing judgment 160 Ill. App. 309.

In an action for injuries to an elevator passenger, caused by the fall of the elevator because of structural defects or unsuitable appliances, the testimony of witnesses that prior to the accident the elevator had stopped of itself, and that the operator had held the rope in the guide so that the elevator would not go down when passengers left it, and that the operator had requested passengers to hurry, did not support the complaint. Cohen *v.* Farmers' Loan, etc., Co., 127 N. Y. S. 561, 70 Misc. Rep. 548.

48. Allegation that car had stopped.—Walsh *v.* Nassau Elect. R. Co., 117 N. Y. S. 358, 133 App. Div. 144.

Where the negligence alleged is the sudden starting of a car with a jerk when it was stationary and at rest and while the plaintiff was attempting to alight from it, and the proof is that the car was moving, and the plaintiff, while it was so moving, attempted to alight, a variance appears which will preclude a recovery. Chicago City R. Co. *v.* Gates, 135 Ill. App. 180.

Where the negligence alleged in the complaint in an action for injuries to a passenger was in stopping a street car and starting it while the passenger was alighting, plaintiff could not recover if the car did not stop until after she fell. McGrane *v.* Nassau Elect. R. Co., 118 N. Y. S. 896, 134 App. Div. 257.

49. Place of injury.—Gardner *v.* Metropolitan St. R. Co., 223 Mo. 389, 122 S. W. 1068, 18 Am. & Eng. Ann. Cas. 1166.

50. Vehicle used by plaintiff.—In an action by a street car passenger for injuries, the very act of negligence alleged must be proved, and, where it was alleged that plaintiff was injured on a south bound car on the west side of a viaduct, he could not recover upon proof that he was injured on a north bound car in the east side of the viaduct. Gardner *v.* Metropolitan St. R. Co., 122 S. W. 1068, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166.

51. Cause of injury.—The variance between the complaint, in an action for injuries to a passenger, which alleges that while she was riding as a passenger, and seated, the carrier propelled its cars at such a dangerous rate of speed around a curve as to throw her from her seat to the ground, and the proof, which shows that the injuries were received while she attempted to alight, is fatal to a recovery, in the absence of an amendment to the complaint, though the carrier was not misled. Scheu *v.* Union R. Co., 98 N. Y. S. 278, 112 App. Div. 239.

In an action for personal injuries, by a passenger against a railroad company,

ceived,[52] taking on or letting off of passenger,[53] servants or persons by whom assault committed,[54] has been held fatal. But, as has been said, the variance must be a substantial and material variance to defeat the plaintiff's right and the cases do not at all agree as to what constitutes a material and substantial variance.[55] In an injury action by a passenger against a carrier, there is no

based on allegations of negligence in failing to stop its train at a station, where she was to change cars, to allow her to get off, and in suddenly and carelessly accelerating the speed of the train while she was getting off there, plaintiff can not recover for the failure of the company to show her the safe way to go from one train to another at said station, or from any train to the station, or from the station to any train. Moss *v.* North Carolina R. Co., 29 S. E. 410, 122 N. C. 889.

52. Manner in which injury was received.—Glass *v.* Chicago, etc., R. Co., 144 Ill. App. 116; Chicago City R. Co. *v.* Carhick, 133 Ill. App. 332; Richmond R., etc., Co. *v.* West, 100 Va. 184, 40 S. E. 643.

Evidence that a passenger remained on a train and was injured by a collision does not support a declaration that he "jumped from the train to escape the collision, and was injured by violent contact with the ground." Shepard *v.* New Haven, etc., R. Co., 45 Conn. 54.

Where plaintiff's contention as set forth in his pleadings was that the starting of the train after the passengers had reached the platform, but before they had an opportunity to alight, caused a mild panic, and that some one pressed upon plaintiff in an eagerness to alight, so as to cause him to lose his hold and be thrown from the moving train, evidence that some person unknown to plaintiff, with the avowed intention of assisting him to alight, brought about his fall and injury, constituted a variance, so that the court properly granted a motion for a nonsuit. Box *v.* Atlantic, etc., R. Co., 48 S. E. 427, 120 Ga. 1050.

When plaintiff, in a suit against a railroad company, counts upon negligence in moving, propelling, and operating a train, and it appears from the evidence that the injury for which he claims damages was caused by the wrongful act of the conductor in shutting the door of a car upon plaintiff's hand, and in pushing him off the car, there is a fatal variance. Chicago, etc., R. Co. *v.* Wilcox, 12 Ill. App. 42.

53. Taking on or letting off passenger. *Illinois.*—Lake St., etc., R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374.

Missouri.—Mason *v.* St. Louis, etc., R. Co., 75 Mo. App. 1; Bond *v.* Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124.

New York.—Coleman *v.* Metropolitan St. R. Co., 81 N. Y. S. 836, 82 App. Div. 435; Wainwright *v.* Interurban St. R. Co., 96 N. Y. S. 114, 84 Misc. Rep. 645; Goldstein *v.* Metropolitan St. R. Co., 98 N. Y. S. 862, 49 Misc. Rep. 647; Edelman *v.* Interurban St. R. Co., 95 N. Y. S. 527.

Where an ordinance prohibits trains of street cars from stopping on the east side of a street when moving westward, or on the west side when moving eastward, and in an action against the street car company for negligence the complaint alleges that the negligence was the failure of the train to stop a sufficient length of time on the west side of the street to enable plaintiff to alight, and the evidence shows a failure to stop a train going west on the east side, there is a fatal variance. North Birmingham St. R. Co *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105.

Where a count in a declaration alleges that plaintiff, while attempting to board an electric street car, was thrown between the cars, and the evidence shows that after stepping on the platform of the car he was thrown under the car, it constitutes a variance. Birmingham R., etc., Co. *v.* Brannon, 31 So. 523, 132 Ala. 431.

54. Servants or persons committing assault.—The plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the train started, by a person holding a lantern in one hand and a club in the other. It does not appear that the person committing the assault and robbery was an employee of the railroad company, otherwise than that he carried a lantern with letters on it, and wore a cap with a badge upon it; nor does it appear that the assault was made in ejecting, or attempting to eject, the plaintiff from the cars, by any one connected with the operation of the train, or having any charge of the depot, its grounds, or the road; but it does appear that the alleged assault was wholly disconnected from any service in which any employee of the railroad company was engaged. Held, that the railroad company operating the train is not responsible for the wrongful acts committed upon the plaintiff, under a petition charging that the plaintiff was assaulted and injured by the servants and employees operating and controlling a train of the company. Sachrowitz *v.* Atchison, etc., R. Co., 37 Kan. 242, 15 Pac. 242.

55. Substantial variance.—See ante, "In General," § 3152.

No substantial variance—*Indiana.*—Cincinnati, etc., R. Co. *v.* Revalee, 46 N. E. 352, 17 Ind. App. 657; Evansville, etc., R.

variance in respect to the specification of mere matters of detail concerning the manner or instrumentalities by which the injury was inflicted or as to the particular agent or servant at fault, if the substantial elements of negligence alleged are proved.[56] In action for injuries caused by a sudden lurch or jerk of

Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608.

Missouri.—Green *v.* Metropolitan St. R. Co., 122 Mo. App. 647, 99 S. W. 28.

Texas.—Hicks *v.* Galveston, etc., R. Co., 96 Tex. 355, 72 S. W. 835, reversing 71 S. W. 322; Christie *v.* Galveston City R. Co. (Tex. Civ. App.), 39 S. W. 638; Denison, etc., R. Co. *v.* Johnson, 36 Tex. Civ. App. 115, 81 S. W. 780.

A declaration, in an action for injuries to a passenger while boarding a street car, which alleges that, while the passenger was boarding the car, it started forward suddenly, throwing him to the ground, is supported by evidence that the car first began to move slowly, and that just as the passenger's foot was on the second step it started forward with a jerk, throwing him from the car. Formiller *v.* Detroit United Railway, 130 N. W. 347, 164 Mich. 653.

While a plaintiff can recover only on the cause pleaded, yet in an action for injury to an alighting passenger there is no variance between a petition charging that plaintiff was thrown down by the sudden start of the car from a standstill, and evidence that the car was still moving though so slightly as to be imperceptible and wholly negligible as a factor in the fall. Kinyoun *v.* Metropolitan St. R. Co. (Mo. App.), 134 S. W. 15.

A complaint in an action for injuries to a passenger, alleging that the conductor in charge of a street car was unfit, and that defendant knew or should have known it, and that the accident happened solely through defendant's negligence, is supported by proof that while plaintiff was standing on the car step the conductor willfully knocked him from the car. Willis *v.* Metropolitan St. R. Co., 78 N. Y. S. 478, 76 App. Div. 340, 33 Civ. Proc. R. 199.

Plaintiff alleged in her statement of claims that, while a passenger in a street car in passing down the aisle, she fell into an opening in the floor of the car, and testified that her movement was affected by the sudden starting of the car. The statement of claim did not allege any negligence in that respect. Held, that there was not sufficient variance between the statement and the proof to defeat the action. Cameron *v.* Citizens' Tract. Co., 65 Atl. 534, 216 Pa. 191.

In an action against a carrier by a passenger for injury while alighting from a train, where the declaration alleged that the passenger "was compelled to step down from the car a great distance to the ground, to wit, two feet," evidence that the distance was between twenty-six and thirty-four inches was not so different from the allegation as to require the court to strike it out on the ground of variance. Chesapeake, etc., R. Co. *v.* Barger, 112 Va. 688, 72 S. E. 693.

Thrown or jumped from car.—In an action against a carrier, plaintiff's right of recovery being predicated on the negligence of defendant in starting the train while plaintiff was in the act of alighting, the petition alleging that she was thrown from the car, it is immaterial whether the evidence shows she was thrown off or that she jumped off for safety. Saeger *v.* Wabash R. Co., 110 S. W. 686, 131 Mo. App. 282. See, to same effect, Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101; S. C., 5 App. D. C. 436; Lake St., etc., R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374.

Jumping to escape danger.—Where, in an action for injuries alleged to have resulted from a collision on a street railway, the declaration averred that plaintiff was thrown from his seat to the ground by the force of the collision, proof that plaintiff jumped from the car on which he was riding, and was injured, in his endeavor to escape the danger of the collision, would not justify a recovery. McAllister *v.* People's R. Co. (Del.), 54 Atl. 743, 4 Pen. 272.

Where a petition alleged that plaintiff was a passenger in the caboose of a train, and was injured by being thrown out of the door, and on the ground, by a collision, he can not recover by showing that he had reasonable cause to apprehend a collision, and that, believing the danger was imminent, he jumped from the train, and was injured, where such facts were not pleaded, since inconsistent with the specific negligence averred. Chitty *v.* St. Louis, etc., R. Co., 49 S. W. 868, 148 Mo. 64. But see, Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747 for an apparently different view.

56. Mere matters of detail.—*Illinois.*—Chicago City R. Co. *v.* McClain, 211 Ill. 589, 71 N. E. 1103.

Massachusetts.—Ware *v.* Gay (Mass.), 11 Pick. 106.

Missouri.—Hannon *v.* St. Louis Trans. Co., 102 Mo. App. 216, 77 S. W. 158; Forrester *v.* Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401; Millar *v.* St. Louis Trans. Co. (Mo.), 114 S. W. 945; Taylor *v.* Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873.

New York.—Powell *v.* Hudson Valley R. Co., 84 N. Y. S. 337, 88 App. Div. 133.

Texas.—Hicks *v.* Galveston, etc., R. Co., 96 Tex. 355, 72 S. W. 835; Houston, etc.,

the vehicle, it is unimportant whether the plaintiff was riding the front car or a trailer.[57] Where the plaintiff alleges that he notified the conductor to stop the car, there is no material variance when it is proven that plaintiff's son who was with him notified the conductor.[58] Where the negligence relied on as the basis of the action is sufficiently proven the fact that other matters alleged, not essential to the cause of action, are shown by the proof not to have existed, will not defeat a recovery.[59] Evidence which goes further than the allegation and

R. Co. *v.* Summers (Tex. Civ. App.), 49 S. W. 1106, affirmed in 92 Tex. 621, 51 S. W. 324; Denison, etc., R. Co. *v.* Johnson, 36 Tex. Civ. App. 115, 81 S. W. 780.

West Virginia.—Kennedy *v.* Chesapeake, etc., R. Co., 68 W. Va. 589, 70 S. E. 359.

There is no variance between a complaint, in an action against a railway company for the negligent death of a passenger, which alleges that he was violently thrown from a train and fatally injured, and the proof that he voluntarily stepped from a moving train onto a station platform, lost his footing and fell, and received the fatal injury. Kansas, etc., R. Co. *v.* Matthews, 39 So. 207, 142 Ala. 298.

There was no fatal variance between allegations that plaintiff was thrown violently from her seat across the aisle of the coach, striking against a seat on the opposite side, and falling heavily to the floor of the car, whereby her right arm sustained injuries, and proof that she was injured by slipping from the seat to her knees and then back against the seat behind her. Kennedy *v.* Chesapeake, etc., R. Co., 68 W. Va. 589, 70 S. E. 359.

There is no variance between the allegation that injury was caused by the sudden movement of the car and proof that the car started forward as passenger was alighting. Jacksonville Elect. Co. *v.* Cubbage, 51 So. 139, 58 Fla. 287.

In an action for injury to a passenger in attempting to alight, there was no substantial variance, though the petition alleged that she was jerked off the car step, whereas she testified that she jumped off, where it appeared that the train gave the "kind of a jerk" it generally does when starting, putting plaintiff in a falling attitude, from which she relieved herself only by making a jump. Findley *v.* Central, etc., R. Co., 66 S. E. 485, 7 Ga. App. 180.

In an action to recover for injuries received by plaintiff while alighting from a street car, though the petition avers that the car was stopped for the purpose of allowing plaintiff to get off, he may recover on the hypothesis that it was stopped under such circumstances as to justify him in believing it was stopped for that purpose. Belt Elect. Line Co. *v.* Tomlin, 40 S. W. 925, 19 Ky. L. Rep. 433.

The fact that some of the witnesses in an action for injuries to a passenger testified that the car started with a sudden lurch or jerk was no ground for setting aside a verdict for plaintiff, though it was not so alleged in the complaint, which alleged that the car was suddenly started without warning to plaintiff. Mueller *v.* Washington Water Power Co., 106 Pac. 476, 56 Wash. 556.

Agent or servant at fault.—The variance between the allegations of the complaint in an action against a railroad company for injuries sustained, to the effect that L. was the conductor of the train, and that through his negligence plaintiff was injured, and the evidence which showed that C. was the conductor, was immaterial, where the evidence disclosed negligence on defendant's part, and the evidence was not objected to by the company. Penny *v.* Atlantic Coast Line R. Co., 45 S. E. 563, 133 N. C. 221, 63 L. R. A. 497.

As to stopping of vehicle—Variance immaterial.—Nilson *v.* Oakland Tract. Co., 10 Cal. App. 103, 101 Pac. 413; Toledo R., etc., Co. *v.* Ketrow, 26 O. C. C. 641; Paris Trans. Co. *v.* Alexander (Tex. Civ. App.), 90 S. W. 1119; Hopkins *v.* Chicago, etc., R. Co., 128 Wis. 403, 107 N. W. 330.

57. Front car or trailer.—The petition, in an action to recover for injuries received from being thrown from a street car by the sudden starting of the car while plaintiff was attempting to alight, alleged that plaintiff was riding on the trailer, but there was evidence introduced at the trial that she was riding on the front car. Held, that the variance was not important. Peck *v.* Springfield Tract. Co., 110 S. W. 659, 131 Mo. App. 134.

58. Notification of conductor.—In an action for injuries to a street car passenger, while alighting from the car, there is no variance justifying a nonsuit between the complaint alleging that the passenger notified the conductor to stop at a crossing and the evidence that the passenger's little son, who was with her on the car, notified the conductor to stop. Cohen *v.* Brooklyn Heights R. Co. (App. Div.), 118 N. Y. S. 803.

59. Negligence relied on proven.—Hansberger *v.* Sedalia Elect. R., etc., Co., 82 Mo. App. 566; Senf *v.* St. Louis, etc., Co., 112 Mo. App. 74, 86 S. W. 887; Lehner *v.* Metropolitan St. R. Co., 110 Mo. App. 215, 85 S. W. 110; Shareman *v.* St. Louis Trans. Co., 103 Mo. App. 515, 78 S. W. 846; Jacobson *v.* St. Louis Trans. Co., 106 Mo. App. 339, 80 S. W. 309.

Where a passenger was injured by the sudden stopping of a car on which she

shows the manner in which the breach alleged was committed, does constitute a variance.[60] Where a petition charges negligence in one particular, the fact that the evidence which supports the charge goes further and shows negligence which contributed to the injury will not defeat a recovery, and constitutes no variance.[61] And it is held that an assault is a negligent act within the meaning of the law.[62] A variance as to the place of the injury, to be fatal must be a substantial and material variance.[63] Mere matters of description or mere inaccuracies in pleading are held to be immaterial.[64] And it has been held that it need not be shown that an assault took place at the exact spot alleged, as the gist of the action is that the assault took place within defendant's depot,[65] and if the place proven is reasonably within the zone specified in the pleading, the variance is immaterial.[66] However, it is held that, notwithstanding plaintiff in an action against a carrier for injuries may be needlessly minute in describing the tort complained of, yet the obligation is upon him to prove the tort charged substantially as pleaded.[67]

was riding, the fact that it was not derailed will not defeat recovery on the ground of variance, despite the allegation in the petition that her injuries were caused by the carelessness of defendants in the construction and operation of the tracks and trains, and that the coach in which she was riding was wrecked, derailed, and thrown off the track. Chicago, etc., R. Co. *v.* Rowell, 151 S. W. 950, 151 Ky. 313.

As to defects in vehicle.—Jorden *v.* St. Louis, etc., R. Co., 122 Mo. App. 330, 99 S. W. 492.

60, Manner of commission of breach.—Musick *v.* United R. Co. (Mo. App.), 134 S. W. 31; Anderson *v.* Chicago, etc., R. Co., 131 Mo. App. 580, 110 S. W. 650.

A complaint charged that defendant had negligently constructed on its depot platform at a point where people were liable to step or be thrown or pushed against the same, an instrument used for signaling trains; that plaintiff, without any negligence, was pushed in such a manner that he was crowded onto said obstructions and caused to trip, so that he fell or was thrown on the same. The evidence showed that the platform was fully occupied, and that plaintiff stepped back to make way for a woman for the reason that there was not room for her to pass otherwise, and fell over the instrument. Held not to show a variance. Vance *v.* Great Northern R. Co., 118 N. W. 674, 106 Minn. 172.

61. Other contributory negligence shown.—Buck *v.* People's St. R., etc., Co., 108 Mo. App. 179, 18 S. W. 1090.

62. Assault.—A complaint in an action for injuries to a passenger, against a street railway company, alleging that while plaintiff was attempting to board a car the conductor negligently and recklessly interferred, so that he was thrown from the car and injured, is supported by proof that while plaintiff was standing on the car steps the conductor willfully knocked him from the car; the assault being in law a negligent act on the part of defendant. Willis *v.* Metropolitan St. R. Co., 78 N. Y. S. 478, 76 App. Div. 340, 33 Civ. Proc. R. 199.

In an action against a street railway the complaint detailed the striking of plaintiff by defendant's motorman, and alleged a cause of action founded not only on negligence, but upon violence, on the part of defendant's servant. The evidence showed that, as plaintiff stepped on the car, the motorman, without cause, struck plaintiff violently, saying, "You get off." Held that, though the proofs showed a willful assault, the variance was immaterial, as it could not have misled defendant. Moritz *v.* Interurban St. R. Co., 84 N. Y. S. 162.

63. Variance as to case.—Where defendant railway company was organized by consolidation of the G. & S. and S. & M. Railway Companies, the fact that the complaint in an action for injuries to a passenger charged that the injuries occurred on the line operated by the S. & M. Railway Company, while the proof showed that it was in fact on the G. & S. Railway Company's line, did not constitute a prejudicial variance. Powell *v.* Hudson Valley R. Co., 84 N. Y. S. 337, 88 App. Div. 133.

64. Mere matters of description, etc.—A complaint against a street railway company alleged that a passenger was injured while alighting "at" C., which appears to have been a shed station, and not a town or city. The evidence showed that the accident occurred about two car lengths from the station. Held, that there was no variance. Birmingham R., etc., Co. *v.* McGinty, 158 Ala. 410, 48 So. 491.

65. Exact spot.—Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202, 33 N. E. 219.

66. Reasonably within zone.—McCaffery *v.* St. Louis, etc., R. Co., 192 Mo. 144, 90 S. W. 816.

67. Effect needless description.—Chicago City R. Co. *v.* Carrick, 133 Ill. App. 332.

§ 3157. Negligence Averred Generally or Specifically.—Where a passenger in injured either through defective appliances or negligence of the carrier's servants, a general allegation of negligence is sufficient to support proof, but, if the negligence is specified, it should be proven as alleged.[68] Where the petition in an action for injuries to a passenger alleges that the carrier so negligently constructed, maintained, and operated its line and the car as to cause the accident, plaintiff may recover on any conceivable negligence that could have caused the injury and he need not adduce proof of specific negligence.[69] And the same rule applies within equal force, but with limited effect, where there is a general allegation of negligence in some particular; and where the negligence in that respect is shown specific averments as to how the thing occurred need not be proven.[70] Or if negligence in the performance of some particular duty is generally alleged, evidence of the specific acts of negligence in such performance is not a variance.[71]

§ 3158. Active or Passive Negligence.—Where a complaint alleges that defendants negligently "caused" a car to start, there is no variance, if the evidence shows that they did not actively cause the car to start, but that their passive negligence permitted it.[72]

§ 3159. Wilful or Wanton Negligence or Delay.—Where the evidence shows a case of willful injury, it fatally varies from an allegation of negligence and is insufficient to sustain a count so based.[73] And when the petition alleges

68. Negligence averred generally or specifically.—Ingles *v.* Metropolitan St. R. Co. (Mo. App.), 129 S. W. 493.

In an action for injuries from a carrier's negligence if negligence is charged in general terms, plaintiff need only show that defendant was a common carrier and that plaintiff was a passenger and injured by the carrier while being carried, but if the petition charges specific negligence the acts charged must be proven as alleged before a prima facie case is made. Cooper *v.* Century Realty Co., 123 S. W. 848, 224 Mo. 709; Kirkpatrick *v.* Metropolitan St. R. Co., 211 Mo. 68, 109 S. W. 682; Beave *v.* St. Louis Trans. Co., 212 Mo. 331, 111 S. W. 52.

Proving specific negligence.—An allegation that a passenger, while alighting, was injured by a sudden starting of the car, does not permit proof of injury caused while stepping from a moving car. Haralson *v.* San Antonio Tract. Co., 53 Tex. Civ. App. 253, 115 S. W. 876.

69. General allegation.—Augustus *v.* Chicago, etc., R. Co. (Mo. App.), 134 S. W. 22.

A declaration for injury to a street car passenger, caused by defendant of a car, counting on negligent management of the car, defects therein, and defects in the railway, was equivalent to a general allegation of negligence, relieving her of the necessity of proving any particular kind of negligence. Tobin *v.* Pittsfield Elect. St. R. Co., 92 N. E. 887, 206 Mass. 581.

70. Same rule applies.—In a street car passenger's action for injuries caused by a derailment, the complaint alleged specifically the manner in which the derailed car was operated, and that by reason thereof the car was derailed, after which it alleged that plaintiff was by such accident, and because of defendant's carelessness and negligence, violently thrown from her seat to the ground where the car left the rails, and that by reason of such accident, caused by defendant's negligence as aforesaid, plaintiff was injured, etc. Held, that the gist of the allegations was that plaintiff was negligently thrown from a car and injured, so that plaintiff was not required to prove, the specific averments as to the manner in which the car was operated. Louisville, etc., Tract. Co. *v.* Snead (Ind. App.), 93 N. E. 177.

71. Proof of specific negligence.—A complaint in an action for injuries to a passenger thrown from the platform of the coach by a lurch of the train, which alleges the duty of the carrier to furnish sufficient coaches for the passengers, and that it failed to furnish to the passenger a safe place in which to travel, and that in consequence thereof the passenger was in an unsafe place, is supported by evidence that the conductor required the passenger to occupy an unsafe place on the platform because of the crowded condition of the coach; for if it was necessary for the passenger to go on the platform, and he went there under the pressure of that necessity and in obedience to the request of the conductor, the platform was for the time the place furnished him. Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

72. Active or passive negligence.—Asbury *v.* Charlotte Elect. R., etc., Co., 34 S. E. 654, 125 N. C. 568.

73. Wilful injury.—Plaintiff's intestate, a man over eighty years of age, was a

wilfulness in the doing or refusal to do an act, proof of mere negligence is not sufficient.[74] While, in an action against a carrier for injuries which the complaint alleges were due to the willful acts of defendant's servants, proof of simple negligence is not sufficient, where the evidence is open to the interpretation that the servants' acts were willful, the question is for the jury, and an instruction that there was a fatal variance between allegations and proof is properly refused.[75] In an action for delay evidence that on account of a wreck the engine was detached from the train, and used to carry another car to another point, delaying the train for hours, does not support an allegation that the act was done wantonly and wilfully.[76]

§ 3160. As to Persons Liable.—In an action on the case, by a passenger in a stage coach, to recover for an injury done to him by its upsetting, the plaintiff is entitled to recover if he prove the liability of any of the persons sued.[77] But in assumpsit to recover for an injury done to the plaintiff, a passenger, by the upsetting of a stage coach, the plaintiff must prove the liability of all persons sued.[78]

§ 3161. As to Injury or Damages.—It seems that the plaintiff should not be restricted to the precise language used in his pleading. Hence, a variance between the allegations and the proof of the injuries arising from the acts of the defendant must be substantial to avail the defendant on objection. Thus, it has been held that there was no substantial variance between an allegation that when plaintiff struck the ground he was shocked and shaken out of his right mind, and became senseless, and evidence that after falling he spoke a few words to persons who came to his assistance, and then became unconscious.[79] Where the declaration alleged that plaintiff was a machinist when he was injured, the fact that the evidence showed that he was a tool maker did not prevent him from recovering damages for deceased earning capacity as a skilled workman, the proof showing that tool makers were machinists, as the word "machinist" was broad enough to cover skilled machinists.[80]

§ 3162. Amendment to Conform to Proof.—In some cases it is within the power of the court to order an amendment of the declaration to conform to

passenger on one of defendant's trains, with a ticket to G. He did not alight at a junction point, but was found next morning some distance therefrom in a frozen condition, from the effects of which he died. A witness saw two white men in the uniform of defendant railroad company come onto the rear platform of the rear car of the train on which deceased was riding and push him, while the train was running, from the platform at a point near where he was found, where the ground was rough and uneven. Held to establish a cause of action for willful injury, and therefore insufficient to sustain a count for negligence. Louisville, etc., R. Co. *v.* Perkins, 152 Ala. 133, 44 So. 602.

74. Mere negligence insufficient.—Where the complaint, in an action against a railroad company for the conductor's refusal to stop its train at the proper station, alleges that he "willfully refused" to stop, and carried her several hundred yards beyond, "without her consent and against her protest," and the evidence shows that the conductor only neglected to stop, and that plaintiff consented to alight at the further place without objection or protest, there is a fatal variance. Louisville, etc., R. Co. *v.* Johnston, 79 Ala. 436.

Where a complaint against a railroad company alleged that plaintiff was willfully injured by the company's servant, no recovery can be had in the absence of proof that the injury was willful. Indiana, etc., R. Co. *v.* Burdge, 94 Ind. 46.

75. Allegation of willful or wanton negligence.—Highland Ave., etc., R. Co. *v.* Winn, 93 Ala. 306, 9 So. 509.

76. Wanton or wilful delay.—Aaron *v.* Southern Railway, 68 S. C. 98, 46 S. E. 556.

77. As to persons liable.—McCall *v.* Forsyth (Pa.), 4 Watts & S. 179.

78. Persons liable in assumpsit.—McCall *v.* Forsyth (Pa.), 4 Watts & S. 179.

79. Allegations as to injury.—International, etc., R. Co. *v.* Hugen, 45 Tex. Civ. App. 326, 100 S. W. 1000.

80. "Tool maker" or machinist.—Fillingham *v.* Michigan United Railways, 117 N. W. 635, 154 Mich 233.

the proof, where it is necessary to promote substantial justice.[81]

§§ 3163-3193. Presumptions and Burden of Proof—§ 3163. In Action for Failure to Perform Contract.—In General.—The law will not presume willful violations of duty, and one alleging that his rights have been willfully invaded has the burden of proving it by something more than mere surmise or conjecture.[82]

In Contract or Tort.— A carrier's liability for damages for breach of contract for carriage of a passenger is subject to the same rules, and may be established by like testimony and presumptions, as in cases of torts based on the same facts.[83]

Refusal to Receive and Carry.—The burden is on a carrier to justify its refusal to accept as passengers those properly applying for transportation by showing the existence of the special facts warranting such refusal.[84]

Presumption of Knowledge of Passenger as to Trains.—A constant traveler on a line of railroad is presumptively chargeable with knowledge of the points at which trains on the line will stop.[85]

Refusal to Honor Ticket.—In an action against a railroad company to recover for the taking up and destruction by a conductor of plaintiff's ticket, and compelling him to pay cash fare, where there is a conflict of evidence as to whether the ticket was a good one or one that had expired, the fact that the conductor destroyed it raises the presumption that it was good, since it was his duty, in any event, to turn it in to the auditor of the road.[86]

Where Time Limit Transpired.—Where the time for transportation to destination had expired when a passenger presented his coupon ticket to the last carrier, in an action for refusal to carry him for that reason, the burden was upon plaintiff to show that the time limitation contained in the ticket was unreasonable.[87]

Breach of Mileage Contract—Assumed Liability.—In an action against a carrier for breach of a contract contained in a mileage book issued by another company, evidence that the defendant's ticket collector had often recognized the mileage contract tends to show an assumption of the contract by defendant and a recognition of its liability thereunder.[88]

Failure to Stop and Receive.—Where a carrier advertises on the schedule of its trains that it will stop at a certain station for the purpose of receiving and discharging passengers, it impliedly contracts with a passenger to do so, and while some overruling necessity might excuse its passing the station, the burden would be on the carrier to show it.[89]

Separation of Passengers.—Where the law provides that carriers shall furnish equal but separate accommodations for the white and colored races, etc.,

81. Amendment to conform to proof.—Where a complaint against a carrier for injuries to a passenger alleged the passenger's unwarranted arrest caused by the conductor, it was competent to show both the arrest and an unwarranted assault committed on the passenger by the conductor, though the complaint was silent as to the assault; it being within the power of the court to have ordered an amendment of the complaint to conform to the proof. Baumstein *v.* New York City R. Co., 107 N. Y. S. 23, 56 Misc. Rep. 498.

82. Failure to perform contract in general.—Hunter *v.* Southern Railway, 73 S. E. 1017, 90 S. C. 507.

83. In contract or tort.—El Paso, etc., R. Co. *v.* Landon (Tex. Civ. App.), 124 S. W. 744.

84. Refusal to receive.—St Louis, etc., R. Co. *v.* Laurence, 106 Ark. 544, 153 S. W. 799.

85. Presumption of knowledge of passenger as to trains.—Powell *v.* St. Louis, etc., R. Co. (Mo.), 129 S. W. 963.

86. Presumption as to validity of ticket.—Louisville, etc., R. Co. *v.* Donaldson, 43 S. W. 439, 19 Ky. L. Rep. 1384.

87. Refusal to honor ticket.—Brian *v.* Oregon, etc., R. Co., 105 Pac. 489, 40 Mont. 109, 25 L. R. A., N. S., 459, 20 Am. & Eng. Ann. Cas. 311.

88. Assumption of liability under contract.—Johnson *v.* Michigan United Railways, 153 Mich. 65, 116 N. W. 529.

89. Failure to stop and receive.—Owens *v.* Atlantic, etc., R. Co., 147 N. C. 357, 61 S. E. 198.

in an action for damages for compelling plaintiff's children to ride in cars assigned to the colored race, it being alleged that the children belonged to the white race, the burden is on the plaintiff to show that the children belonged to the white race according to the rules of determination laid down by law.[90]

Delay—Failure to Make Schedule.—It being shown that a carrier failed to make its schedule time and connections resulting in injury to a passenger, a presumption of negligence arises, putting on the carrier the burden of showing that such failure was not due to its negligence.[91] In such cases it is deemed that the carrier is the only one who can explain the causes of the delay.[92] So where the defendant alleges that the delay was caused by a wreck on one of its branch lines, the burden is on defendant to show that it was in no way responsible for the wreck, or that it used due diligence to repair the damage and resume operation of its trains.[93]

Presumption of Willfulness.—In an action against a railroad company because of the delay of a train upon which plaintiff expected to travel, a presumption that defendant was negligent because of long delay in making connections according to schedule rebutted the presumption that defendant willfully caused the delay, since two contrary presumptions will not arise from the same fact.[94]

Failure to Stop and Discharge.—A railroad company is conclusively presumed to know of its undertaking to carry a passenger to, and stop at, a flag station, when he buys a ticket therefor, and boards the proper train, regardless of the conductor's neglect of his duty to call for his ticket, and so inform himself of the passenger's destination.[95]

Failure to Stop Reasonable Time.—Where the gravaman of the complaint is that the train did not stop long enough to enable plaintiff, by the use of reasonable diligence, to leave the cars in safety, such allegation must be established by proof; the fact that plaintiff was carried beyond her destination establishes no presumption of negligence on the part of the carrier.[96]

§ 3164. In Actions for Ejection.—As a general rule in actions for ejection of passengers the burden is on plaintiff to prove by a preponderance of the evidence the truth of the facts alleged.[97] Thus, a passenger who claims to have

90. Separation of passengers.—Acts 1890, p. 152, No. 111, requires railroad companies to provide equal, but separate, accommodations for the white and colored races, and makes it a misdemeanor to assign a passenger to a coach other than the one set aside for persons of his race. Plaintiff sued for damages on the ground that two of his children, born of white parents, had been unlawfully assigned by the conductor to a coach set apart for colored people. Held, that the burden of proof was on plaintiff to show that his children belonged to the white race, and under the statute any person having an appreciable mixture of negro blood belongs to the colored race. Lee *v.* New Orleans, etc., R. Co., 51 So. 182, 125 La. 236.

91. Delay—Failure to make schedule.—Taber *v.* Seaboard Air Line Railway, 62 S. E. 311, 81 S. C. 317.

Where a carrier has failed to make its schedule time to the injury of a passenger, a presumption of negligence arises, and the burden is on the carrier to show that such failure was not due to its negligence. Taber *v.* Seaboard Air Line Railway, 66 S. E. 292, 84 S. C. 291, 19 Am. & Eng. Ann. Cas. 1132.

92. In an action against a railroad company because of the delay of a train upon which plaintiff expected to travel, where there was evidence of long delay in making schedule connections, resulting in some expense and loss of time to a passenger, a presumption of negligence arose which it was incumbent on the carrier to negative; the carrier being the only one that could make such explanation. Mulligan *v.* Southern R. Co., 84 S. C. 171, 65 S. E. 1040.

93. Defense set up by defendant.—International, etc., R. Co. *v.* Harder, 81 S. W. 356, 36 Tex. Civ. App. 151.

94. Presumption of wilfulness.—Mulligan *v.* Southern R. Co., 84 S. C. 171, 65 S. E. 1040.

95. Failure to stop and discharge.—San Antonio, etc., R. Co. *v.* Dykes (Tex. Civ. App.), 45 S. W. 758.

96. Failure to stop reasonable time.—Hewes *v.* Philadelphia, etc., R. Co., 76 Md. 154, 24 Atl. 325.

97. Facts alleged in declaration.—El Paso Elect. R. Co. *v.* Alderete, 36 Tex. Civ. App. 142, 81 S. W. 1246.

In an action for damages in ejecting a passenger from a train, when the pleadings put in issue the facts whether plain-

been ejected from a train while attempting to ride on a commutation ticket issued to a firm, has the burden of proving the existence of the firm, and that he was a member thereof.[98] So in an action against a street railway company for ejecting a passenger who presented an improperly punched transfer, the burden is on him to show that the conductor on the first car was bound to issue a transfer to him to the car from which he was ejected.[99] But where a railroad company, in an action by a passenger to recover damages for a wrongful ejectment, admitted the ejectment complained of, and pleaded facts authorizing it which were denied by the passenger, the burden of proof was on the company.[1] Where defendant, by its answer, admits that plaintiff is entitled to actual damages, the burden of proof is upon it, under a statute which provides that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." [2]

Relation of Carrier and Passenger.—The burden of showing that the expulsion of a person from a car lawful does not devolve on a railway company until it be shown that such person was rightfully in the car.[3] In an action for damages for injuries sustained by plaintiff in being put off a railroad train, the plaintiff must prove, not that the train was that of defendant, but it was in defendant's use at the time.[4] But when it is admitted that a railroad company which is sued for the ejection of a passenger from the train is the owner of the railroad on which the train runs, a presumption arises that the same is operated by the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact.[5]

Reasonableness of Rules of Carrier.—The general rule is that it will be presumed that the requirement of the conductor as to the payment of fare, increased fare, etc.,[6] was lawful, where the carrier is sued for a wrongful ejection.

Validity of Ticket or Transfer.—A railroad company sued for ejecting a passenger has the burden of showing that the ticket was not legal, and that the conductor was not authorized to receive it, where the ticket was evidently gen-

tiff voluntarily left the train, and what was the regular fare, the burden of proof is on plaintiff. Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 7 Ky. L. Rep. 498.

98. Right to use commutation ticket.—Granier *v.* Louisiana, etc., R. Co., 42 La. Ann. 880, 8 So. 614.

99. Right to transfer.—Birmingham R., etc., Co. *v.* Turner 154 Ala. 542, 45 So. 671.

1. Ejectment admitted.—Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 23 S. W. 509, 15 Ky. L. Rep. 380.

The burden was on defendant, a railroad company, sued for ejecting a passenger, to sustain its defense that he had refused to pay his fare, etc. Holt *v.* Hannibal, etc., R. Co., 74 S. W. 631, 174 Mo. 524.

Under Rev. St. 1899, § 1074 (Ann. St. 1906, p. 923), authorizing the ejection of passengers for nonpayment of fare or offensive conduct, the burden is on a railroad company sued for ejecting a passenger to show ejection on a statutory ground. Ferguson *v.* Missouri Pac. R. Co. (Mo. App.), 128 S. W. 799.

Where a carrier defends an action by a passenger for wrongful ejection on the ground of the passenger's failure to comply with conditions of his ticket, the burden of proof is on the carrier to show such conditions. Daniels *v.* Florida, etc., R. Co., 39 S. E. 762, 62 S. C. 1.

2. Statutory provisions.—Louisville, etc., R. Co. *v.* Champion, 24 Ky. L. Rep. 87, 68 S. W. 143. See Ky. Civ. Code Prac., § 526.

3. In action for ejectment.—Central, etc., R. Co. *v.* Cannon, 32 S. E. 874, 106 Ga. 828.

4. Relation of carrier and passenger.—Sullivan *v.* Oregon R., etc., Co., 12 Ore. 392, 7 Pac. 508, 53 Am. Rep. 364.

5. Presumption arising on admission.—Peabody *v.* Oregon R., etc., Co., 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823.

6. Reasonableness of rules.—Where the complaint in an action against a street railroad company, in a city of over 100,000 population, for the ejection of a passenger for the nonpayment of fare, does not allege that the company was not acting under a contract with the city, made in pursuance of 2 Burns' Rev. St. 1901, § 5458c et seq., authorizing and relating to such contracts, which would authorize the charge of an increased fare, it will be presumed that the requirement of the conductor as to the payment of the increased fare was lawful. Smith *v.* Indianapolis St. R. Co., 63 N. E. 849, 158 Ind. 425.

uine.[7] And where transfers are received by a passenger from a street car conductor in response to a request made in due course for proper transfers, it will be presumed, in the absence of evidence to the contrary, that they were proper tokens of transfer, and entitled the passenger to passage on the car to which he transferred, and that the conduct of the conductor of that car in refusing to receive them in lieu of cash fares was unwarranted.[8]

Ticket Purchased of Broker.—A person who purchases of a ticket broker a ticket which purports on its face to have been irregularly issued has the burden of proving, in an action against a carrier for ejection from a train for refusal to pay his fare otherwise than with the ticket, that the sale by the broker was authorized.[9]

Special Contract.—Where a passenger, suing for wrongful ejection from the train on the refusal of the conductor to honor his ticket, which had expired, relied on a special contract with the agent selling the ticket that he should have the right to the trip until a designated date, an answer alleging that the contract was evidence by the ticket alone denied the special contract, and the burden of proof was on the passenger.[10]

Failure to Produce Ticket.—In an action by a passenger who was ejected from a railroad train, though he had a ticket, where the company defended on the ground that he failed to produce his ticket, the burden of proving that he intended to produce his ticket and that he so notified the conductor is on the plaintiff.[11]

Authority of Servant.—In an action against a railroad company for injuries caused by being ejected from a train by a brakeman, the burden of proof is upon the plaintiff to show that the brakeman had authority to eject him.[12] But the rule is otherwise where the conductor ejects a passenger and if there is no dispute as to the fact of a passenger's having been ejected by a person representing himself to be a conductor, and possessed of the paraphernalia of such officer at the time, and being actually engaged in taking fares of other passengers, a strong presumption is created that such person was in fact a conductor of the train.[13]

§§ 3165-3193. In Actions for Personal Injury—§ 3165. As to Relation of Carrier and Passenger.—A person suing a carrier for injuries received while a passenger must establish the fact that he was a passenger at the time.[14] In an action for injuries alleged to have occurred while plaintiff was boarding

7. Validity of ticket.—Ferguson *v.* Missouri Pac. R. Co. (Mo. App.), 128 S. W. 799.

8. Validity of transfer.—Summerfield *v.* St. Louis Trans. Co., 84 S. W. 172, 108 Mo. App. 718.

9. Ticket purchased of broker.—Comer *v.* Foley, 98 Ga. 678, 25 S. E. 671.

10. Special contract.—Cincinnati, etc., R. Co. *v.* Carson, 140 S. W. 71, 145 Ky. 81.

11. Failure to produce ticket.—Louisville, etc., R. Co. *v.* Mason, 4 Ala. App. 353, 58 So. 963.

12. Authority of servant.—Lake Shore, etc., R. Co. *v.* Peterson, 42 N. E. 480, 43 N. E. 1, 144 Ind. 214.

The authority of a brakeman to put a passenger off a train will not be presumed, but must be proved. Illinois Cent. R. Co. *v.* Black, 122 Ill. App. 439.

13. Ejection by conductor.—Lampkins *v.* Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530.

Where a train is in motion, and a man appears with a conductor's cap and badge, and acts as such, and is recognized, it must be presumed that he is in the carrier's employ as a conductor. Hoffman *v.* New York, etc., R. Co., 44 N. Y. Super. Ct. 1.

Where a man appears on a train wearing a brakeman's cap and jacket, and assuming to act with authority, it may be presumed that he was in the company's employ as a brakeman. Hughes *v.* New York, etc., R. Co., 36 N. Y. Super. Ct. 222.

14. General rule as to burden of proof.—Birmingham R., etc., Co. *v.* McCurdy, 172 Ala. 488, 55 So. 616; Domenico *v.* El Paso Elect. R. Co. (Tex. Civ. App.), 90 S. W. 60.

The burden is on plaintiff to prove that he was a passenger. Lincoln Tract. Co. *v.* Webb, 73 Neb. 136, 102 N. W. 258, 119 Am. St. Rep. 879; Meschneck *v.* Brooklyn, etc., R. Co., 109 N. Y. S. 594, 125 App. Div. 265; Schneier *v.* Brooklyn Heights R. Co., 109 N. Y. S. 595, 125 App. Div. 911.

one of defendant's cars as a passenger, while the car was standing at a regular stopping place for the reception of passengers, the burden was on plaintiff to prove that he was a passenger.[15]

Mail Clerk.—In an action for the death of a railway mail clerk, the burden of proving that deceased was in the discharge of his official duties at the time of the accident in which he was killed is on plaintiff.[16]

Person Riding on Freight.—It seems to be the rule that a person claiming to have been injured while riding on a freight train as a passenger must show that the railway company allowed such trains to carry passengers.[17] And in an action to recover for the death or injury of one riding on a freight train in violation of the company's rule forbidding the carrying of passengers on freight trains, the burden of showing that the attitude the company assumed towards the deceased was that of a carrier of passengers is on the plaintiff.[18]

Status of Person Riding on Engine.—Where the printed regulations of the defendant prohibited the engineer from allowing persons not in its employment to ride upon the engine, and where the engineer informed the plaintiff that it was against the rule to carry him in that way, but nevertheless allowed him to ride, the presumption is against the right of the plaintiff to be upon the engine, whether he paid fare or rode free.[19]

Person Riding on Employee's Pass.—The fact that plaintiff was riding on an employee's pass raises a prima facie presumption that he was a servant of the company.[20]

Authority of Servant to Contract.—It is not to be presumed that brakemen and other servants of similar duties have authority to make contracts of carriage at all or that a person could by virtue of such a contract become a passenger.[21]

Presumptions as to Contract.—Where, in an action by a husband and wife against a railroad company for injuries received by the wife while a passenger, it does not appear who paid for the ticket on which the wife traveled, the pre-

15. Person boarding car at regular stopping place.—Alabama, etc., R. Co. *v.* Bates, 149 Ala. 487, 43 So. 98.

16. Mail clerk.—Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458, rehearing denied in 109 Pac. 1025.

17. Person riding on freight.—Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118.

18. Riding in violation of carrier's rules.—San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

Where passengers are forbidden on freight trains and there are no cars attached to the trains except freight cars, the burden of proving that the injured person was justified in riding thereon is on the party claiming damages for his injury. Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

19. Status of person riding on engine.—Robertson *v.* New York, etc., R. Co. (N. Y.), 22 Barb. 91.

20. Person riding on employee's pass.—Pennsylvania R. Co. *v.* Books, 57 Pa. 339, 98 Am. Dec. 229.

21. Authority of servants to contract.—Missouri, etc., R. Co. *v.* Huff, 98 Tex. 110, 81 S. W. 525; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 17 S. W. 1039; Missouri, etc., R. Co. *v.* Williams, 91 Tex. 255, 42 S. W. 855.

Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on a coal car, it was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on the car, but the burden was on plaintiff to prove such facts. Judgment 78 S. W. 249, reversed in Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110.

Burden of proof to show authority of employees to allow persons in train.—In International, etc., R. Co. *v.* Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521, there was no dispute as to appellee having the consent of the appellant to ride on a hand car, but it was denied that such servant had any authority to give appellant's consent for him to do so, and there was evidence tending to support this view of the case. It was held that the district court erred in holding as a matter of law, under the facts of the case, that appellee had the consent of appellant to ride upon a hand car, but that it should have been left to the jury, under appropriate instructions, to determine the status of appellee in connection of said car, citing Jackson *v.* Second Ave. R. Co., 47 N. Y. 274, 7 Am. Rep. 448; Redding *v.* South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

sumption is that the implied contract for her safe carriage was made with her, and not with the husband.[22]

Presumption Arising from Ticket Issued.—Where there is no coupon or other statement on the ticket to indicate that any part of the contract is to be performed by any other carrier than the defendant, it would be presumed that plaintiff is to be under defendant's care during the whole trip, and the burden is on defendant to show that such is not the fact.[23]

Waiver of Contractual Limitations.—Where the contract under which plaintiff was being transported limited his right to occupy certain portions of the train while in transit, the burden is on him to show a waiver of the benefits of such contract in that respect.[24]

§ 3166. As to Injury.—In an action by a passenger against a carrier he must prove the injury alleged in his pleading,[25] and show that such injury was the proximate result of the carrier's negligence.[26]

§§ 3167-3193. As to Negligence or Cause of Injury—§ 3167. In General.—The burden is upon a plaintiff who seeks to recover from a carrier damages for personal injuries sustained while upon his journey to prove negligence or facts from which a presumption of negligence arises,[27] and a charge of the court which places the burden of proof on the carrier is erroneous.[28] Because a passenger is injured without his fault, it will not be presumed that injury resulted from carrier's negligence, nor is the burden on carrier to show that it did not.[29] In an action against a carrier for injuries to a passenger, the burden of

22. Presumptions as to contract.—Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

23. Presumption arising from ticket issued.—Clemmens *v.* Washington Park Steamboat Co., 162 Fed. 815.

24. Waiver of contractual limitations.—Illinois Cent. R. Co. *v.* Jennings, 229 Ill. 608, 82 N. E. 403.

25. As to injury.—Casper *v.* New Orleans R., etc., Co., 121 La. 603, 46 So. 666.

26. Proximate result of negligence.—See post, "Connection between Negligence and Injury," § 3168.

27. Burden of proving negligence—In general.—*Georgia.*—Davis *v.* Central Railroad, 60 Ga. 329; Mitchell *v.* Western, etc., R. Co., 30 Ga. 22; Western, etc., R. Co. *v.* Hunt, 116 Ga. 448, 42 S. E. 785.

Indiana.—Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

Louisiana.—Casper *v.* New Orleans R., etc., Co., 121 La. 603, 46 So. 666.

Michigan.—Thurston *v.* Detroit United R. Co., 100 N. W. 395, 137 Mich. 231.

Missouri.—Young *v.* Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175, affirmed in 88 S. W. 767, 113 Mo. App. 636.

Pennsylvania.—Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

Tennessee.—Railroad *v.* Mitchell, 58 Tenn. (11 Heisk.) 400.

Texas.—Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 8 S. W. 78; St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 481, 9 S. W. 467; Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 279, 28 S. W. 277, 47 Am. St. Rep. 103; St. Louis, etc., R. Co. *v.* Parks, 97 Tex. 131, 76 S. W. 740; Paris, etc., R. Co. *v.* Robinson, 53 Tex. Civ. App. 12, 114 S. W. 658.

Virginia.—Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

In an action for injury to a passenger, plaintiff must show a breach of duty on the carrier's part, or on the part of its servants, which has produced the injury. Feil *v.* West Jersey, etc., R. Co., 77 N. J. L. 502, 72 Atl. 362.

Charging negligence of codefendants.—Where plaintiff who was injured in a collision between street cars sued two street railroad companies, and charged that she suffered damages through the negligence of the servants of both, the burden was on her to prove such charge. Chlanda *v.* St. Louis Trans. Co., 112 S. W. 249, 213 Mo. 244.

Assault.—One suing a street railway company for injuries received while a passenger, in consequence of being assaulted by the conductor, has the burden of showing, by the weight of the evidence, that the injury was caused by the wrongful act of the conductor, or the verdict must be for the company. Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108.

28. Charge erroneous.—Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

29. No presumption from mere injury.—Texas, etc., R. Co. *v.* Buckalew, 3 Tex. Civ. App. 272, 275, 22 S. W. 994; Jones *v.* Ft. Worth, etc., R. Co., 47 Tex. Civ. App. 596, 105 S. W. 1007, citing Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Mt. Adams, etc., R. Co. *v.* Isaacs, 18 O. C. C. 177, 10 O. C. D. 49.

proof of negligence where it is denied, is on the plaintiff, and can not be shifted to the defendant without showing that the injury in question was caused by some person or thing connected with the carrier's railroad or business of transportation.[30] Here as in other cases the burden is on plaintiff to show all the essential elements of actionable negligence.[31] While, as will be shown later,[32] a presump-

30. Carrier must control agency injuring passenger.—*United States.*—Pennsylvania R. Co. *v.* McCaffrey, 149 Fed. 404, 79 C. C. A. 224; The Nederland, 14 Fed. 63; Irvine *v.* Delaware, etc., R. Co., 184 Fed. 664, 106 C. C. A. 600.

Alabama.—Louisville, etc., R. Co. *v.* Cornelius, 6 Ala. App. 386, 60 So. 740.

Delaware.—Butler *v.* Wilmington City R. Co., 2 Boyce's (25 Del.) 262, 78 Atl. 871; Braunstein *v.* People's R. Co., 2 Boyce's (25 Del.) 55, 78 Atl. 609.

Florida.—Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

Georgia.—Mitchell *v.* Western, etc., R. Co., 30 Ga. 22.

Illinois.—Vischer *v.* Northwestern Elev. R. Co., 256 Ill. 572, 100 N. E. 270, affirming judgment 171 Ill. App. 544; Wabash R. Co. *v.* Jellison, 124 Ill. App. 652.

Maryland.—Central R. Co. *v.* Smith, 74 Md. 212, 21 Atl. 706.

Michigan.—Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

Missouri.—Yarnell *v.* Kansas, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Cooper *v.* Century Realty Co., 224 Mo. 709, 123 S. W. 848.

Montana.—Tailon *v.* Mears, 29 Mont. 161, 74 Pac. 421.

Nebraska.—Lincoln Tract. Co. *v.* Webb, 73 Neb. 136, 102 N. W. 258, 119 Am. St. Rep. 879.

New York.—Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418.

Ohio.—Cleveland City R. Co. *v.* Osborne, 66 O. St. 45, 63 N. E. 604.

Pennsylvania.—Cline *v.* Pittsburg R. Co., 226 Pa. 586, 75 Atl. 850, 27 L. R. A., N. S., 936.

Tennessee.—East Tennessee, etc., R. Co. *v.* Mitchell, 58 Tenn. (11 Heisk.) 400.

Texas.—Texas, etc., R. Co. *v.* Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994; Paris, etc., R. Co. *v.* Robinson, 53 Tex. Civ. App. 12, 114 S. W. 658.

Virginia.—Roanoke R., etc., Co. *v.* Sterrett, 111 Va. 293, 68 S. E. 998.

Washington.—Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72.

In an action against a street railway company for death caused by collision of a street car with plaintiff's intestate while awaiting the car to take passage hereon, the plaintiff assumes the burden of showing by a preponderance of the evidence the defendant's negligence. Kruck *v.* Connecticut Co., 80 Atl. 162, 84 Conn. 401.

A passenger, suing a carrier for injuries received through the negligence of the carrier, has the burden of proving negligence. Reiss *v.* Wilmington City R. Co. (Del.), 67 Atl. 153.

Where plaintiff, a passenger on a street car, claimed that she was injured while attempting to alight because of the defective condition of a step of the car, she was bound to show that she was injured while in the exercise of due care, and that the defective step was the proximate cause of her injury. Smithers *v.* Wilmington City R. Co. (Del.), 6 Pen. 422, 67 Atl. 167.

Parents suing for the negligent death of a son while a passenger must, to recover, establish prima facie that the carrier was negligent, and that the negligence caused the death. Hart *v.* St. Louis, etc., R. Co., 102 Pac. 1101, 80 Kan. 699.

The negligence of a railway company will not be presumed in an action against it for personal injury received by a passenger, but must be shown; and there can be no recovery unless it appears to be the efficient cause of the injury without contributory fault in the plaintiff. Mitchell *v.* Chicago, etc., R. Co., 16 N. W. 388, 51 Mich. 236, 47 Am. Rep. 566.

The burden of proving that defendant street far company was negligent in failing to employ a conductor or second man on its car is on plaintiff passenger, who alleges such negligence. Palmer *v.* Winona R., etc., Co., 80 N. W. 869, 78 Minn. 138.

In a street car passenger's action for injuries, the burden was on plaintiff to prove that his injury was the result of defendant's failure to observe such precautions as the exigencies of the case required. Previsich *v.* Butte Electric R. Co., 47 Mont. 170, 131 Pac. 25.

Where negligence denied.—In an action by a passenger against the carrier for personal injuries caused by defendant's negligence, the alleged negligence being denied, plaintiff has the burden of proof. Kentucky Cent. R. Co. *v.* Gerreiss, 14 Ky. L. Rep. 397.

31. Essential elements of actionable negligence.—Kelley *v.* Grand Trunk Western R. Co., 46 Ind. App. 697, 93 N. E. 616.

In an action against a railroad for death of a passenger killed through the destruction of a train alleged to have been neg-

32. Presumption.—See post, "Presumption Arising from Evidence," §§ 3169-3174.

tion of negligence arises against a carrier on proof that an injury to a passenger was chargeable to an appliance of transportation, yet the burden of proving such fact as a basis for the presumption, in an action to recover for the injury, rests upon the plaintiff.[33]

§ 3168. Connection between Negligence and Injury.—A passenger claiming to have been injured by a carrier's negligence has the burden in the first instance of showing that the negligence proximately contributed to the injury.[34] Where a passenger claims to have been injured by the carrier's negligence in failing to furnish a safe place for alighting, the burden of showing that the negligence in this respect contributed proximately to the injury rests on the plaintiff.[35]

Carrying Past Destination Resulting in Injury.—Where the plaintiff is put off some distance from his destination and alleges sickness resulting from the exposure, the burden is on him to show what he alleges in that respect.[36]

§§ 3169-3174. Presumption Arising from Evidence—§§ 3169-3173. General Rule—Prima Facie Case—§ 3169. Negligence Generally Pleaded.—It may be generally stated that no presumption of negligence can arise from the mere fact of injury to the passenger,[37] even though plaintiff be free from

ligently run through a forest fire, plaintiff had the burden of proving that defendant's engineer was negligent in attempting to proceed after discovering the fire. Konieczny *v.* Detroit, etc., R. Co., 164 Mich. 66, 128 N. W. 1096.

33. Original burden.—Kefauver *v.* Philadelphia, etc., R. Co., 122 Fed. 966.

Elevator cases.—The plaintiff in an action for injuries received by a passenger through the defective working of an elevator has the burden of showing that the injury resulted from defendant's negligence. Griffen *v.* Manice, 73 N. Y. S. 559, 36 Misc. Rep. 364; S. C., 77 N. Y. S. 626, 74 App. Div. 371, affirmed in 66 N. E. 1109, 174 N. Y. 505.

34. Connection between negligence and injury.—Louisville, etc., R. Co. *v.* Cornelius, 6 Ala. App. 386, 60 So. 740.

In an action against a railway company for personal injuries, plaintiff must show that the negligence of defendant was the proximate cause of the injury. Braunstein *v.* People's R. Co., 2 Boyce's (25 Del.) 55, 78 Atl. 609.

In an action for injuries from a defect in a station platform received in alighting, the burden is on plaintiff to show that the injury is directly traceable to the accident. McClanahan *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 535.

In an action for injury to a passenger, the plaintiff must prove by competent evidence that the negligence of defendant was the proximate cause of the injury Painter *v.* Chicago, etc., R. Co. (Neb.), 140 N. W. 787.

In an action by a passenger on a street car to recover for personal injuries occasioned by the negligence of defendant, plaintiff must prove some negligent act of the defendant which was the proximate cause of the injury. Cleveland City R. Co. *v.* Osborne, 66 O. St. 45, 63 N. E. 604.

Where damages are claimed for injuries to a passenger resulting from the negligence of railroad company, it devolves upon plaintiff to show that the injury was caused by defendant. St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 481, 9 S. W. 467.

35. Negligence as to stopping place.—Rist *v.* Philadelphia Rapid Trans. Co., 236 Pa. 218, 84 Atl. 687.

36. Sickness resulting from exposure.—St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 9 S. W. 467.

Plaintiff's wife having been carried by the depot, and put off 500 yards beyond, which is alleged to have caused her sickness, plaintiff has the burden of proving that the sickness resulted from the act of the carrier. Gulf, etc., R. Co. *v.* Head, 4 Texas App. Civ. Cas., § 209, 15 S. W. 504.

37. General rule.—*Delaware.*—Reiss *v.* Wilmington City R. Co. (Del.), 67 Atl. 153.

District of Columbia.—Snashall *v.* Metropolitan R. Co., 8 Mackey (19 D. C.) 399, 10 L. R. A. 746.

Illinois.—Feitl *v.* Chicago City R. Co., 113 Ill. App. 381, affirmed in 211 Ill. 279, 71 N. E. 991.

Maryland.—Charles *v.* United R., etc., Co., 101 Md. 183, 60 Atl. 249.

Missouri.—Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374; Hornstein *v.* United Railways, 97 Mo. App. 271, 70 S. W. 1105.

Nebraska.—Lincoln Tract. Co. *v.* Webb, 73 Neb. 136, 102 N. W. 258, 119 Am. St. Rep. 879; Lincoln Tract. Co. *v.* Heller,

contributory negligence,[38] unless caused by some instrumentality in the charge of the carrier, and notice of the threatened violence or impending danger must be brought home to the carrier before negligence can be imputed,[39] and unless, as matter of experience applicable to the particular case, the result is more likely

102 N. W. 262, 72 Neb. 127, reversing 100 N. W. 197.

New York.—Hoffman *v.* Third Ave. R. Co., 61 N. Y. S. 590, 45 App. Div. 586.

South Carolina.—McKittrick *v.* Greenville Tract. Co., 88 S. C. 91, 70 S. E. 414; Anderson *v.* South Carolina, etc., R. Co., 77 S. C. 434, 58 S. E. 149.

Texas.—Paris, etc., R. Co. *v.* Robinson, 53 Tex. Civ. App. 12, 114 S. W. 658; San Antonio, etc., R Co. *v.* Robinson, 73 Tex. 277, 285, 11 S. W. 327; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536, 16 S. W. 320.

Utah.—Christensen *v.* Oregon, etc., R. Co., 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

Virginia.—Reynolds *v.* Richmond, etc., R. Co., 92 Va. 400, 23 S. E. 770.

Washington.—Allen *v.* Northern Pac. R. Co., 77 Pac. 204, 35 Wash. 221, 66 L. R. A. 804.

Intestate, a prosperous business man, of happy family relations and in good health, secured a lower Pullman berth in defendant's train, and undressed and went to bed about 1 o'clock, and was not seen again until his dead body was found between the rails some time afterwards. Intestate's hat and outer clothing were found at the foot of the berth, and the window at the head of the berth was closed, and a dust screen six inches high extended across the window at the foot of the berth; the sash being raised twelve or fifteen inches above the top of the screen. The evidence tended to show that the vestibule door was out of repair, so as not to latch easily; but it was not shown that it was open, or that intestate was seen in the aisle after retiring, and no extraordinary lurching of the car was shown, and the porter testified that after fixing the dust screen in the window he did not raise it. Held, that the mere happening of the accident did not raise an inference of negligence. Losie *v.* Delaware, etc., Co., 126 N. Y. S. 871, 142 App. Div. 214.

No presumption of negligence arises on the part of a carrier from the fact that a passenger has been injured while on the carrier's train; but, in order to raise such presumption, it must appear that the injury resulted from some agency or instrumentality of the carrier, some act or omission of its servants, or some defect in the instrumentalities of transportation. Brown *v.* Atlantic, etc., R. Co., 64 S. E. 1012, 83 S. C. 53.

Under the laws of Pennsylvania, no presumption of negligence by a carrier arises from mere proof of injury to a passenger, negligence being presumed only where a passenger is injured by some act or omission of the carrier or its employees, or by something connected with the appliances of transportation; but the burden of showing negligence still remains upon the passenger where such circumstances are as consistent with due care as with negligence. Pittsburg, etc., R. Co. *v.* Grom, 133 S. W. 977, 142 Ky. 51; Spear *v.* Philadelphia, etc., R. Co., 3 Pa. Co. Ct. Rep. 472.

In the absence of a statute making proof of death or injury prima facie evidence of negligence on the part of a carrier, proof of the injury alone will not sustain a recovery. Wright *v.* Sioux Falls Tract. System (S. Dak.), 133 N. W. 696.

38. Plaintiff free from negligence.—In an action against a street car company for personal injury, though it be found that plaintiff was free from contributory negligence, the fact of the injury is not prima facie evidence of defendant's negligence. Donovan *v.* Hartford St. R. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

39. When presumption arises.—Anderson *v.* South Carolina, etc., R. Co., 77 S. C. 434, 58 S. E. 149. See post, "Rules Applied in Particular Cases," §§ 3175-3189.

When a flagman opened the water closet door of a car, the fingers of a passenger, who was standing near by, slipped into the crevice of the door near the hinge, and, the flagman suddenly shutting the door, were crushed. Held, that the injury was accidental, and there was no presumption of negligence. Murphy *v.* Atlanta, etc., R. Co., 89 Ga. 832, 15 S. E. 774.

From instrumentality connected with transportation.—No presumption of negligence arise from the mere fact of injury to plaintiff, but would arise only from the fact that the injury resulted from something connected with the operation of the railroad. Pennsylvania R. Co. *v.* MacKinney, 124 Pa. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820.

Where plaintiff's intestate was killed in a railway accident caused by a rock becoming detached from a hillside and falling on the train, the burden of proof to show negligence is on plaintiff, the accident being disconnected with the appliances and operation of the road. Fleming *v.* Pittsburgh, etc., R. Co., 158 Pa. 130, 27 Atl. 858, 38 Am. St. Rep. 835, 22 L. R. A. 351.

to be due to the defendant's negligence than to any of the other possible causes.[40] So where the nature of an accident discloses that an injury to a passenger might as well have happened through his own negligence as that of the common carrier, the fact of the injury raises no presumption that the carrier was negligent.[41] And where the evidence introduced by the plaintiff shows that the accident resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railway, there is no burden on the carrier to free itself from a presumption of negligence.[42] The doctrine or res ipsa loquitur has no general application to injuries resulting to a passenger. If, however, an injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, or by some defect in machinery, cars, or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the passenger and raises a rebuttable presumption of negligence.[43] This doctrine applies where

40. The doctrine of res ipsa loquitur does not apply where the accident might as plausibly have resulted from negligence on the part of the passenger as on the part of the carrier; nor is it applicable to the death of a passenger from circumstances that are personal and peculiar to him, and not by reason of mismanagement of or accident to the train itself. Price *v.* St. Louis, etc., R. Co., 88 S. W. 575, 75 Ark. 479, 112 Am. St. Rep. 79.

It was so held in a case where a passenger was found under the wheels of a car on the opposite side from a station. Just as the car started other passengers got out on the right side. The court said that even assuming that the condition of the road was dangerous on the side of the accident, that the car started too quickly, and that the passenger was not warned, there was no case for the jury under Pub. St. c. 112, § 212; Leary *v.* Fitchburg R. Co., 173 Mass. 373, 53 N. E. 817.

Where, in an action for injuries to a passenger, it appeared that the car came to a sudden stop and that a piece of iron came up through the seat on which she was seated, in the absence of any explanation tending to show that the accident occurred without negligence on the part of the defendant, a finding of a want of proper care was justified. Hebblethwaite *v.* Old Colony St. R. Co., 78 N. E. 477, 192 Mass. 295.

41. Contributory negligence indicated.—Dresslar *v.* Citizens' St. R. Co., 47 N. E. 651, 19 Ind. App. 383.

The presumption of negligence, which arises against the carrier, when injury is suffered by one passively relying upon it to transport him to his destination, does not exist where the voluntary movement of the passenger contributed to the injury. Pittsburgh, etc., R. Co. *v.* Aldridge, 61 N. E. 741, 27 Ind. App. 498.

42. Act of God, etc.—St. Louis, etc., R. Co. *v.* Burrows, 61 Pac. 439, 62 Kan. 89; Elwood *v.* Chicago City R. Co., 90 Ill. App. 397.

Where it is satisfactorily established that a vis major occasioned an abnormal condition in a carrier's department of transportation, which produced injury to a passenger, the presumption that such abnormal condition proceeded from the carrier's negligence, or that it evidences antecedent negligence, is no longer available. Western Maryland R. Co. *v.* Shivers, 61 Atl. 618, 101 Md. 391.

The rule that proof that a passenger is injured casts on the carrier the burden of proving its freedom from negligence does not apply, where the passenger's evidence shows that his injury resulted probably from some unavoidable cause and some cause outside the ordinary control of the carrier; the burden being on the passenger to reasonably satisfy the jury that his injury is justly attributable to the carrier's negligence. Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

Wagon driven by third person.—The concurrent facts of the happening of an accident to a passenger on a street car and the exercise by the passenger of ordinary care do not raise a presumption of negligence against the carrier, so as to shift the burden of proof on it to show that it was not guilty of negligence, where plaintiff's evidence shows that the accident was due to a wagon driven so close to an open car as to strike plaintiff's foot. Judgment 62 Ill. App. 550 reversed in Chicago City R. Co. *v.* Rood, 45 N. E. 238, 163 Ill. 477, 54 Am. St. Rep. 478.

43. Doctrine of res ipsa loquitur.—*United States.*—Railroad Co. *v.* Pollard, 22 Wall. 341, 22 L. Ed. 877; Stokes *v.* Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 35 L. Ed. 270, 11 S. Ct. 653; Gleeson *v.* Virginia Mid. R. Co., 140 U. S. 435, 443, 35 L. Ed. 458, 11 S. Ct. 859; Steamboat New World *v.* King, 16 How. 469, 477, 14 L. Ed. 1019; Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 663, 45 L. Ed. 361, 21 S. Ct. 275; Southern Pac. Co. *v.* Cavin, 144 Fed. 348, 75 C. C. A. 350; North Jersey St. R. Co. *v.* Purdy, 142 Fed. 955, 74 C. C. A. 125; Sprague *v.* Southern R. Co., 92 Fed.

the circumstances attending an injury to a passenger are so unusual and of such a nature that the accident could not well have happened without the defendant being negligent, or when it is caused by something connected with the equipment or operation of the train,[44] and where it occurred in some manner which can not

59, 34 C. C. A. 207; Texas, etc., R. Co. *v.* Gardner, 114 Fed. 186, 52 C. C. A. 142.

California.—Bassett *v.* Los Angeles Tract. Co., 133 Cal. xix, 65 Pac. 470.

Delaware.—Braunstein *v.* People's R. Co., 2 Boyce's (25 Del.) 55, 78 Atl. 609.

Illinois.—Feitl *v.* Chicago City R. Co., 113 Ill. App. 381, judgment affirmed in 211 Ill. 279, 71 N. E. 991; Castelano *v.* Chicago, etc., R. Co., 149 Ill. App. 250; Barnes *v.* Danville St. R., etc., Co., 85 N. E. 921, 235 Ill. 566; McFadden *v.* Chicago, etc., R. Co., 149 Ill. App. 298; Alton, etc., Tract. Co. *v.* Oller, 119 Ill. App. 181, judgment affirmed in 75 N. E. 419, 217 Ill. 15, 4 L. R. A., N. S., 399; Illinois Cent. R. Co. *v.* Beebe, 69 Ill. App. 363, affirmed in 50 N. E. 1019, 174 Ill. 13, 43 L. R. A. 210, 66 Am. St. Rep. 253; Chicago City R. Co. *v.* Morse, 98 Ill. App. 662, judgment affirmed in 64 N. E. 304, 197 Ill. 327; Brimmer *v.* Illinois Cent. R. Co., 101 Ill. App. 198; Springer *v.* Schultz, 105 Ill. App. 544, judgment affirmed in 68 N. E. 753, 205 Ill. 144.

Indiana.—Louisville, etc., R. Co. *v.* Snider, 20 N. E. 284, 117 Ind. 435, 3 L. R. A. 434, 10 Am. St. Rep. 60; Louisville, etc., R. Co. *v.* Hendricks, 28 N. E. 58, 128 Ind. 462; Indianapolis St. R. Co. *v.* Schmidt, 71 N. E. 201, 163 Ind. 360.

Iowa.—Dorn *v.* Chicago, etc., R. Co., 154 Iowa 140, 134 N. W. 855.

Kentucky.—Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 3 S. W. 591, 9 Ky. L. Rep. 22; S. C., 13 Ky. L. Rep. 44.

Louisiana.—Le Blanc *v.* Sweet, 31 So. 766, 107 La. 355, 90 Am. St. Rep. 303.

Missouri.—Sweeny *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682; Haderlein *v.* St. Louis R. Co., 31 Mo. App. 601; Hamilton *v.* Metropolitan St R. Co., 89 S. W. 893, 114 Mo. App. 504; Price *v.* Metropolitan St. R. Co., 220 Mo. 435, 119 S. W. 932; Kirkpatrick *v.* Metropolitan St. R. Co., 161 Mo. App. 515, 143 S. W. 865; Norris *v.* St. Louis, etc., R. Co., 239 Mo. 695, 144 S. W. 783; Partello *v.* Missouri Pac. R. Co. (Mo.), 145 S. W. 55.

Nebraska.—Lincoln St. R. Co. *v.* McClellan, 74 N. W. 1074, 54 Neb. 672, 69 Am. St. Rep. 736; Chicago, etc., R. Co. *v.* Wolfe, 86 N. W. 441, 61 Neb. 502, affirmed in 23 S. Ct. 847, 187 U. S. 638, 47 L. Ed. 344; Chicago, etc., R. Co. *v.* Winfrey, 93 N. W. 526, 67 Neb. 13; Lincoln Traction Co. *v.* Heller, 100 N. W. 197, 72 Neb. 127, reversed on rehearing 102 N. W. 262.

New York.—Loudoun *v.* Eighth Ave. R. Co., 56 N. E. 988, 162 N. Y. 380, reversing judgment 44 N. Y. S. 742, 16 App. Div. 152.

South Carolina.—Cooper *v.* Georgia, etc., R. Co., 39 S. E. 543, 61 S. C. 345; Bunch *v.* Charleston, etc., R. Co., 91 S. C. 139, 74 S. E. 363.

Utah.—Paul *v.* Salt Lake City R. Co., 34 Utah 1, 95 Pac. 363.

Virginia.—Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786.

Washington.—Williams *v.* Spokane Falls, etc., R. Co., 80 Pac. 1100, 39 Wash. 77, reversed in 84 Pac. 1129, 42 Wash. 597.

Whenever something unusual occurs in the operation of a public conveyance carrying passengers for hire, proof of such fact and of a consequent injury to a passenger raises the presumption of negligence. Briscoe *v.* Metropolitan St. R. Co., 120 S. W. 1162, 222 Mo. 104.

Basis of doctrine.—Res ipsa loquitur as applied to carriers is based on the apparent fact that the accident could not have happened without the carrier's negligence, or, on the literal meaning of the expression that the thing itself speaks, and shows prima facie that the carrier was negligent. De Yoe *v.* Seattle Elect. Co., 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133.

The legal presumption takes the place of the proof which the person injured is unable to make, and puts the defendant at once to his defense. Hayman *v.* Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815; Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533; Meier *v.* Pennsylvania R. Co., 64 Pa. 225, 3 Am. Rep. 581; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. 351, 39 Am. Rep. 787.

44. Negligence presumed from unusual conditions. — *United States.* — Whitney *v.* New York, etc., R. Co., 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615.

Illinois.—Beatty *v.* Metropolitan, etc., R. Co., 141 Ill. App. 92; Chicago Union Tract. Co. *v.* Leonard, 126 Ill. App. 189; Chicago City R. Co. *v.* Morse, 98 Ill. App. 662, judgment affirmed in 64 N. E. 304, 197 Ill. 327; Chicago Union Tract. Co. *v.* Mommsen, 107 Ill. App. 353.

Iowa.—Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

Kentucky.—Central Pass. R. Co. *v.* Bishop, 9 Ky. L. Rep. 348.

New York.—Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, affirming 56 Barb. 425

Pennsylvania.—Williams *v.* Pittsburg R. Co., 50 Pa. Super. Ct. 473, 479.

Virginia.—Roanoke R., etc., Co. *v.* Sterrett, 108 Va. 533, 62 S. E. 385, 19 L. R. A., N. S., 316.

Washington.—Wile *v.* Northern Pac. R. Co., 72 Wash. 82, 129 Pac. 889.

If a passenger is injured by equipment wholly under the carrier's control, and

be proved by the plaintiff.[45] It is applicable only when the thing shown speaks of the negligence of the defendant, and not merely of the happening of the accident.[46] Where the proof shows that the cause of the injury happened in no unusual way, as from a sudden lurching or jerking of a car,[47] or where sawdust is blown or thrown into the eye of a passenger waiting at a depot,[48] there is no presumption in the plaintiff's favor and he must establish the negligence alleged. In order to raise a presumption of negligence the plaintiff must establish the relation of passenger and carrier, and indicate that his injury during transit resulted from a breach of a duty which the carrier owed pertaining to his safety.[49]

the accident is of such a character that it would not ordinarily occur if due care was used, the law presumes negligence. O'Callaghan *v.* Dellwood Park Co., 89 N. E. 1005, 242 Ill. 336, 26 L. R. A., N. S., 1054, 17 Am. & Eng. Ann. Cas. 407.

Burning out of fuse.—The ordinary burning out of a fuse used to prevent an excessive amount of electricity to enter the motors of electric street cars is not prima facie evidence of negligence in an action for injuries to a passenger alleged to have been caused thereby. Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285.

45. Inability of plaintiff to prove cause of accident.—Sullivan *v.* Capital Tract. Co., 34 App. D. C. 358.

In a personal injury action, if the cause of injury is not within the reasonable knowledge of plaintiff, he may go to the jury, especially in an action against a carrier, upon evidence of negligence and injury, without being required to specify the particular cause, under the doctrine of res ipsa loquitur. Paducah Tract. Co. *v.* Baker (Ky.), 113 S. W. 449, 18 L. R. A., N. S., 1185.

46. Things shown must speak of negligence.—Paynter *v.* Bridgeton, etc., Tract. Co., 52 Atl. 367, 67 N. J. L. 619.

A mere fall from a street car, without any evidence to show how it was occasioned, raises no presumption of negligence on the part of the street car company. Paynter *v.* Bridgeton, etc., Tract. Co., 52 Atl. 367, 67 N. J. L. 619.

Where there was no evidence that the track where the accident occurred was defective, it was reversible error to charge, in effect, that the burden was on the defendant to show that the accident causing the injury did not occur by reason of its negligence. Hoffman *v.* Third Ave. R. Co., 61 N. Y. S. 590, 45 App. Div. 586.

A passenger on a railroad train, which had stopped at a station, placed his hand on the jamb of the car door. It was injured by the company's brakeman entering the car and closing the door. Held, in an action for such injury, that the burden was on plaintiff to show negligence on the part of such brakeman, and, failing to show this, the evidence would not support a verdict for him. Texas, etc., R. Co. *v.* Overall, 82 Tex. 247, 18 S. W. 142.

Passenger falling on car floor.—Where a passenger on a street car fell on the floor and was injured, no presumption of negligence arose; there being no evidence to show that defendant was responsible for the fall. Rhea *v.* Minneapolis St. R. Co., 111 Minn. 271, 126 N. W. 823.

47. Rule inapplicable.—Beatty *v.* Metropolitan, etc., R. Co., 141 Ill. App. 92.

A passenger was injured while alighting from a car. Her dress was caught while she was alighting from the front platform so firmly that some one pulled her towards the car to loosen her dress. There were five persons on the platform at the time she alighted. Held, insufficient as a matter of law, notwithstanding the doctrine of "res ipsa loquitur," to show negligence on the theory that the platform was defective. Thomas *v.* Boston Elev. R. Co., 79 N. E. 749, 193 Mass. 438.

Where a passenger on a crowded street car was injured by the trolley pole slipping from the wire, negligence could not be inferred from such occurrence, and no recovery could be had in the absence of some additional proof that the slipping of the pole from the wire was due to some negligent act of the carrier. Feldheim *v.* Brooklyn, etc., R. Co., 107 N. Y. S. 413, 122 App. Div. 883.

48. Sawdust blown in eye.—Where a passenger was injured by sawdust blowing in her eye from an elevated railroad structure adjoining defendant's depot, and plaintiff testified that she did not know whether the sawdust was thrown or blew down, it being proved that there was a wind blowing at the time from fourteen to twenty-two miles per hour, plaintiff was not entitled to recover under the doctrine of res ipsa loquitur. Wadsworth *v.* Boston, etc., R. Co., 66 N. E. 421, 182 Mass. 572.

The mere presence of sawdust and shavings and a piece of wood on an elevated railroad structure, by the falling of which a person is injured, is not of itself evidence of negligence. Wadsworth *v.* Boston, etc., R. Co., 66 N. E. 421, 182 Mass. 572.

49. Presumption arising from evidence.—Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

Negligence can not be presumed against a railway company in an action for personal injuries received by a passenger, if it did nothing outside of the usual course

The general rule seems to be that where a passenger's injuries are from something within the carrier's control or which he would have provided against,[50] or

of its business, unless that course of business was itself improper or special circumstances required particular caution. Mitchell *v.* Chicago, etc., R. Co., 16 N. W. 388, 51 Mich. 236, 47 Am. Rep. 566.

50. General rule as to shifting of burden.—*United States.*—Kirkendall *v.* Union Pac. R. Co., 200 Fed. 197, 118 C. C. A. 383; New Jersey R., etc., Co. *v.* Pollard, 22 Wall. 341, 22 L. Ed. 877; Carter *v.* Kansas City Cable R. Co., 42 Fed. 37.

Arkansas.—St. Louis etc., R. Co. *v.* Leflar, 104 Ark. 528, 149 S. W. 530.

Georgia.—Central R. Co. *v.* Freeman, 75 Ga. 331.

Illinois.—Galena, etc., R. Co. *v.* Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Atchison, etc., R. Co. *v.* Elder, 50 Ill. App. 276; New York, etc., R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Vischer *v.* Northwestern Elev. R. Co., 256 Ill. 572, 100 N. E. 270.

Indiana.—Memphis, etc., Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71; Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338; Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Louisville, etc., R. Co. *v.* Snider, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Terre Haute, etc., R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Kentucky.—Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 9 Ky. L. Rep. 22, 3 S. W. 591; Davis *v.* Paducah R., etc., Co., 24 Ky. L. Rep. 135, 68 S. W. 140, 113 Ky. 267; Southern R. Co. *v.* Brewer, 32 Ky. L. Rep. 1374, 108 S. W. 936.

Maryland. — Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346; Baltimore, etc., R. Co. *v.* Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; Baltimore, etc., R. Co. *v.* State, 63 Md. 135.

Missouri.—Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666; Hite *v.* Metropolitan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Cooper *v.* Century Realty Co., 224 Mo. 709, 123 S. W. 848.

Montana.—John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632, 32 L. R. A., N. S., 85.

Nebraska. — Chicago, etc., R. Co. *v.* Hague, 48 Neb. 97, 66 N. W. 1000; judgment 104 N. W. 882, 74 Neb. 369, affirming on rehearing, Lincoln Tract. Co. *v.* Shepherd, 74 Neb. 369, 107 N. W. 764; Chicago, etc., R. Co. *v.* Landauer, 39 Neb. 803, 58 N. W. 434.

New York.—Holbrook *v.* Utica, etc., R. Co., 12 N. Y. 236, 64 Am. Dec. 502, affirming 16 Barb. 113; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Hegeman *v.* Western R. Corp., 16 Barb. 353; Burke *v.* State, 119 N. Y. S. 1089, 64 Misc. Rep. 558; Meschneck *v.* Brooklyn, etc., R. Co., 109 N. Y. S. 594, 125 App. Div. 265; Schneier *v.* Brooklyn Heights R. Co., 109 N. Y. S. 595, 125 App. Div. 911.

North Carolina.—Lambeth *v.* North Carolina R. Co., 66 N. C. 494, 8 Am. Rep. 508.

Pennsylvania.—Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533; Wright *v.* Pennsylvania R. Co., 3 Pittsb. Rep. 116; Dampman *v.* Pennsylvania R. Co., 166 Pa. 520, 31 Atl. 244; Ginn *v.* Pennsylvania R. Co., 220 Pa. 552, 69 Atl. 992; Meier *v.* Pennsylvania R. Co., 64 Pa. 225, 3 Am. Rep. 581.

South Carolina.—McKittrick *v.* Greenville Tract. Co., 88 S. C. 91, 70 S. E. 414; Sutton *v.* Southern Railway, 82 S. C. 345, 64 S. E. 401; Shelton *v.* Southern Railway, 86 S. C. 98, 67 S. E. 899; Williford *v.* Southern Railway, 85 S. C. 301, 67 S. E. 302; Sullivan *v.* Charleston, etc., R. Co., 85 S. C. 532, 67 S. E. 905; Zemp *v.* Wilmington, etc., R. Co., 9 Rich. L. 84, 64 Am. Dec. 763.

Utah.—Christensen *v.* Oregon, etc., R. Co., 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

Virginia.—Roanoke R., etc., Co. *v.* Sterrett, 111 Va. 293, 68 S. E. 998; Baltimore, etc., R. Co. *v.* Wightman, 70 Va. (29 Gratt.) 431, 26 Am. Rep. 384; Baltimore, etc., R. Co. *v.* Noell, 73 Va. (32 Gratt.) 394.

Washington.—Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72.

West Virginia.—Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

The presumption of negligence which attaches when a passenger is injured through the use of the carrier's instrumentalities requires defendant to prove that the injury was without negligence on his part by showing an inevitable accident. Walker *v.* Beaumont Land, etc., Co., 115 Pac. 766, 15 Cal. App. 726.

Where it is shown that an injury was caused by the operation of a railroad train, the burden is upon the company to show that it exercised all ordinary care to avoid the injury. Atlantic, etc., R. Co. *v.* Pipkin, 64 Fla. 24, 59 So. 564.

A showing that a passenger was killed by a train under the carrier's management and control casts the burden upon it to negative the presumption that it was negligence. Judgment 105 N. W. 526, reversed on rehearing in Dieckmann *v.* Chicago, etc., R. Co., 121 N. W. 676, 145 Iowa 250, 31 L. R. A., N. S., 338.

The breaking of a hoisting device of a ferry gangway, whereby a person on the gangway was injured, makes a prima facie case of negligence against the ferry com-

through an act or omission of the carrier's servant which might have been prevented by a high degree of care,[51] a presumption of negligence arises, which, generally speaking, shifts the burden of proof to the defendant.[52] When the thing causing the injury is under the exclusive control of the officers of the carrier, the public have no right, and no opportunity, to interfere in regard to it. When, therefore, a passenger is so injured, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, the car, or other appliances involved in the accident, upon the only party in a condition to bear it; viz, the carrier, which has the exclusive possession and care of it.[53] Thus, it is said that where a passenger is injured by anything done or left undone by a carrier or its employees in connection with appliances of transportation, or conduct of business, burden of proof is upon the carrier to show absence of negligence.[54] But as has already been said no such presumption arises unless the evidence shows that injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation.[55] So if an

pany. Bartnik *v.* Erie R. Co., 55 N. Y. S. 266, 36 App. Div. 246.

Where a passenger by proof of the happening of the accident establishes a prima facie case, the burden is thereby cast upon defendant of explaining the accident. Washington-Virginia R. Co. *v.* Bouknight, 75 S. E. 1032, 113 Va. 696, Ann. Cas. 1913E, 546.

Elevator.—A presumption arises against the owner and operator of a passenger lift in a building, in favor of a person injured while in transportion under ordinary conditions. Burdette *v.* Chicago Auditorium Ass'n, 166 Ill. App. 186.

51. Act or omission of servant.—Whalen *v.* Consolidated Tract. Co., 61 N. J. L. 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; Sutton *v.* Southern Railway, 82 S. C. 345, 64 S. E. 401; Hite *v.* Metropolitan St. R. Co., 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555.

It appearing that the window and attachments were in good order, and that the fall must have been due to it not having been properly fastened, and there being no evidence that defendant's employees raised the window, plaintiff could not recover. Faulkner *v.* Boston, etc., Railroad, 72 N. E. 976, 187 Mass. 254.

The rule that a presumption of negligence on the part of the carrier arises when a passenger is injured in the course of transportation can not be invoked, without evidence tending to connect the carrier, or its employees, or some of the appliances of transportation with the happening of the injury. To throw the burden upon the carrier, it must be first shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation. Ault *v.* Cowan, 20 Pa. Super. Ct. 616.

52. Irvine *v.* Delaware, etc., R. Co., 184 Fed. 664, 106 C. C. A. 600.

A charge in an action for personal injuries, resulting from a collision between a street car and a railroad train, that it was the duty of the street railway to "carry her safely to her point of destination, and the failure thus to do put the defendant in the wrong and the burden of proof devolves upon it," is not erroneous under the rules laid down in Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597.

53. Hayman *v.* Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815.

54. Anything done or left undone by carrier.—Burns *v.* Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

It is said that a presumption of negligence upon the part of the carrier arises from proof of injury to a passenger, through any agency or instrumentality of the carrier. Moore *v.* Greenville Tract. Co., 94 S. C. 249, 77 S. E. 928.

"Appliances of transportation," as used in rule relating to burden of proof of negligence of carrier, defined. Burns *v.* Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

An injury to a passenger caused by apparatus furnished by and under the control of the company, raises a presumption of negligence. Wayne *v.* St. Louis, etc., R. Co., 165 Ill. App. 353.

55. Sutton *v.* Pennsylvania R. Co., 230 Pa. 523, 79 Atl. 719; Thomas *v.* Philadelphia, etc., R. Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; Ginn *v.* Pennsylvania R. Co., 220 Pa. 552, 69 Atl. 992; Barnes *v.* Danville St. R., etc., Co., 235 Ill. 566, 85 N. E. 921; Levin *v.* Philadelphia, etc., R. Co., 228 Pa. 266, 77 Atl. 456.

A passenger's injury unexplained will be presumed to have resulted from the carrier's negligence only where the injury is caused by a breaking at some part of the train, by a defective condition of some instrumentality or by the manner of its operation, and does not include a case where a prospective passenger went to a

intoxicated person, after having purchased his ticket at a railroad station, should, on his way out of the ticket office, stumble upon a heated stove, and suffer serious injury, there would be no reason for excusing the injured man from making out his case because he had a railroad ticket in his pocket, or because the stove on which he fell belonged to a railroad company, or was standing in a railroad station. It was no part of the machinery or transportation, and was in no sense peculiar to the business of the railroad company.[56] The same thing is true where the plaintiff is injured in a waiting room or passage way, by putting his hand through the glass in the swinging door. The door is no part of the machinery employed for the carriage of passengers.[57]

To What Carriers Rule Applies.—The rule that proof of the occurrence of an accident causing injuries to a passenger without fault on his part is proof of negligence on the part of the carrier applies to street-railroad companies operating cars by electricity or steam power.[58]

Effect of Voluntary Character of Passenger's Act.—The doctrine of res ipsa loquitur is applicable where the passenger is making a voluntary movement, and the injury is caused by the position or condition of the carrier's appliances, or the management of the means of transportation. Hence, where a street car passenger was injured in alighting from a street car by his feet becoming entangled in the end of a trolley rope negligently left lying on the floor of the car without the passenger's knowledge, the doctrine of res ipsa loquitur was not rendered inapplicable because the passenger was not passive or under the absolute control of the carrier, but was attempting to alight.[59]

Evidence as to Competency of Employee.—It is incumbent on a carrier to employ none but sober and competent men to run their vehicles and in pur-

flag station at night and endeavored to stop the train by a flaming torch; the train having passed and injured him before he could escape, and the operators being in ignorance of his presence or intention until after he was injured. Bruff *v.* Illinois Cent. R. Co. (Ky.), 121 S. W. 475.

In an action by a passenger against a carrier for injuries, where it appears that the injury was not caused by any defect in the machinery or appliances used by the company, or any defect in construction of the road, and was not caused by any act of the employees of the carrier, no presumption of the carrier's negligence arises, and the burden of proving negligence is on plaintiff. Le Deau *v.* Northern Pac. R. Co., 115 Pac. 502, 19 Idaho 711, 34 L. R. A., N. S., 725, Ann. Cas. 1912C, 438.

An accident to a passenger on a street car, caused by her foot being caught upon the running board while she was alighting, whereby the heel of her shoe was torn off and she was thrown to the ground and injured, is not within the rule of res ipsa loquitur; but facts raising an inference of negligence on the part of the street railroad must be shown, in order to authorize a recovery for the injuries. Wilbur *v.* Rhode Island Co., 61 Atl. 601, 27 R. I. 205.

The act of a passenger in tossing through the open window of a car an empty bottle, the accidental breaking of such bottle against a car upon another track, and the return of a fragment of glass through another open window, injuring another passenger, is in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employees in the conduct of the train, or with the construction of the road, and therefore there is no presumption of negligence on the part of the railroad company, and the burden is upon the injured passenger to prove by affirmative evidence that the defendant company or its employees had been guilty of negligence which was responsible for the injury. Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

Explosion dynamite lying on street.—Bigwood *v.* Boston, etc., St. R. Co., 209 Mass. 345, 95 N. E. 751, 35 L. R. A., N. S., 113.

Stream of water entering car.—The mere unexplained fact that a stream of water entered a car window, injuring a passenger, is not sufficient to raise a presumption of the carrier's negligence. Spencer *v.* Chicago, etc., R. Co., 81 N. W. 407, 105 Wis. 311.

56. Hayman *v.* Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815.

57. Hayman *v.* Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815.

58. To what carriers rule applies.—Bosqui *v.* Sutro R. Co., 63 Pac. 682, 131 Cal. 390.

59. When applicable.—Denver City Tramway Co. *v.* Hills, 50 Colo. 328, 116 Pac. 125, 36 L. R. A., N. S., 213.

suance of this general principal it is held that proof of a habit of intoxication in a conductor raises, in case of an accident, a presumption of negligence.[60]

Regulated by Statute.—This question is in some cases regulated by specific statutory provision. Thus, it may be and is in some cases provided that the proof of an injury resulting from the running of a train established a prima facie case in favor of plaintiff.[61] The statute in some cases creates the presumption that a passenger injured by the operation of a railroad was injured through the negligence of the road; but the presumption ceases when the carrier makes it appear that its agents had exercised all ordinary care, and on such evidence the jury do not take any presumption with them to the jury room in weighing the evidence.[62] Where the question arises under a statute, the rule depends upon the particular of terms of the statute and the construction placed thereon by the courts.[63]

60. Habit of intoxication.—Pennsylvania R. Co. *v.* Books, 57 Pa. 339, 98 Am. Dec. 229.

61. Under statutory provision. — *United States.*—Southern R. Co. *v.* Meyers, 87 Fed. 149, 32 C. C. A. 19.

Arkansas.—Barringer *v.* St. Louis, etc., R. Co., 73 Ark. 548, 85 S. W. 94, 87 S. W. 814, construing Kirby's Dig., § 6773; Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603.

Georgia statute.—Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384, construing code, § 3033; Electric R. Co. *v.* Carson, 98 Ga. 652, 27 S. E. 156; Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840; Florida, etc., R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. 283; Central, etc., R. Co. *v.* Holmes, 110 Ga. 282, 34 S. E. 846; Savannah, etc., R. Co. *v.* Flaherty, 110 Ga. 335, 35 S. E. 677.

The presumption that where it has been shown that a passenger on a railroad was hurt or damaged by the running of its trains or machinery, the company was negligent, is a common-law presumption and did not originate with the act of 1855 (Code, § 3033). Central Railroad *v.* Brinson, 70 Ga. 207; Augusta, etc., R. Co. *v.* Randall, 79 Ga. 304, 4 S. E. 674.

Mississippi statute.—Yazoo, etc., R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154, construing Rev. Code—1892, § 1008.

Nebraska statute.—Chicago, etc., R. Co. *v.* Zernecke, 82 N. W. 26, 59 Neb. 689, 55 L. R. A. 610, affirmed in 22 S. Ct. 229, 183 U. S. 582, 46 L. Ed. 339.

62. Extent of presumption.—Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; Seaboard, etc., R. Co. *v.* Thompson, 57 Fla. 155, 48 So. 750.

Under Gen. St. 1906, § 3148, presumption of negligence held to arise against railroad company on proof of personal injury or property loss caused by running of train and proof of the untimate fact that caused the injury or loss. Warfield *v.* Hepburn, 62 Fla. 409, 57 So. 618.

In an action for injuries to a passenger, it is not sufficient for plaintiff to simply prove the accident, that she was a passenger, and that she had not been safely carried to her place of destination, so as to shift the burden to defendant company to prove a want of negligence, where the circumstances connected with plaintiff's accident were of such a character as to withdraw against the defendant any presumption of negligence. McGinn *v.* New Orleans R., etc., Co., 43 So. 450, 118 La. 811, 13 L. R. A., N. S., 601

63. Construction of statute.—Civ. Code, § 2754, throwing the burden of proof on a carrier to show want of negligence, refers to "things" intrusted to the care of the carrier and not to a person. McGinn *v.* New Orleans R., etc., Co., 43 So. 450, 118 La. 811, 13 L. R. A., N. S., 601.

Under Civ. Code, art. 2315, in an action by a passenger against a railroad for damages resulting from an accident, plaintiff must prove negligence of defendant. Marsalis *v.* Louisiana, etc., R. Co., 129 La. 146, 55 So. 744.

Arkansas statute.—Where a passenger boarding a train at a station, under the mistaken belief that it would carry her to her destination, was injured while alighting therefrom after being informed of the mistake and while the train was in motion, a finding that she was a passenger and was injured, and that the injuries were caused by a moving train, established a prima facie case of negligence of the carrier, under Kirby's Dig., § 6607, providing that, where a person is injured because of the negligence of railway employees to keep a lookout for persons, the company shall be liable, and the burden of proof shall devolve on it to establish the fact that it performed its duty. St. Louis, etc., R. Co. *v.* Fambro, 88 Ark. 12, 114 S. W. 230.

Georgia statute.—The word "running," as used in Civ. Code 1895, § 2321, creating a presumption of negligence against a railroad company where damage is done by the running of its locomotives, cars, or machinery, does not refer so much to actual motion as it does to the general operation of its locomotives, cars, or machinery. Smith *v.* Atlantic, etc., R. Co., 62 S. E. 1020, 5 Ga. App. 219.

New York statute—A violation of Laws

§ 3170. Both General and Specific Negligence Alleged.—Where a passenger suing for injuries pleaded general and specific acts of negligence, and the cause was tried on the theory that both specific and general negligence was alleged, the presumption of the carrier's negligence arose on proof of plaintiff's injury while a passenger.[65]

Proof Particular Defects.—In an action against a carrier for personal injuries, where it is shown that the injuries were sustained under circumstances where the maxim "res ipsa loquitur" applies, plaintiff is not required in the first instance to prove any particular defect by evidence other than that establishing the prima facie presumption, even though the facts with respect to some defect are unnecessarily alleged with particularity in the complaint.[66]

§ 3171. Specific Negligence Alleged.—Where, in an action aganist a carrier for injuries to a passenger, the petition alleges specific acts of negligence, plaintiff has the burden of proving such acts, and must recover, if at all, on the negligence so pleaded.[67] The plaintiff in such a case can not rely on the doctrine of res ipsa loquitur.[68]

§ 3172. Assumption of Unnecessary Burden by Plaintiff.—A plaintiff who in his case in chief puts in proof some specific acts of negligence, does not thereby preclude himself from the presumption of negligence to which he is entitled under his petition charging negligence in general terms and not specifically, though in so doing he assumes an unnecessary burden in making out a prima facie case.[69]

§ 3173. Effect of Attempted Explanation.—The attempt of a passeger, who was injured by an electric shock while on an electric street car, to explain the reason of the accident, does not prevent him from relying on the doctrine of res ipsa loquitur.[70]

§ 3174. Operation and Effect of Presumption.—Presumption Rebuttable.—The presumption of negligence resulting in injury to a passenger is rebuttable, and may be overcome by the facts when they appear.[71] The doctrine

1890, c. 565, § 138, providing that no train on an elevated railroad shall be permitted to start until every passenger on the platform desiring to board or enter the cars shall have actually boarded or entered the same, does not create a presumption of negligence against the railroad, but is merely evidence to be considered with other facts on the question of negligence. Brown *v.* Manhattan R. Co., 94 N. Y. S. 190, 105 App. Div. 395, construing Laws, 1890, c. 565, § 138.

65. General and specific negligence.—Roberts *v.* Sierra R. Co., 111 Pac. 519, 14 Cal. App. 180, rehearing denied in 111 Pac. 527.

66. Evidence of accident in general.—Dearden *v.* San Pedro, etc., R. Co., 93 Pac. 271, 33 Utah 147; Cramblet *v.* Chicago, etc., R. Co., 82 Ill. App. 542.

A presumption of negligence by a common carrier arises from the happening of an accident resulting in injury to a passenger, due to some agency over which the carrier has no control. Emerson *v.* Butte Elect. R. Co., 129 Pac. 319, 46 Mont. 454.

67. Where specific negligence alleged.—Orcutt *v.* Century Bldg. Co., 99 S. W. 1062, 201 Mo. 424, 8 L. R. A., N. S., 929; Sterrett *v.* Metropolitan St. R. Co., 225 Mo. 99, 123 S. W. 877; Randall *v.* Sterling, etc., R. Co., 158 Ill. App. 56.

68. Res ipsa loquitur does not apply.—Allison *v.* St. Louis, etc., R. Co., 157 Mo. App. 72, 137 S. W. 896.

In an action by a passenger against a carrier, where the plaintiff alleges in his declaration the specific facts upon which he relies to establish the negligence of the defendant—thus showing that they are within his knowledge—the burden is upon him to establish negligence as the basis for recovery; and he does not make out a prima facie case calling for rebuttal or explanation by the defendant by merely proving that he was a passenger and the occurrence of the accident by which he was injured. Sullivan *v.* Capital Tract. Co., 34 App. D. C. 358.

69. Assumption of unnecessary burden.—Price *v.* Metropolitan St. R. Co., 220 Mo. 435, 119 S. W. 932.

70. Attempted explanation.—McDonough *v.* Boston Elev. R. Co., 208 Mass. 436, 94 N. E. 809.

71. Presumption rebuttal.—Minneapolis St. R. Co. *v.* Odegaard, 182 Fed. 56; Roberts *v.* Sierra R. Co., 111 Pac. 519, 14 Cal. App. 180.

of res ipsa loquitur merely raises a presumption, which presumption yields readily to evidence.[72] Where a passenger is injured under circumstances justifying an inference of defendant's negligence, the defendant can show due care, and the cause of the accident, to rebut negligence.[73]

Continuance Throughout Trial.—The presumption of negligence on the part of a carrier, arising from the fact of injury to a passenger through the carrier's instrumentality, continues throughout the trial of the case.[74]

Effect as to Burden of Proof.—The rule seems to be that upon the primary question of the defendant's negligence, in the absence of a statute which makes the act or omission complained of negligence per se, the burden never shifts, but is upon the plaintiff throughout the case.[75] "Prima facie evidence," in legal intendment, means evidence which if unrebutted or unexplained, is sufficient to maintain the proposition and warrant the conclusion to support which it has been introduced; but a prima facie case, when made out, does not, either necessarily or usually, change the burden of proof.[76] But in the sense of the

While proof that a street car passenger was injured in a collision between two cars moving in oposite directions shows prima facie negligence, entitling the passenger to go to the jury in an action against the company for his injury, it does not create an irrebuttable presumption of negligence, such proof merely shifting the burden to defendant to prove that the collision resulted from an accident which reasonable prudence and foresight could not have prevented. Briggs *v.* Durham Tract. Co., 147 N. C. 389, 61 S. E. 373.

The presumption of negligence on the part of a carrier, arising from the proof of an injury to a passenger in consequence of the derailment of the train, may be rebutted. Illinois Cent. R. Co. *v.* Porter, 94 S. W. 666, 117 Tenn. 13.

72. Presumption yields to evidence.—Garner *v.* Chicago, etc., Tract. Co., 150 Ill. App. 149.

73. Rebuttal evidence.—Cohen *v.* Farmers' Loan, etc., Co., 127 N. Y. S. 561, 70 Misc. Rep. 548.

74. Continuance throughout trial.—McKittrick *v.* Greenville Tract. Co., 88 S. C. 91, 70 S. E. 414.

75. Burden remains on plaintiff.—St. Louis, etc., R. Co. *v.* Parks, 97 Tex. 131, 134, 76 S. W. 740, reversing 73 S. W. 439, citing Clark *v.* Hiles, 67 Tex. 141, 2 S. W. 356.

76. Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793.

In an action against a street railroad for injuries to plaintiff while a passenger on one of defendant's cars by a collision with a wagon, the burden of proving negligence on the part of the defendant rested on plaintiff throughout the trial, and was not changed by proof of plaintiff's injuries by the collision, which, with the aid of legal presumptions, made out plaintiff's prima facit case against the defendant. Chicago Union Tract. Co. *v.* Mee, 75 N. E. 800, 218 Ill. 9, 2 L. R. A., N. S., 725, 4 Am. & Eng. Ann. Cas. 7, reversing judgment 119 Ill. App. 332; Maher *v.* Metropolitan St. R. Co., 92 N. Y. S. 825, 102 App. Div. 517.

The fact that an accident happens to a person when carried by a common carrier makes, under some circumstances, a prima facie case but it does not change the burden of proof or render it less the duty of the court to take the case from the jury when, on all the evidence, no negligence appears; and it is a general rule in this commonwealth that the making of a prima facie case does not change the burden of proof. Gibson *v.* International Trust Co., 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928.

Where, in an action for injuries to a passenger by the derailment of the car, the carrier gave evidence from which the jury could find that it had used due care in the construction, equipment, and maintenance of the railway, the burden of proof was not shifted, but remained on plaintiff to establish the carrier's negligence on all the evidence, of which the presumption of negligence, on proof of the derailment and injury formed only a part. Carroll *v.* Boston Elev. R. Co., 86 N. E. 793, 200 Mass. 527.

In an action against a street railway company for injuries to a passenger, the burden of proof on the question of negligence does not shift to defendant on proof that the injuries resulted from the derailment of a car. Omaha St. R. Co. *v.* Boesen, 105 N. W. 303, 74 Neb. 764, 4 L. R. A., N. S., 122.

In an action against a street railway company for injuries to a passenger arising from one car escaping from the control of its driver, sliding down an incline, and colliding with another car at the bottom, it is error to instruct that the burden is on defendant to prove such facts as will demonstrate its freedom from negligence; since, while the presumption arising from such an accident is that the company was negligent, this presumption is merely an aid to plaintiff in sustaining the burden of proof, which remains on him

burden of the evidence, the "burden of proof" may change from one side to the other as the trial proceeds; in the sense of maintaining the issue involved in the action it constantly remains on the party alleging the fact which constitutes the issue, and when all the evidence has been introduced the jury must determine whether it has been maintained.[77] Hence, it is held that the burden upon the defendants when plaintiff has made a case which entitles him to the application of the res ipsa loquitur doctrine is not satisfactorily to account for the occurrence, but merely to rebut the inference that he has failed to use due care.[78] And as long as the facts are as consistent with due care as with negligence, the burden of evidence remains with the plaintiff.[79]

§§ 3175-3189. Rules Applied in Particular Cases—§ 3175. Stations and Stopping Places.—In an action for injuries to a passenger while alighting from a car at a usual stopping place, or at a regular station even though it is in an unsafe condition, no presumption of negligence of defendant arises from the mere happening of the accident; but the burden is on plaintiff to prove negligence.[80] But where a passenger using a station or stopping place properly and with due care is injured by something within the carrier's control and in a respect to which the carrier owes the passenger a duty, the carrier is presumed to

throughout the case. Judgment 62 N. Y. S. 1139, 48 App. Div. 632, reversed in Kay *v.* Metropolitan St. R. Co., 57 N. E. 751, 163 N. Y. 447.

In an action for personal injuries sustained by his being thrown from a street car on its jumping the track, though plaintiff made a prima facie case by proof that the car was going at a "pretty good rate," and that the accident happened at a point where there were side tracks leading into the car stable, the burden nevertheless remained on him, when the proof was all in, to show negligence on the part of the defendant. Hollahan *v.* Metropolitan St. R. Co., 76 N. Y. S. 751, 73 App. Div. 164.

77. Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793.

If a carrier introduces evidence to show that it was not negligent in causing the car to be severely jolted injuring a passenger, the passenger still has the burden of proving negligence, though the jolt, unexplained, would be presumptive evidence of negligence. Webber *v.* Old Colony St. R. Co., 210 Mass. 432, 97 N. E. 74.

Plaintiff's burden of proof as to negligence of defendant, in an action against a carrier for injury from collision of cars, does not shift, even where a presumption of negligence exists from the collision; but the presumption is to be weighed with defendant's evidence, and if as a whole, the evidence does not preponderate for plaintiff, he can not recover. Sewell *v.* Detroit United Railway, 158 Mich. 407, 123 N. W. 2.

Extent of burden shifted.—Garner *v.* Chicago, etc., Tract. Co., 150 Ill. App. 149. See Wilson *v.* Chicago City R. Co., 144 Ill. App. 604.

While the derailment of a train may raise a presumption of negligence, yet it does not throw upon the railroad company, in an action by passenger injured, the duty of showing by a preponderance of evidence that the accident was not a result of its negligence. It is enitled to verdict if evidence upon issues balances. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103, affirming 26 S. W. 301.

79. Facts equally consistent with both theories.—Pittsburg, etc., R. Co. *v.* Grom, 142 Ky. 51, 133 S. W. 977.

Where, in an action for injuries to an elevator passenger, defendant showed by a mechanician in charge of the elevator his daily inspection thereof and the machinery, and experts showed that they had made inspection at reasonable intervals, with a view to certify to the sufficiency and structural soundness of the elevator, the evidence overcame the inference of negligence of defendant in maintaining unsuitable or defective appliances. Cohen *v.* Farmers' Loan, etc., Co., 127 N. Y. S. 561, 70 Misc. Rep. 548.

80. Negligence as to condition of stopping place.—Rist *v.* Philadelphia Rapid Trans. Co., 236 Pa. 218, 84 Atl. 687.

The doctrine of res ipsa loquitur does not apply, so as to authorize a recovery by a passenger for injuries sustained while alighting from a car, the step of which was not more than eighteen inches from the platform, where none of the attending circumstances tended to show negligence on the part of the carrier. Texas Mid. R. Co. *v.* Frey, 61 S. W. 442, 25 Tex. Civ. App. 386.

Negligence can not be presumed from the mere happening of the event, none of the attending circumstances tending to establish negligence. San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327; Broadway *v.* San Antonio Gas Co., 24 Tex. Civ. App. 603, 60 S. W. 270; Texas Mid. R. Co. *v.* Frey, 25 Tex. Civ. App. 386, 61 S. W. 442.

have been negligent.[81] It has been so held where a passenger slipped on an asphalt pavement in a train shed[82] and where a bridge leading to a ferryboat collapsed.[83] And such a presumption would arise where a passenger, immediately after alighting from the train at a station, is injured by defendant's locomotive on another track close by.[84]

Carrier's Control over Approaches, Platforms, etc.—Where a passenger is injured by the breaking of the floor of the station platform, the burden is on the company to show affirmatively a condition of things which would exonerate it from liability.[85] But in such cases the burden is upon the plaintiff to show that the walk approach or platform, where he received his injury, was constructed by the defendant and was in its possession and control as one of the means of transportation of passengers.[86]

Obstruction, Dangerous Articles, etc., on Platform.—The existence or an obstruction over which a passenger falls upon a station platform is not, in the absence of evidence or something about the obstruction itself, to indicate the length of time during which it was on the platform, or the cause of its presence there, sufficient to charge the railroad with negligence.[87]

Articles Thrown from Train.—Where a passenger, while standing on a station platform waiting for his train, is struck and injured by a mail sack, piece of coal or other article thrown from a swiftly passing train, it will be presumed that the injury resulted from the carrier's negligence, and the burden is on it to show the contrary.[88]

Speed on Entering Station.—Where there was evidence only that a train came in fast at a station where plaintiff, with other passengers, was waiting on the station platform for its arrival, no inference could be drawn that the engineer was negligently running at such an excessive or unusual speed as to endanger the plaintiff.[89]

81. Things within carrier's control—Breach of duty.—Cotton on a railway platform, at a station, is presumed to be in the company's custody and care, and responsibility for the manner in which it is placed or piled on the platform is presumed to rest on the company, and in an action by a passenger for injuries the burden of rebutting the presumption is on the company. Kird *v.* New Orleans, etc., R. Co., 29 So. 729, 105 La. 226.

Where a street car passenger was injured at night by stepping into an unprotected trolly pole hole as he was transferring from one car to another, made necessary by repairs being made in the track, proof of such facts established a prima facie case of negligence against defendants. Colorado Springs, etc., R. Co. *v.* Petit, 86 Pac. 121, 37 Colo. 326.

82. In this case it was held that the jury might infer that the company had not exercised that care which the law required, and that a verdict on the doctrine of res ipsa loquitur was justified. Barnes *v.* New York, etc., R. Co., 87 N. Y. S. 608, 42 Misc. Rep. 622.

83. Bridge leading to ferryboat.—Where a person, having paid for a ticket for ferriage, has, on invitation of the employees of the ferry company, passed out on an iron bridge leading to the ferryboat, and, while standing thereon, it broke, precipitating her into the river, it is not for the passenger to prove that the breaking was due to the negligence of the company, but for the company to establish affirmatively a state of facts which would release it from responsibility. Patton *v.* Pickles, 24 So. 290, 50 La. Ann. 857.

84. Trains on intervening tracks.—Philadelphia, etc., R. Co. *v.* Anderson, 72 Md. 519, 20 Atl. 2, 20 Am. St. Rep. 483, 8 L. R. A. 673.

85. Breaking of platform.—Leveret *v.* Shreveport Belt R. Co., 34 So. 579, 110 La. 399.

86. Carrier's control over approaches, etc.—Quimby *v.* Boston, etc., R. Co., 69 Me. 340.

87. Obstructions, dangerous articles, etc., on platform.—Scholtz *v.* Interborough Rapid Trans. Co., 95 N. Y. S. 557, 48 Misc. Rep. 619.

88. Mail bag thrown from train.—Huddleston *v.* St. Louis, etc., R. Co., 90 Ark. 378, 119 S. W. 280.

Piece of coal.—There is a presumption of negligence on the part of the carrier where a piece of coal is thrown from the tender of a passing train, striking one waiting at the depot to take a train. Louisville, etc., R. Co. *v.* Reynolds, 71 S. W. 516, 24 Ky. L. Rep. 1402.

89. Speed on entering station.—Savageau *v.* Boston, etc., Railroad, 96 N. E. 67, 210 Mass. 164.

Stopping at Unusual and Unsafe Place.—Stopping a railway train at an unusual place renders the company presumptively in the wrong to that extent, and the burden of explaining the neglect is cast upon them.[90]

Failure to Light Stations, Premises, etc.—Where it is alleged that a passenger fell from the platform of a car, when attempting to enter in the night, because the company neglected to light the platform, the accident was not such as ordinarily results only from the negligence of the carrier, and the plaintiff is bound to prove, not only the fact of the injuries, but that they were caused by the company's negligence.[91]

§ 3176. As to Roadbed and Track.—The same general rules apply where the passenger is injured because of a defective roadbed or track or structure alongside of the track, etc.[92] Thus, it is held that the fact that a bridge gives away when a train is passing over it creates a presumption of negligence on the part of the carrier.[93] And where a passenger is injured in consequence of an embankment having been swept away, there arises a presumption of negligence on the part of defendant,[94] and this rule applies to a lessee of the railroad.[95]

Falling Poles, Wires, etc.—The burden is on a street railroad company, in an action by a passenger for injuries resulting from the falling of the poles or wires on the car, to show the cause of the accident.[96]

Obstructions on Track.—A passenger who shows that the train collided with the top of a tree which had blown across the track, and that he was injured in consequence thereof, shows facts from which the presumption of negligence of the carrier arises, and it must show its freedom from breach of duty.[97]

Obstruction Near Tracks—Collision.—Where a passenger is injured by a

90. Stopping at unusual and unsafe place.—Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

91. Failure to light stations, premises, etc.—Chicago, etc., R. Co. *v.* Trotter, 60 Miss. 442.

92. Broken rail.—The fact that an accident upon defendant's railroad, which caused personal injuries to a passenger, arose from a broken rail, imposed upon defendant the burden of showing that it used "the hightest reasonable and practical skill, care, and diligence" as to the "fitness of the road." Wabash, etc., R. Co. *v.* Friedman, 41 Ill. App. 270.

It is improper, in an action by a railway passenger for injuries caused by the derailment of his train, to instruct the jury that there is no presumption that the rail causing the accident was broken before his train reached it, another train having passed safely over it a short time before, and that if plaintiff claims that it was so broken he has the burden of proof. Cleveland, etc., R. Co. *v.* Newell, 75 Ind. 542.

Injury to a passenger caused by defect in the roadway makes a prima facie presumption of negligence, which will carry the case to the jury. McCafferty *v.* Pennsylvania R. Co., 44 Atl. 435, 193 Pa. 339, 74 Am. St. Rep. 690.

Condition of railroad switch as calling for application of rule of "res ipsa loquitur."—Texas, etc., R. Co. *v.* Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155.

93. Bridge giving away.—Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 551.

When an injury occurs to a railway passenger by reason of the giving way of a bridge under the passing train, proof of the casualty is prima facie evidence of negligence in the location or construction of the bridge, or in both its location and construction. So, too, where the subversion of the bridge appears to have been occasioned by an unusual flood or freshet. Otherwise, where the injury occurs from causes entirely foreign to the apparatus or operations of the road. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

94. Embankment swept away.—Brehm *v.* Great Western R. Co. (N. Y.), 34 Barb. 256; Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. 351, 39 Am. Rep. 787.

95. Rule applies to lessee.—Philadelphia, etc., R. Co. *v.* Anderson, 94 Pa. 351, 39 Am. Rep. 787.

96. Falling poles, wires, etc.—Stern *v.* Westchester Elect. R. Co., 90 N. Y. S. 870, 99 App. Div. 491.

Where a passenger on a street car was injured by the fall of a trolly pole as he was alighting at a junction point, proof that plaintiff was a passenger, of the fact of the accident, and the resulting injury, established a prima facie case of negligence, without proof as to what caused the pole to fall. Judgment 102 Ill. App. 202, affirmed in Chicago City R. Co. *v.* Carroll, 68 N. E. 1087, 206 Ill. 318.

97. Obstruction on tracks.—Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

collision between the car and a bridge,[98] or an obstruction on the right of way,[99] the presumption that the company was negligent controls, in the absence of proof to the contrary.[1] Thus, it is held that where a passenger on a train is injured by having his arm, which was placed in or out of a window in such a way as not to constitute contributory negligence, struck by a mail pouch suspended by the side of the track,[2] or by a train passing on a parallel and adjacent track,[3] a presumption of negligence on the part of the carrier arises.

Animal on Track.—Where a passenger is injured by a collision between a passenger train and an animal, there arises a presumption of negligence, which, though not conclusive,[4] imposes on the carrier the burden of proving that its road was fenced as required by statute.[5] The presence of an animal on a track raises a prima facie presumption of negligence on the part of the carrier, they being bound, as between themselves and a passenger, to keep the road free from obstructions of that character, and, in the absence of evidence to rebut that presumption, they are liable to plaintiff for injuries sustained.[6]

§ 3177. As to Vehicle.—The mere fact of injury is insufficient to raise a presumption of negligence.[7] But where a passenger is injured through a defective condition of the vehicle, the case is within the rule that a passenger injured without his fault by a defective appliance of the carrier's is prima facie entitled to recover.[8] In such a case the carrier has the burden of showing all

98. Collision with bridge.—Wilkerson *v.* Corrigan Consol. St. R. Co., 26 Mo. App. 144.

99. Obstruction along way.—Cincinnati, etc., R. Co. *v.* Brown, 9 O. C. C. 198, 6 O. C. D. 225; Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

1. Cincinnati, etc., R. Co. *v.* Brown, 9 O. C. C. 198, 6 O. C. D. 225.

2. Arm struck by mail pouch.—McCord *v.* Atlanta, etc., R. Co., 134 N. C. 53, 45 S. E. 1031.

3. Train adjacent track.—Where plaintiff, riding on defendant's train sat with his arm resting on the window sill, but, according to the weight of evidence, not extending without, and some part of a passing freight train struck and seriously injured the arm, a presumption of want of proper care on the part of the railroad company arises, and, the company failing to remove it, a judgment for plaintiff will be affirmed. Breen *v.* New York, etc., R. Co., 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450.

4. Presumption not conclusive.—Though a railroad company is bound to use the highest degree of care and vigilance to keep cattle off the track, there is not a conclusive presumption of negligence on its part in every case of injuries to passengers caused by cattle being on the track. Wright *v.* Pennsylvania R. Co. (Pa.), 3 Pittsb. Rep. 116.

5. Animal on track.—Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58.

Where, through the failure of defendant to comply with Act March 30, 1860 (Laws 1860, c. 268), requiring railroad companies to fence their tracks, a passenger was injured by defendant's train colliding with a cow, the passenger may recover for his injuries without proof of any other negligence on the part of defendant. Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254.

6. Presumption from implied duty as to obstructions.—Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. 234, 72 Am. Dec. 698.

7. Mere fact of injury.—There is no presumption of negligence on the part of a carrier from the mere fact of the fall of an open car window on the arm of a passenger. Boucher *v.* Boston, etc., Railroad, 79 Atl. 993, 76 N. H. 91, 34 L. R. A., N. S., 728.

A passenger alighted from a car, and, after both feet were on the pavement, her skirt was caught in a part of the car, in what way does not appear, and she was dragged along for about the width of two houses. The car did not appear defective, but was of the most approved form and pattern. Held, that the company was not liable. Doyle *v.* Metropolitan St. R. Co., 60 N. Y. S. 475, 29 Misc. Rep. 331.

8. Falling window sash.—*Georgia.*—Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979.

Indiana.—Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A., N. S., 527, rehearing denied in 84 N. E. 13.

Minnesota.—Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410.

Missouri.—Rattan *v.* Central Elect. R. Co., 120 Mo. App. 270, 96 S. W. 735.

New York.—Miller *v.* Ocean Steamship Co., 43 Hun 640, 6 N. Y. St. Rep. 664; Burke *v.* State, 119 N. Y. S. 1089, 64 Misc. Rep. 558.

Where it appears that an injury received while alighting was occasioned in such a manner and from such cause as to show that something was wrong with the

the collateral facts necessary to explain the cause of the accident, and of showing proper diligence in maintaining the car and appliances in a safe condition.[9] These rules apply where the coupling of the train breaks,[10] where an accident results from an accidental detachment of part of the cars of a train,[11] where a hand rail on a street car gives away,[12] where a car wheel,[13] or axle,[14] breaks, where the peddle wheel of a steamboat breaks,[15] where a stage plank or gangway falls and injures a passenger leaving a steamboat,[16] where a trap door collapses under a passenger,[17] where large sparks and cinders are permitted to es-

car, proof of the accident and the means and cause of it is sufficient to put the carrier upon his proof. Hitchcock *v.* Brooklyn City R. Co., 44 Hun 627, 8 N. Y. St. Rep. 848.

In an action against a cable railway for personal injuries caused by the running away of a car on which plaintiff was a passenger, the result of the breaking of a grip shank, the fact that the brakes proved insufficient to hold the cars when the grip shank broke raises a presumption that they were defective in construction. Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93.

In an action for injuries received while entering defendant's street car, plaintiff testified that the car had stopped, and was ready to receive passengers; that the motorman left it, and went outside, towards the rear; that plaintiff, in company with others, stepped on the front platform, when the brake flew around and struck her on the check. Held, that such evidence raised a presumption of negligence on the part of defendant, and it was error to dismiss the complaint. Gilmore *v.* Brooklyn Heights R. Co., 6 App. Div. 117, 39 N. Y. S. 417. See Thompson *v.* St. Louis, etc., R. Co., 111 Mo. App. 465, 86 S. W. 465.

In an action for injuries to a passenger on a street car, though the burden of proof on the whole case was on plaintiff, her showing that the injury was caused by the flying up of a trap door in the floor of the car placed on defendant the necessity for explaining the happening to free itself from the presumption of negligence. Baum *v.* New York, etc., R. Co., 108 N. Y. S. 265, 124 App. Div. 12.

9. Carrier's burden of proof.—Cleveland, etc., R. Co. *v.* Hadley, 82 N. E. 1025, 170 Ind. 204, 16 L. R. A., N. S., 527, rehearing denied in 84 N. E. 13.

Where a passenger fell from the platform of a street car and was killed in consequence of the gate not being securely fastened, the question being as to whether the gate had been insecurely latched or was unlatched by the passenger himself, the burden of proof is on the carrier. Spurlock *v.* Shreveport Tract. Co., 42 So. 575, 118 La. 1.

Where a passenger on a street car was injured by stepping on an electrical metal plate in defendant's car, and receiving an electric shock, the burden was on defendant to show that the presence of the electricity could not have been detected and prevented by the exercise of the highest degree of care. McRae *v.* Metropolitan St. R. Co., 102 S. W. 1032, 125 Mo. App. 562.

Where a passenger proved his injuries as the result of a breakage in one of the cars of a train in which he was riding, the carrier, in order to defeat a recovery, must show, not only that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent, but that, if the accident was due to a latent defect in the material or construction of the car, it could not have been discovered either by the carrier or the builders by the exercise of such care. Morgan *v.* Chesapeake, etc., R. Co., 105 S. W. 961, 32 Ky. L. Rep. 330.

10. Breaking of coupling.—Galveston, etc., R. Co. *v.* Young, 45 Tex. Civ. App. 430, 100 S. W. 993; Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608; Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64, affirmed in 93 Tex. 707, no op.

The mere fact that a train parts in transit raises a presumption of negligence against the carrier. Feldschneider *v.* Chicago, etc., R. Co., 99 N. W. 1034, 122 Wis. 423.

11. Detachment of part of train.—Tuttle *v.* Chicago, etc., R. Co., 48 Iowa 236.

12. Hand rail on car.—McCarty *v.* St. Louis, etc., R. Co., 105 Mo. App. 596, 80 S. W. 7.

13. Breaking of car wheel.—The breaking of a car wheel is presumptive evidence of negligence. Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

14. Broken axle.—Pate *v.* Columbia, etc., R. Co., 52 Wash. 166, 100 Pac. 324.

15. The breaking of a paddle wheel of a steamboat, whereby a passenger was injured, raises a presumption of negligence on the part of the carrier. Yerkes *v.* Keokuk, etc., Packet Co., 7 Mo. App. 265.

16. Falling stage plank or gangway.—Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245.

17. The collapse of a trap door forming a part of the floor of a street car, under the weight of a passenger, who was simply walking thereon, resulting in injury to her, was evidence of negligence under the doctrine res ipsa loquitur. Jorden *v.* St. Louis, etc., R. Co., 99 S. W. 492, 122 Mo. App. 330.

cape from the engine,[18] where a fire extinguisher falls on a passenger,[19] where an explosion in a car results from some unknown cause,[20] where an explosion occurs in the controller box of a street car,[21] causing the passenger to jump therefrom to his injury,[22] where a steamboat boiler explodes,[23] where the locomotive boiler exploded while attached to and haulting the train,[24] where a passenger is injured by an electric shock while on the car,[25] or while boarding or alighting therefrom,[26] where a lamp in an omnibus bursts and injures a passenger,[27] where a ventilating window falls and injures a passenger,[28] where the

18. Sparks and cinders.—St. Louis, etc., R. Co. *v.* Parks, 40 Tex. Civ. App. 480, 90 S. W. 343; Texas Mid. R. Co. *v.* Jumper, 24 Tex. Civ. App. 671, 60 S. W. 797.

19. Falling fire extinguisher.—Where a passenger on a street car was injured by the falling of a fire extinguisher fastened to the side of the car some twenty inches over her head, proof of such accident established a prima facie case of negligence against defendant entitling plaintiff to recover, in the absence of evidence explaining the occurrence. Allen *v.* United Tract. Co., 73 N. Y. S. 737, 67 App. Div. 363.

20. Spear *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. Rep. 393.

Where it is shown by the evidence that the relation of passenger and carrier exists, that an explosion occurred in one of the cars of the train on which the plaintiff was riding, and that an injury resulted to her, the burden shifts to the carrier to show that it was not negligent in the premises. Chicago Union Tract. Co. *v.* Newmiller, 116 Ill. App. 625, judgment affirmed in 74 N. E. 410, 215 Ill. 383.

21. Explosion in controller box.—German *v.* Brooklyn Heights R. Co., 95 N. Y. S. 112, 107 App. Div. 354; Gay *v.* Milwaukee Elect. R., etc., Co., 138 Wis. 348, 120 N. W. 283; Firebaugh *v.* Seattle Elect. Co., 40 Wash. 658, 82 Pac. 995, 2 L. R. A., N. S., 836, 111 Am. St. Rep. 990.

Where plaintiff was injured by an explosion from the controller on defendant's street car, and the evidence of an expert was that the accident could not have occurred from any other cause than a defect in the condition of the electrical mechanism and equipment of the car, and there was no evidence to warrant a finding that such an accident could have happened from any other cause, a case for the application of the doctrine of res ipsa loquitur is presented. Beattie *v.* Boston Elev. R. Co., 86 N. E. 920, 201 Mass. 3.

22. Causing passenger to jump.—This rule was applied in German *v.* Chicago, etc., Co., 150 Ill. App. 149; Chicago Union Tract. Co. *v.* Newmiller, 215 Ill. 383, 74 N. E. 410, affirming judgment 116 Ill. App. 625; Brod *v.* St. Louis Trans. Co., 115 Mo. App. 202, 91 S. W. 993; Lynch *v.* Metropolitan St. R. Co., 90 N. Y. S. 378; Paine *v.* Geneva, etc., Tract. Co., 101 N. Y. S. 204, 115 App. Div. 729.

23. Steamboat boiler exploding.—It is a presumption of law that the proprietors of a steamboat are liable for the explosion of a boiler on a boat under their control, and they are bound to show, if they can, that the accident occurred from causes which human skill and foresight in the construction and management of the machine could not avert or foresee. Caldwell *v.* New Jersey Steamboat Co., 56 Barb. 425; S. C., 47 N. Y. 282.

24. Locomotive exploding.—Kelly *v.* Chicago, etc., R. Co., 113 Mo. App. 468, 87 S. W. 583.

25. Electric shock.—McDonough *v.* Boston Elev. R. Co., 208 Mass. 436, 94 N. E. 809; Eickhof *v.* Chicago, etc., R. Co., 77 Ill. App. 106.

In an action for personal injuries resulting from an electric shock caused by contract with defendant's street car while alighting therefrom, evidence that the car was so charged with electricity as to injure a person by contact with any part establishes a prima facie case of negligence. Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Where the controller box on an electric car was charged with electricity to such an extent as to endanger the safety of passengers who might accidentally touch it, an inference of negligence was warranted. South Covington, etc., St. R. Co. *v.* Smith, 86 S. W. 970, 27 Ky. L. Rep. 811.

26. Boarding or alighting from car.—Where plaintiff was shocked by electricity as he took hold of the handhold of an electric car for the purpose of boarding it at a point where it had stopped to take on passengers, and he was badly injured, the circumstances surrounding the injury were sufficient to raise a presumption of negligence on the part of the company. Dallas, etc., St. R. Co. *v.* Broadhurst, 68 S. W. 315, 28 Tex. Civ. App. 630.

27. Lamp in omnibus.—A passenger in an omnibus was injured by the bursting of a lamp, and in an action for damages against the owners it was held that the burden of proof was on them to show affirmatively that the fluid used in the lamp was a safe and proper article. Wilkie *v.* Bolster (N. Y.), 3 E. D. Smith 327.

28. Ventilating window.—Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442.

fender on a vehicle came loose and swung around on an alighting passenger [29] and other similar cases,[30] and a presumption of negligence on the part of the carrier arises. It seems that the apparatus or machinery must in some way be connected with the transportation of the passenger.[31]

Application to Elevators.—The rule as to the degree of care required, and as to the onus of proof in case of injury from giving way of machinery, applicable between a common carrier of passengers and his passengers, is applicable as between the owner and manager of a passenger elevator and the passengers in it.[32]

Platforms Obstructions, Dangerous Article, etc.—It is undoubtedly true that if the plaintiff is injured by reason of the unsafe or defective condition of the platform of the vehicle, a presumption of negligence arises which places the burden upon the defendant to explain the occurrence in a way not consistent with

29. Defective fender.—McDonnell *v.* Chicago R. Co., 131 Ill. App. 227.

30. Falling brace rod.—St. Louis, etc., R. Co. *v.* Loyd (Ark.), 150 S. W. 864.

Overheating of plate over wheel by friction.—Where a passenger on a street car was injured by the overheating of a plate over a wheel by friction caused by the overloading of the car, the heating of the plate raised a presumption of negligence on the part of the company. Powell *v.* Hudson Valley R. Co., 84 N. Y. S. 337, 88 App. Div. 133.

Fall of fender.—An inference of negligence making the carrier liable for injury to a passenger on a street car is justified by the fact of the dislodgment of a nut causing the fall of the rear fender of the car, occasioning the accident; the jury not being bound to accept as sufficient the carrier's evidence of its system of inspection. Winter *v.* Interurban St. R. Co., 96 N. Y. S. 1009, 49 Misc. Rep. 131.

Device to register fares.—The maxim res ipsa loquitur is applicable to a case where a passenger in a street car is injured by the fall of a device used for registering fares. Weir *v.* Union R. Co., 98 N. Y. S. 268, 112 App. Div. 109.

Presumption from fall of berth in sleeping car.—Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597, followed in Railroad Co. *v.* Walrath, 38 O. St. 461, affirming 7 Am. L. Rec. 555, 6 O. Dec. 718.

Fall of trolley pole.—Proof of the falling of a trolley pole from an electric car, when it stopped at the usual stopping place, on a person standing there for the purpose of getting on the car, raises the presumption of negligence on the part of the traction company, and unless rebutted the party injured is entitled to recover. Cincinnati Tract. Co. *v.* Holzenkamp, 78 N. E. 529, 74 O. St. 379, 6 L. R. A., N. S., 800, 113 Am. St. Rep. 980.

Failure of brakes to work.—Where the brakes of a street car fail to work because of a broken chain, and a passenger is injured, the presumption of negligence arises, which is not overcome by evidence that the brakes held on a previous trip of the car. Dougherty *v.* Pittsburgh R. Co., 62 Atl. 926, 213 Pa. 346.

Giving way of temporary foot rest on hand car as showing negligence.—International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; International, etc., R. Co. *v.* Cock (Tex.), 14 S. W. 242.

31. Where a passenger, approaching an elevated railroad platform in order to gain it, pressed his hand against the glass of a locked door with sufficient force to break it, such facts were insufficient to raise a presumption that the door was improper for the purposes for which it was constructed, or that the breakage arose from any defect in the glass or door, under the doctrine of "res ipsa loquitur." Judgment, 113 N. Y. S. 1006, 61 Misc. Rep. 601, reversed in McCormack *v.* Interborough Rapid Trans. Co., 117 N. Y. S. 532, 132 App. Div. 703.

32. Application to elevators.—Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673; Steiskal *v.* Marshall Field & Co., 87 N. E. 117, 238 Ill. 92, affirming judgment 142 Ill. App. 154.

Where a passenger on an elevator operated in a rented building by the landlord is injured by the falling of the elevator through a defect in the appliance, the presumption of negligence arises against the landlord in accordance with the principle that negligence in a common carrier of passengers is presumed from an injury to a passenger from a defective appliance, and hence a peremptory instruction for the defendant landlord is properly refused, though there is no proof of specific negligence. Judgment 88 Ill. App. 529, affirmed in Springer *v.* Ford, 59 N. E. 953, 189 Ill. 430, 52 L. R. A. 930, 82 Am. St. Rep. 464.

Where, in an action for injuries to a passenger in an elevator through the falling thereof, plaintiff was entitled to go to the jury on the presumption of negligence, an instruction that the burden of proving the specific facts causing the injury rested throughout the case on plaintiff was properly refused. Orcutt *v.* Century Bldg. Co., 112 S. W. 532, 214 Mo. 35.

its negligence.[33] But to hold that ice, formed on the step of the platform as the result of a storm, is a part of the car or of the machinery or compliances of transportation, would be violence to the meaning of the word, unless it be made to appear to have been there a sufficient time and in a dangerous condition so as to render the carrier negligent on these grounds alone.[34] And where a passenger is injured by stepping on an obstacle on the platform, in the absence of any evidence as to how the obstacle came there, and how long it had been, there is no presumption of negligence.[35] And no presumption of negligence arises from the mere fact that a passenger stumbled over a gangplank lying on the deck of a vessel. Negligence must be proven.[36]

§§ 3178-3181. Receiving and Discharging Passengers—§ 3178. In General.—The mere showing of an injury to a passenger boarding or alighting from a vehicle does not create a presumption of negligence on the part of the carrier,[37] although the circumstances may be such as to require an explanation

33. Sutton *v.* Pennsylvania R. Co., 230 Pa. 523, 79 Atl. 719; Aston *v.* St. Louis Trans. Co., 105 Mo. App. 226, 79 S. W. 999.

In an action for injuries to a passenger, owing to her foot having caught in a strand or loop of a car mat, there being evidence that the mat was practically worn out, it was not incumbent on plaintiff to prove that the particular strand or loop had been in a dangerous condition long enough to charge defendant with constructive notice. Spaeth *v.* Manhattan R. Co., 96 N. Y. S. 861, 109 App. Div. 819.

34. Sutton *v.* Pennsylvania R. Co., 230 Pa. 523, 79 Atl. 719, citing Fearn *v.* West Jersey Ferry Co., 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366; Hayman *v.* Pennsylvania R. Co., 118 Pa. 508, 11 Atl. 815; Farley *v.* Philadelphia Tract. Co., 132 Pa. 58, 18 Atl. 1090; Bernhardt *v.* Western Pennsylvania R. Co., 159 Pa. 360, 28 Atl. 140.

It will be presumed that the presence of a light snow, and thin ice under it, on the platform at the bottom of stairs at an elevated railway station, was due to the snowstorm prevailing when plaintiff slipped on it, so that the railway company was not negligent in not having it cleared off. Rusk *v.* Manhattan R. Co., 61 N. Y. S. 384, 46 App. Div. 100.

35. Obstacles on platform.—Bernhardt *v.* Western Pennsylvania R. Co., 159 Pa. 360, 28 Atl. 140.

Stepping on loose bolt, etc.—The fact that a passenger was injured while alighting at a station by stepping on a small, loose bolt, without any showing as to how it came there or how long it had been there, raises no presumption of negligence. Serviss *v.* Ann Arbor R. Co. (Mich.), 135 N. W. 343.

Where a passenger alighting from a train steps upon a bung from a keg lying on the platform, and sprains her ankle, no presumption of negligence on the part of the company arises. Bernhardt *v.* Western Pennsylvania R. Co., 159 Pa. 360, 28 Atl. 140.

36. Where passenger is injured by stumbling over obstacle.—Where a passenger on a steamboat stumbles over a gang plank of ordinary construction, lying on the deck of the vessel in close proximity to the place where it must be used, causing severe injuries, the owner of the vessel is not liable, in the absence of proof that the plank was negligently or unusually constructed or handled, or other proof of specific negligence which caused the fall. Seddon *v.* Bickley, 153 Pa. 271, 25 Atl. 1104.

37. Mere injury.—*California.*—Wyatt *v.* Pacific Elect. R. Co., 156 Cal. 170, 103 Pac. 892.

Delaware.—Elliott *v.* Wilmington City R. Co. (Del.), 6 Pen. 570, 73 Atl. 1040; Butler *v.* Wilmington City R. Co., 2 Boyce's (25 Del.) 262, 78 Atl. 871.

Illinois.—Chicago City R. Co. *v.* Catlin, 70 Ill. App. 97; Chicago, etc., R. Co. *v.* Bingenheimer, 14 Ill. App. 125.

Missouri.—Schaefer *v.* St. Louis, etc., R. Co., 128 Mo. 64, 30 S. W. 331.

Montana.—Knuckey *v.* Butte Elect. R. Co., 41 Mont. 314, 109 Pac. 979.

When a passenger's injury is alleged to have resulted from the premature starting of the car as he was endeavoring to get aboard or alight, there is no presumption of negligence, on the part of the defendant arising from the mere fact that the passenger was injured. Coyle *v.* People's R. Co. (Del.), 80 Atl. 638.

In an action for the death of a person killed by a train at a station, on the ground that the train started before he had time to alight, where there is no evidence how the accident happened, or whether he was on the train or the station platform when thrown under the train, the company can not be held liable because of the presumption that he was in the exercise of due care, since there is also a presumption, in favor of the carrier, that it performed its duty. Yarnell *v.* Kansas, etc., R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

Where a train has come to a stop, and

from the carrier,[38] but the burden is on plaintiff to establish that his injury resulted from defendant's negligence.[39] The rule seems to be that the happening of an accident to a passenger while on or getting off a car, which, in the usual and ordinary course of things, would not happen with proper care, casts the burden upon the company, in an action against it by the passenger to recover for injuries so received, of explaining the circumstances of the accident so as to relieve it from liability.[40] It must first be shown that the carrier had knowledge that the passenger desired to board or alight, or of such facts as to make them alert as to whether he desired to do so,[41] and that the injury came from the movement of the car by those in charge of it, or from something connected therewith, and in the control of the carrier, and it is then presumed that the thing causing the injury was due to the carrier's negligence, and the burden of proof shifts.[42] A showing that the passenger was injured by the operation of the vehicle which he was attempting to board as a passenger, makes out a prima facie case of negligence so as to place the burden upon the company of negativing negligence.[43]

Operation of Vehicle Slowing Down for Alighting Passenger.—Where a passenger who is getting ready to alight when the vehicle stops, it having slowed down for that purpose, is injured by the violent operation thereof, there

a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her kneepan, without any apparent external cause, or presumption of negligence on the part of the company is raised. Delaware, etc., R. Co. *v.* Napheys, 90 Pa. 135.

38. Although explanation required.—Peck *v.* St. Louis Trans. Co., 178 Mo. 617, 77 S. W. 736.

39. Burden on plaintiff.—File *v.* Wilmington City R. Co. (Del.), 80 Atl. 623; Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001; Foden *v.* Brooklyn Heights R. Co., 121 N. Y. S. 420, 136 App. Div. 765.

The burden is on plaintiff to show that, after the stopping of defendant's train at his station or at what he had reason to believe was his station, defendant negligently put the train in motion before he had time to depart therefrom by the exercise of ordinary care, and that by putting the train in motion by a sudden motion or jerk he was injured. Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540.

In an action by a passenger against a street railway company to recover for personal injuries caused by the alleged negligent starting of a car while plaintiff was in the act of alighting, the defense being a general or special denial, the burden of proof never shifts, but remains with the plaintiff to prove that the injury was received substantially as alleged. Lincoln Tract. Co. *v.* Brookover, 77 Neb. 217, 109 N. W. 168, judgment reversed on rehearing in 111 N. W. 357.

40. General rule.—City, etc., R. Co. *v.* Svedbork, 20 App. D. C. 543, affirmed in 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

41. Knowledge as to desire to alight.—Masterson *v.* Crosstown St. R. Co., 94 N. E. 1086, 201 N. Y. 499, reversing judgment 120 N. Y. S. 1134, 136 App. Div. 908.

A passenger on a street car signaled the conductor to stop the car, and, as it was slowing down, he prepared to get off, and was injured by the gripman suddenly increasing the speed of the car. Held, that he could not recover in the absence of proof that the conductor signaled the gripman, since the latter may have slackened the speed in the exercise of reasonable care in the operation of the car. Armstrong *v.* Metropolitan St. R. Co., 55 N. Y. S. 498, 36 App. Div. 525, order affirmed in 59 N. E. 1118, 165 N. Y. 641.

42. When presumption arises.—Wyatt *v.* Pacific Elect. R. Co., 156 Cal. 170, 103 Pac. 892; Flynn *v.* Interborough Rapid Trans. Co., 96 N. Y. S. 259, 48 Misc. Rep. 529; Paul *v.* Salt Lake City R. Co., 34 Utah 1, 95 Pac. 363.

Plaintiff, a large portly man, arose from his seat at the back of a street car as it was approaching his destination, and, when it had come to or nearly to a standstill, attempted to alight. When standing upright, he could not observe the condition of his feet, and, as he stepped off the car, they became entangled in a rope which was lying on the floor of the car in front of the seat or on the seat, and which was either fastened to or part of the trolley rope. As he stepped from the car, it immediately increased its speed, and plaintiff's feet were jerked from under him by the rope, and he was dragged some distance, receiving serious injuries. He testified that he did not know of the existence of the rope nor of the danger until after the accident. Held, that such facts raised a presumption of negligence on the part of the carrier under the doctrine res ipsa loquitur. Denver City Tramway Co. *v.* Hills, 116 Pac. 125, 50 Colo. 328, 36 L. R. A., N. S., 213.

43. Injury by operation of vehicle.—Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

arises a presumption of negligence,[44] and the passenger is not required to show the cause of the violent movement of the vehicle to sustain his case,[45] unless the injury was occasioned under such circumstances as clearly indicate contributory negligence on the part of the passenger, as where the passenger on an open street car was standing with one foot on the platform and the other on the car step, with his hand on the rail,[46] where he was standing on the running board,[47] or where he was attempting to alight from a moving vehicle.[48]

Sudden Starting without Reasonable Time.—The general rule seems to be that if the car has stopped for a passenger to get aboard or alight and the passenger is in the act of doing so with due care, the sudden starting of the car before a reasonable time elapses is sufficient to raise a presumption of negligence,[49] which can only be overcome by affirmatively showing that, notwithstanding the existence of such facts, the starting of the car was the result of unavoidable accident or some cause beyond the operators control.[50] Thus, it is said that operators of a street car who make a sudden start of the car of sufficient violence to injure a passenger proceeding with reasonable care to reach a place of security are presumptively negligent, and the presumption becomes conclusive unless it is shown that the manner of starting the car was unavoidable in the exercise of the highest degree of care.[51] This rule applies to elevator cases,[52] and it seems that such would undoubtedly be the rule where the car-

44. Griffin *v.* Pacific Elect. R. Co., 1 Cal. App. 678, 82 Pac. 1084.

The sudden starting of a street car with a jerk of sufficient violence to throw to the ground a passenger, who had placed her foot on the running board to alight at the crossing which the car was slowly approaching, justifies an inference of negligence. Paducah Tract. Co. *v.* Baker (Ky.), 113 S. W. 449, 18 L. R. A., N. S., 1185.

Negligence may be inferred from a "lurch" of a street car of sufficient violence to throw off the car a passenger who had notified the conductor of her desire to get off at a certain street, and who, after the conductor called out the street, had gone to the rear door to alight. Consolidated Tract. Co. *v.* Thalheimer, 37 Atl. 132, 59 N. J. L. 474. Judgment 43 Atl. 1060, 63 N. J. L. 407, affirmed in Scott *v.* Bergen County Tract. Co., 48 Atl. 1118, 64 N. J. L. 362.

Where a street car passenger was injured by being thrown from the car by the sudden acceleration of the speed thereof, after its speed had been slackened in response to her notice that she desired to alight, the happening of the accident was sufficient to raise a presumption of negligence on the part of the carrier. Paul *v.* Salt Lake City R. Co., 83 Pac. 563, 30 Utah 41.

45. Renfro *v.* Fresno City R. Co., 2 Cal. App. 317, 84 Pac. 357.

46. Contributory negligence clearly indicated.—Conroy *v.* Detroit United Railway, 102 N. W. 641, 104 N. W. 319, 139 Mich. 173.

47. Standing on running board.—The fact that a cable car gave a sudden jerk, throwing plaintiff from the running board, is, per se, insufficient to make the company liable. Bartley *v.* Metropolitan St. R. Co., 49 S. W. 840, 148 Mo. 124.

48. Moving vehicle.—Regan *v.* St. Louis Trans. Co., 180 Mo. 117, 79 S. W. 435.

49. St. Louis, etc., R. Co. *v.* Stell, 87 Ark. 308, 112 S. W. 876.

Presumption of negligence.—*Alabama.*—Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748.

California.—Joyce *v.* Los Angeles R. Co., 82 Pac. 204, 147 Cal. 274; Cody *v.* Market St. R. Co., 82 Pac. 666, 148 Cal. 90.

Colorado.—Denver Consol. Tramway Co. *v.* Rush, 73 Pac. 664, 19 Colo. App. 70.

Illinois.—Chicago City R. Co. *v.* Dinsmore, 44 N. E. 887, 162 Ill. 658.

Maryland.—United R., etc., Co. *v.* Beidelman, 95 Md. 480, 52 Atl. 913; United R., etc., Co. *v.* Woodridge, 97 Md. 629, 55 Atl. 444.

Missouri.—Bell *v.* Central Elect. R. Co., 125 Mo. App. 660, 103 S. W. 144.

New York.—Martin *v.* Second Ave. R. Co., 38 N. Y. S. 220, 3 App. Div. 448, 73 N. Y. St. Rep. 714; Gregorio *v.* New York City R. Co., 97 N. Y. S. 373, 49 Misc. Rep. 249.

South Carolina.—McKittrick *v.* Greenville Tract. Co., 88 S. C. 91, 70 S. E. 414.

Under Georgia statute.—Georgia R., etc., Co. *v.* Reeves, 123 Ga. 697, 51 S. E. 610; Pierce *v.* Georgia R., etc., Co., 9 Ga. App. 666, 72 S. E. 66.

50. Evidence to overcome presumption.—Bell *v.* Central Elect. R. Co., 125 Mo. App. 660, 103 S. W. 144.

51. Operators presumptively negligent.—Miller *v.* Metropolitan St. R. Co., 125 Mo. App. 414, 102 S. W. 592.

52. Where an elevator is stopped and its door opened to permit the entry of a passenger, and the operator starts it while the passenger is entering, so that

rier failed to warn the passenger of his danger, which concurrently with the sudden movement of the car contributed to the injury.[53]

Attempt to Board Moving Car.—In a suit for personal injuries received by being thrown in attempting to board a car while moving as it reaches or pulls out from a street crossing or stopping place, plaintiff must show some fault on the part of the employees of the company.[54]

Presumption That Acts Done by Authorized Servants.—Where a street car which had stopped to receive passengers at a regular place starts in the usual way before the passenger has an opportunity to reach a place of safety, it may be inferred that it started by the acts of the street car employees.[55] Thus, where the door to a vestibuled car is closed as the train starts, it will be presumed to have been closed by some one connected with the operation of the train.[56] And where the usual signal for starting the car was given at such a time as to cause injury to the plaintiff, the presumption is that it was given by the conductor.[57]

§ 3179. Carriage beyond Destination.—Where the plaintiff was carried several hundred yards beyond his destination which is alleged to have caused his sickness, plaintiff has the burden of proving that the sickness resulted from the act of the carrier,[58] and to instruct the jury otherwise is error.[59]

§ 3180. Putting Off at Wrong Destination.—Where a passenger is induced to alight by the negligence of a conductor at a strange place, remote from his destination, no presumption of negligence is raised in law against the defendant from the bare fact that the passenger sustained the injury, and the burden rests upon the passenger to prove the allegations of fact on which he relies for the recovery.[60]

§ 3181. Duties and Accommodation in Transit.—Mere injury to a passenger while aboard a car creates no presumption that it was caused by negli-

the passenger is injured, there is a presumption of negligence, rendering the operator's employer liable for the injury. Wagner *v.* Farmers', etc., Ins. Co. (Neb.), 133 N. W. 650.

The fact that an elevator shot upward after it had reached the main floor, and while plaintiff was attempting to alight from it, is, of itself, evidence of want of care and mismanagement in its operation. Franklin, etc., Publishing Co. *v.* Behrens, 80 Ill. App. 313, affirmed in 54 N. E. 896, 181 Ill. 340.

53. Kansas, etc., R. Co. *v.* Davis, 83 Ark. 217, 103 S. W. 603.

54. Attempt to board moving car.—Weber *v.* New Orleans, etc., R. Co., 104 La. 367, 28 So. 892.

Where plaintiff, by a sudden jerk of a street car which he was attempting to board, was thrown from the step and under the wheels, but failed to show that the jerk was attributable to some negligent act of the company, or its servants, the trial court properly directed a nonsuit. Stager *v.* Ridge Ave. Pass. R. Co., 119 Pa. 70, 12 Atl. 821.

A passenger, who had left the train and entered a restaurant on a ferry, being informed that his train was leaving, attempted to climb the steps of a moving car, when a jerk occasioned by an increase in speed overbalanced him, and he was struck by some obstruction close to the car, but necessary in the operation of the road. Held, that there was no presumption of negligence arising from the accident. Allen *v.* Northern Pac. R. Co., 77 Pac. 204, 35 Wash. 221, 66 L. R. A. 804.

Authority of servant.—Where, in an action by a passenger to recover for injuries sustained in getting off a moving train, plaintiff claims that she alighted at the command of the conductor, evidence that the person who directed her to get off was in possession of a lantern and went through the train taking up tickets from the passengers places on the railway company the burden of showing that such person was not in charge of the train. Coursey *v.* Southern R. Co., 38 S. E. 866, 113 Ga. 297.

55. Presumption as to who started vehicle.—Killam *v.* Wellesley, etc., St. R. Co., 214 Mass. 283, 101 N. E. 374.

56. Closing door.—Rainey *v.* Grand Trunk R. Co., 84 Vt. 521, 80 Atl. 723.

57. As to giving signals, etc.—Kohr *v.* Metropolitan St. R. Co., 92 S. W. 1145, 117 Mo. App. 302.

58. Carriage beyond destination.—Gulf, etc., R. Co. *v.* Head, 4 Texas App. Civ. Cas., § 209, 15 S. W. 504.

59. Erroneous charge.—St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 9 S. W. 467.

60. Putting off at wrong destination.—Georgia R., etc., Co. *v.* McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A., N. S., 1177.

gence of the carrier operating the car; but if it be shown that the injury came from the movement of the car by those in charge of it, from something connected therewith, or in control of the carrier, it is presumed that the thing causing the injury was due to the carrier's negligence, throwing on it the burden of disproving the prima facie case.[61]

Passenger Riding on Platform.—The burden is on a passenger injured from being thrown or pushed from the platform to show that his presence there was due to the overcrowded condition of the train,[62] and that the carrier was guilty of negligence in thus causing or permitting him to be injured.[63] Thus, where a man in a crowded car gives a woman his place, and stands on the front platform and is injured, he forfeits the advantage of the presumption that the accidents resulted from the negligence of the company.[64]

§§ 3182-3189. Management of Vehicle—§ 3182. Jerks and Jolts.—The doctrine of res ipsa loquitur does not apply to injuries from jerks, jolts, or jars which ordinarily attend the coupling of cars, starting, stopping and running of trains, and which are not shown to have been caused by the carrier's negligence.[65] And a jerk or jar causing a passenger's injuries will be assumed to have been an ordinary one, and not one caused by negligence, in the absence of proof of negligence.[66] And it is said that the fact that persons are not ordi-

61. Injury to passenger aboard vehicle.—Wyatt *v.* Pacific Elect. R. Co., 103 Pac. 892, 156 Cal. 170.

Where a passenger in a crowded summer car by its sudden movement is thrown beyond the guard rail and his head is struck by a car on the other track, but there is no injury to the car in which the passenger is riding, no presumption of negligence arises from the mere happening of the accident. Cline *v.* Pittsburg R. Co., 75 Atl. 850, 226 Pa. 586, 27 L. R. A., N. S., 936.

Where the injury does not result from an accident to the vehicle or from any defect in the means of transportation, there is no presumption in the passenger's favor. Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. 624, 31 Atl. 52.

62. Passenger riding on platform.—Alabama, etc., R. Co. *v.* Gilbert, 6 Ala. App. 372, 60 So. 542.

63. Where an injury to a passenger results solely because the car is so crowded that he can not get inside, and he either falls or is pushed off the platform, also crowded, shortly after the train was started, the burden of proof is throughout on the passenger to show that his injury is due solely to defendant's negligence. Dennis *v.* Pittsburg, etc., R. Co., 165 Pa. 624, 31 Atl. 52.

64. Forfeiting benefit of presumption.—Paterson *v.* Philadelphia Rapid Trans. Co., 67 Atl. 616, 218 Pa. 359, 12 L. R. A., N. S., 839.

65. Res ipsa loquitur inapplicable.—Wile *v.* Northern Pac. R. Co., 72 Wash. 82, 129 Pac. 889; Chicago Union Tract. Co. *v.* Straud, 114 Ill. App. 479; Johnson *v.* Interurban St. R. Co., 38 N. Y. S. 866; Flynn *v.* Interborough Rapid Trans. Co., 96 N. Y. S. 259, 48 Misc. Rep. 529.

Injury to a passenger from a coupling made in an ordinary manner does not justify an inference of negligence on the part of the railroad company. Yazoo, etc., R. Co. *v.* Humphrey, 36 So. 154, 83 Miss. 721.

Where a little girl walked to the rear platform, and the conductor rang the bell for the next crossing, and the car slowed down and ran into a turnout, and by reason of the motion caused by entering the turnout the child fell from the platform, no inference arose that the accident occurred by negligence in handling the car. Pascell *v.* North Jersey St. R. Co., 69 Atl. 171, 75 N. J. L. 836.

The mere fact that the stopping of a passenger train at a station is accompanied with a "jerk," resulting in injury to a passenger, with nothing to show that it was of more than ordinary violence or that it was avoidable by reasonable care, does not establish negligence. Jonas *v.* Long Island R. Co., 47 N. Y. S. 149, 21 Misc. Rep. 306.

A jerk of a cable car which is a frequent incident in the operation of such cars, and consistent with care and proper equipment, does not raise any presumption of negligence. De Yoe *v.* Seattle Elect. Co., 102 Pac. 446, 53 Wash. 588, judgment affirmed on rehearing in 104 Pac. 647.

66. Assumed to be ordinary.—Wile *v.* Northern Pac. R. Co., 72 Wash. 82, 129 Pac. 889; Herstine *v.* Lehigh Valley R. Co., 151 Pa. 244, 25 Atl. 104.

In an action against a railroad company for injuries to a passenger, where plaintiff merely proves that, while standing at the door of the coach in which he was riding, "there was a fearful shock," resulting in his injury, with nothing to show the cause or nature of the shock, there is no evidence of defendant's negligence, and the trial court rightly directed

narily thrown from their seats in a car in rounding a curve does not justify the presumption that an injury so caused was due to the want of care of defendant.[67] But if extraordinary violence and lurching attend the starting or stopping of a railroad train or street car whereby a passenger is injured, the company is called upon to show that due care was used to prevent it.[68] And if a passenger suing for a personal injury shows an unusual sudden and violent jerk or jolt of the train or car and resulting injury, he establishes a prima facie case within the maxim res ipsa loquitur,[69] even though he was riding on the platform or running board of the vehicle, because of the crowded condition of the car.[70] Thus, where a passenger is thrown from the car in which he is riding, out of his seat and upon the ground, and such accident would not have happened under ordinary circumstances, had the carrier's servants used the required degree of care, and the passenger shows his freedom from contributory negligence, a pre-

a verdict in its favor. Saunders *v.* Chicago, etc., R. Co., 6 S. Dak. 40, 60 N. W. 148.

Where a passenger who claims to have been injured by the jerking of the vehicle in which he was riding, brings suit for damages, the burden is on him to prove the unusual character of a jerk of the car. Sanson *v.* Philadelphia Rapid Trans. Co., 239 Pa. 505, 86 Atl. 1069.

67. Cars rounding curve.—Judgment 41 N. Y. S. 931, 10 App. Div. 364, 75 N. Y. St. Rep. 1302, affirmed in Wilder *v.* Metropolitan St. R. Co., 57 N. E. 1128, 161 N. Y. 665.

68. Extraordinary violence.—Burr *v.* Pennsylvania R. Co., 64 N. J. L. 30, 44 Atl. 845; Langley *v.* Metropolitan St. R. Co., 74 N. Y. S. 857, 36 Misc. Rep. 804.

Plaintiff thrown from seat to floor.—Hoffman *v.* Third Ave. R. Co., 61 N. Y. S. 590, 45 App. Div. 586.

69. Evidence showing unusual and violent jerks.—*Illinois.*—Lavis *v.* Wisconsin Cent. R. Co., 54 Ill. App. 636.

Iowa.—Sever *v.* Minneapolis, etc., R. Co., 156 Iowa 664, 137 N. W. 937.

Missouri.—Coudy *v.* St. Louis, etc., R. Co., 85 Mo. 79; Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239; Todd *v.* Missouri Pac. R. Co., 126 Mo. App. 684, 105 S. W. 671; Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558; Bussell *v.* Quincy, etc., R. Co., 125 Mo. App. 441, 102 S. W. 613.

Pennsylvania.—Dixey *v.* Philadelphia Trac. Co., 180 Pa. 401, 36 Atl. 924.

A person who declares against a carrier, on an injury sustained while in the character of a passenger, makes a prima facie case by showing that, shortly before the arrival of her train, she entered a detached car in the apparently proper position, and in apparent readiness to be attached to the train when it should arrive, connected with the station platform by a gang plank, and in which car she was injured by the violent impact of another car shoved against it. Root *v.* Catskill Mountain R. Co., 33 Fed. 858.

A jolt which was sufficient to cause a street car passenger to be lifted from her seat and fall, and cause the forward part of the car to rise up on one side, unexplained, is presumptive proof of negligence, not being an ordinary incident of street car travel. Webber *v.* Old Colony St. R. Co., 97 N. E. 74, 210 Mass. 432.

Plaintiff's evidence showed that defendant's cable car on which plaintiff was riding made an unusual and violent stop, so that the glass in the window was shattered and plaintiff was thrown against a stove; that another passenger was thrown against a window with such force as to break the glass and bend the protecting bars; and that the car was run over the crossing at the full speed of the cable, which, according to defendant's testimony, was violative of its rules. There was also evidence that an iron plate which was along the side of the cable conduit was struck by the grip shank and dented. Held to make out a case of presumptive negligence. Briscoe *v.* Metropolitan St. R. Co., 222 Mo. 104, 120 S. W. 1162.

In an action against a street railway company for injuries to a passenger, plaintiff testified that she had stood up preparatory to alighting, and signaled the conductor, when the car gave a sudden jerk that "knocked her somewhere," after which she had no further remembrance, and it appeared that she had received traumatic injuries. Held, that the evidence was sufficient to raise a presumption of negligence. Order 97 N. Y. S. 658, 111 App. Div. 332, affirmed in Lomas *v.* New York City R. Co., 81 N. E. 1169, 188 N. Y. 628.

Where it appears, in an action by a passenger against a street car company, that the street car was stopped by the motorman so suddenly as to throw the passenger forward against the seat in front of him, there is a presumption of negligence in operation of the car calling for an explanation by the company. Tilton *v.* Philadelphia Rapid Trans. Co., 79 Atl. 877, 231 Pa. 63.

Sudden jerking and jolting.—Evansville, etc., R. Co. *v.* Mills, 37 Ind. App. 598, 77 N. E. 608.

70. Where riding on running board.—Brainard *v.* Nassau Elect. R. Co., 61 N. Y. S. 74, 44 App. Div. 613.

sumption of negligence on the part of the carrier arises.[71] So where the car strikes an obstruction on the track and lurches or jerks so as to injure a passenger, negligence is presumed.[72] And in such cases the plaintiff need not show the immediate connection between the injury and the misconduct of the carrier, the car being under the control of the carrier or its servants, and the accident such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care.[73]

Method of Propulsion.—Where the construction and method of propelling and stopping a car are such as to involve a serious jerk in starting, stopping or checking the speed thereof, an inference of want of ordinary care in its operation, from the fact that a passenger was thrown and injured, through the starting or stopping of the car, is justified.[74]

Defective Machinery.—Where a car stops short by reason of defective machinery or appliances and results in injury to a passenger, the law presumes that the carrier was negligent.[75]

Passenger Thrown from Platform.—Where a passenger is injured by being thrown from the platform by a lurch of the train no more violent than the lurching of trains commonly incident to their rapid movement when operated with due care, he must prove that his presence on the platform while the train was in motion was due to the carrier's negligence.[76]

§ 3183. Breaking Down or Overturning of Coach.—Where a passenger is injured by the breaking down or overturning of a coach, it will be presumed that it was occasioned by the negligence of the carrier, and the burden of proof is on him to establish want of negligence, and that the injury was occasioned by inevitable casualty, which human care and foresight could not prevent.[77] Where

71. Passenger thrown from car.—Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

72. Striking obstruction.—North Chicago St. R. Co. *v.* Schwartz, 82 Ill. App. 493.

73. Connection between injury and misconduct.—Dougherty *v.* Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239.

74. Method of propulsion.—Dochtermann *v.* Brooklyn Heights R. Co., 52 N. Y. S. 1051, 32 App. Div. 13, order affirmed in 58 N. E. 1087, 164 N. Y. 586.

In an action for the death of a passenger on a horse car, caused by his being thrown over the front dashboard by a sudden application of the brake, the burden is on defendant to show some emergency justifying such management of the car. Bradley *v.* Second Ave. R. Co., 54 N. Y. S. 256, 34 App. Div. 284.

75. Defective machinery.—Clow *v.* Pittsburg Tract. Co., 158 Pa. 410, 27 Atl. 1004.

Where a passenger is injured by a sudden stopping of a car, throwing him forward, caused by a bolt getting into the slot of the cable, the burden is on the carrier to show that the accident was not due to any omission of duty resting on it. Chicago Union Tract. Co. *v.* Mommsen, 107 Ill. App. 353.

Where the sudden stopping of a street car caused a passenger to be thrown from his seat and injured, and, in an action by him for the injury, the cause of the same was alleged to be the violent stopping of the car, and there was evidence that a bolt or piece of iron of some kind was taken out of the slot rail after the accident by defendant's servants and taken away by them, the character of such piece of iron being within the knowledge of defendant, the burden was on defendant to show how the obstruction, whatever it was, got into the rail. Redmon *v.* Metropolitan St. R. Co., 84 S. W. 26, 185 Mo. 1, 105 Am. St. Rep. 558.

76. Passenger thrown from platform.—Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

77. Breaking down or overturning of coach.—Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799.

The upsetting of a stage is prima facie evidence of negligence, and in an action by a passenger who has been injured it is only necessary for him to show that he was injured by the upsetting of the stage. Saltonstall *v.* Stockton, Fed. Cas. No. 12,271, Taney 11, affirmed in 13 Pet. 181, 10 L. Ed. 115; McKinney *v.* Neil, Fed. Cas. No. 8,865, 1 McLean 540.

California. — Fairchild *v.* California Stage Co., 13 Cal. 599; Boyce *v.* California Stage Co., 25 Cal. 460; Bush *v.* Barnett, 96 Cal. 202, 31 Pac. 2.

Colorado.—Wall *v.* Livezay, 6 Colo. 465; Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Indiana.—Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

a stage coach was overturned by striking a boulder, in turning back into the road after turning out, negligence of the driver is presumable.[78] This is true where a wheel breaks and causes the coach to overturn,[79] or where a coach, while being driven upon a ferry, breaks into and precipitates a passenger into the water, where he is drowned.[80]

§ 3184. Injury from Animals Drawing Coach.—In an action against a carrier, operating coaches, for injuries to a passenger, evidence that the horses ran and kicked, and that the driver lost all control over them, raises a presumption that defendant, in disregard of its duty, provided wild and unsafe horses and a careless and incompetent driver.[81]

§ 3185. Derailment.—Under the res ipsa loquitur rule proof of injury to a passenger caused by the derailment or overturning of a train, such derailment or overturning being unexplained, makes a prima facie case of the carrier's negligence,[82] which may, of course, be strengthened by evidence of facts going

Maryland.—Stockton *v.* Frey (Md.), 4 Gill 406, 45 Am. Dec. 138.

Virginia.—Farish & Co. *v.* Reigle, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666.

If, in an action by a passenger against the owners of a stagecoach, for an injury caused by its insufficiency, he proves that, while the coach was driven at a moderate rate, on a plain and good, level road, without coming in contact with any other object, one of the wheels came off, whereby it was overturned, and he was hurt, the law will imply negligence, and the onus will be on the defendants to rebut this presumption. Ware *v.* Gay (Mass.), 11 Pick. 106.

A prima facie case of negligence is made out against a carrier by proof that its sleigh, while in control of the driver, with the horses traveling six miles an hour on a level road, turned to one side and upset, injuring the plaintiff. Ryan *v.* Gilmer, 2 Mont. 517, 25 Am. Rep. 744, 4 Ky. L. Rep. 151.

Where a plaintiff was injured by the overturning of defendant's sleigh, in which he was being conveyed for hire, on a level road, and without any apparent cause, proof of the accident and the infliction of the injury establishes a prima facie case against the carrier. Ryan *v.* Gilmer, 2 Mont. 517, 4 Ky. L. Rep. 151, 25 Am. Rep. 744.

78. Stage coach striking boulder.—Dinnigan *v.* Peterson, 4 Cal. App. 764, 87 Pac. 218.

79. Breaking of wheel.—Where a plaintiff shows that she was injured by the overturning of a coach, caused by the breaking of one of its wheels while it was being driven round a curve, down grade, on a mountain road, where one side of the track was about a foot lower than the other, she has made out a prima facie case; and if no evidence is given to show that there was no defect in the wheel, and that the defendant was not guilty of negligence, she is entitled to recover. Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750, 59 Am. Rep. 428.

80. Breach breaking into while taking ferry.—McLean *v.* Burbank, 11 Minn. 277, Gil. 189.

81. Injury from animals drawing coach.—Budd *v.* United Carriage Co., 25 Ore. 314, 35 Pac. 660, 27 L. R. A. 279.

82. Derailment res ipsa loquitur applies.—*United States.*—Minahan *v.* Grand Trunk Western R. Co., 138 Fed. 37, 70 C. C. A. 463.

Alabama.—Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

Arizona.—Southern Pac. Co. *v.* Hogan, 13 Ariz. 34, 108 Pac. 240, 29 L. R. A., N. S., 813.

Arkansas.—George *v.* St. Louis, etc., R. Co., 34 Ark. 613; Eureka Springs R. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; St. Louis, etc., R. Co. *v.* Mitchell, 57 Ark. 418, 21 S. W. 883; Arkansas Mid. R. Co. *v.* Rambo, 90 Ark. 108, 117 S. W. 784; St. Louis, etc., R. Co. *v.* Leflar, 104 Ark. 528, 149 S. W. 530.

Colorado.—Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Rio Grande, etc., R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76.

Delaware.—Braunstein *v.* People's R. Co., 2 Boyce's (25 Del.) 55, 78 Atl. 609.

Georgia.—Yonge *v.* Kinney, 28 Ga. 111; Central R. Co. *v.* Sanders, 73 Ga. 513.

Illinois.—Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138; Heazle *v.* Indianapolis, etc., R. Co., 76 Ill. 501; Peoria, etc., R. Co. *v.* Reynolds, 88 Ill. 418; McGrew *v.* Chicago, etc., R. Co., 142 Ill. App. 210; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526; Hill *v.* Chicago City R. Co., 126 Ill. App. 152.

Indiana.—Pittsburgh, etc., R. Co. *v.* Williams, 74 Ind. 462; Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Southern R. Co. *v.* Adams (Ind. App.), 100 N. E. 773; Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640; Cincinnati, etc., R. Co. *v.* Bravard, 38 Ind. App. 422, 76 N. E. 899; Indiana Union

Tract. Co. *v.* McKinney, 39 Ind. App. 86, 78 N. E. 203.

Iowa.—Cronk *v.* Wabash R. Co., 123 Iowa 349, 98 N. W. 884.

Kansas.—Atchison, etc., R. Co. *v.* Elder, 57 Kan. 312, 46 Pac. 310; Chicago, etc., R. Co. *v.* Brandon, 77 Kan. 612, 95 Pac. 573; Meador *v.* Missouri, etc., R. Co., 62 Kan. 865, 61 Pac. 442; Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45.

Kentucky.—Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385; Felton *v.* Holbrook, 21 Ky. L. Rep. 1824, 56 S. W. 506; Louisville, etc., R. Co. *v.* Smith (Ky.), 2 Duv. 556.

Louisiana.—Reems *v.* New Orleans, etc., R. Co., 126 La. 511, 52 So. 681.

Massachusetts.—Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Egan *v.* Old Colony St. R. Co., 195 Mass. 159, 80 N. E. 696; Harriman *v.* Reading, etc., St. R. Co., 173 Mass. 28, 53 N. E. 156.

Mississippi.—Brown *v.* Yazoo, etc., R. Co., 88 Miss. 687, 41 So. 383.

Missouri.—Hipsley *v.* Kansas, etc., R. Co., 88 Mo. 348; Furnish *v.* Missouri Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; S. C., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800; Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Heyde *v.* St. Louis Trans. Co., 102 Mo. App. 537, 77 S. W. 127; Bowlin *v.* Union Pac. R. Co., 125 Mo. App. 419, 102 S. W. 631; MacDonald *v.* Metropolitan St. R. Co., 219 Mo. 468, 118 S. W. 78, 16 Am. & Eng. Ann. Cas. 810; O'Gara *v.* St. Louis Trans. Co., 204 Mo. 724, 103 S. W. 54, 12 L. R. A., N. S., 840, 11 Am. & Eng. Ann. Cas. 850; Holland *v.* St. Louis, etc., R. Co., 105 Mo. App. 117, 79 S. W. 508.

Montana.—Pierce *v.* Great Falls, etc., R. Co., 22 Mont. 445, 56 Pac. 867.

Nebraska.—Spellman *v.* Lincoln Rapid Trans. Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316.

Nevada.—Sherman *v.* Southern Pac. Co., 115 Pac. 909, 33 Nev. 385, Ann. Cas. 1914A, 287, denying rehearing 111 Pac. 416.

New Jersey.—Bergen County Tract Co. *v.* Demarest, 62 N. J. L. 755, 42 Atl. 729, 72 Am. St. Rep. 685.

New York.—Murphy *v.* Coney Island, etc., R. Co. (N. Y.), 36 Hun 199; Webster *v.* Elmira, etc., R. Co., 85 Hun 167, 32 N. Y. S. 590, 65 N. Y. St. Rep. 628; Braun *v.* Union R. Co., 100 N. Y. S. 1012, 115 App. Div. 566; Klinger *v.* United Tract. Co., 87 N. Y. S. 864, 92 App. Div. 100, modified in 181 N. Y. 521, 73 N. E. 1125; Adams *v.* Union R. Co., 80 N. Y. S. 264, 80 App. Div. 156, 12 N. Y. Ann. Cas. 386.

Ohio.—Cincinnati St. R. Co. *v.* Kelsey, 9 O. C. C. 170, 6 O. C. D. 209.

Pennsylvania.—Reading City Pass. Co. *v.* Eckert (Pa.), 2 Sad. 31, 4 Atl. 530.

Rhode Island.—Cheetham *v.* Union R. Co., 26 R. I. 279, 58 Atl. 881.

South Dakota.—Reeves *v.* Chicago, etc., R. Co., 24 S. D. 84, 123 N. W. 498.

Tennessee.—Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202; Illinois Cent. R. Co. *v.* Porter, 117 Tenn. 13, 94 S. W. 666.

Texas.—Mexican, Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; International, etc., R. Co. *v.* Thompson, 34 Tex. Civ. App. 67, 77 S. W. 439; Galveston, etc., R. Co. *v.* Green (Tex. Civ. App.), 91 S. W. 380; Davis *v.* Galveston, etc., R. Co., 42 Tex. Civ. App. 55, 93 S. W. 222; Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104; St. Louis, etc., R. Co. *v.* Parks, 97 Tex. 131, 76 S. W. 740, reversing 73 S. W. 439; Houston, etc., R. Co. *v.* Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 737.

Virginia.—Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445; Baltimore, etc., R. Co. *v.* Noell, 73 Va. (32 Gratt.) 394.

Washington.—Pate *v.* Columbia, etc., R. Co., 52 Wash. 166, 100 Pac. 324.

When a passenger suffers injury by the breaking down or overturning of a railway coach, the prima facie presumption is that it was occasioned by some negligence of the carrier, and the burden is upon the carrier to rebut the presumption. Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013.

The derailment of a passenger car directly resulting in injury to a passenger on such car, under the principle of res ipsa loquitur, raises a presumption of negligence. Lake Shore Elect. Railway *v.* Hobart, 22-32 O. C. D. 154.

Proof that while the train was on a bridge the coach on which plaintiff was a passenger was overturned into the water by some cause unknown to him is sufficient to authorize an inference of negligence on the part of the carrier. Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

Plaintiff having shown an injury caused by the wreck of defendant's train while he was a passenger thereon, or at least having offered evidence which made it necessary to consider his injury under such circumstances as one hypothesis of the case, that hypothesis proven cast upon the defendant the burden of reasonably satisfying the jury that the wreck was not due to its negligence. St. Louis, etc., R. Co. *v.* Savage, 163 Ala. 55, 50 So. 113.

Where the relation of passenger and carrier exists, a derailment resulting in an injury to a passenger raises a presumption of negligence. Washington-Virginia R. Co *v.* Bouknight, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546.

Where a passenger is injured as the result of the derailment of a car, the burden of proof is cast upon the carrier to show that the accident was not the result of its negligence or some inevitable casualty. Washington-Virginia R. Co. *v.* Bouknight, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546.

to show the causes of the accident, such as defective tracks,[83] broken switches,[84] vehicles, etc.,[85] or repeated derailments of the same vehicle,[86] and in effect throws on the carrier the burden of proving that the accident could not have been prevented by the exercise of the highest degree of care.[87] The carrier, to escape liability, must meet the case so made by proof equalizing it.[88] Where the truck of the tender to an engine leaves the rails and the wheels run on the cross-ties causing a passenger coach to tilt over and a passenger is injured, the rule of res ipsa loquitur applies.[89] The fact that the wheels of a pasenger car left the rails and ran along the ties without any showing of defective wheels or trucks made a strong prima facie showing that the track or roadbed was defective.[90]

Application to Street Railways.—The rule applied to steam railroads, that where a train running at a great rate of speed leave the track, and passengers are injured, a question is presented which calls for an explanation from the defendant, has never been applied to street cars in a city, proceeding at a slow pace.[91]

83. Effect of evidence of causes of accident.—Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

Broken rail.—While plaintiff was riding as a passenger in one of the defendants' cars, the car in which he rode was, by reason of the breaking of one of the rails, overturned, in consequence of which his shoulder blade was broken, and, without imputation of negligence on his part, he sustained serious injury. Held a prima facie case of negligence on the part of the defendants, entitling him to damages. Brignoli *v.* Chicago, etc., R. Co. (N. Y.), 4 Daly 182. See Chicago City R. Co. *v.* Mead, 107 Ill. App. 649, judgment affirmed in 206 Ill. 174, 69 N. E. 19.

It is not error to instruct that, where a passenger is injured without negligence on his part, the carrier is presumed to have been negligent, in a case where the injury occurred by reason of a broken railroad rail and cross tie, which derailed the train. Arkansas Mid. R. Co. *v.* Griffith, 39 S. W. 550, 63 Ark. 491.

The breaking of a rail in a railroad track, when not shown to have been due to vis major or unavoidable accident, is indicative of negligence in the railroad as against a passenger, regardless of the condition of the track prior to the time of the break. Western Maryland R. Co. *v.* Shivers, 61 Atl. 618, 101 Md. 391.

Proof of a break in the tracks, causing the derailment of a car, is sufficient to establish a prima facie case of negligence in an action by a passenger injured thereby. Illinois Cent. R. Co. *v.* Kuhn, 64 S. W. 202, 107 Tenn. 106.

84. Misplaced switch.—In an action by a passenger for personal injuries, proof that the train left the track because of a misplaced switch is sufficient to raise a prima facie presumption of negligence so as to throw the burden on the company to show want of negligence. New York, etc., R. Co. *v.* Daugherty (Pa.), 11 Wkly. Notes Cas. 437; Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578.

85. A prima facie case of negligence by the application of the rule of res ipsa loquitur is made out by proof that plaintiff, a passenger in a railway car, was injured by derailment of the car occasioned by a wheel working loose on the axle. Stevens *v.* European, etc., R. Co., 66 Me. 74.

Broken axle.—A prima facie case of negligence on the part of the carrier is made out by proof of injury to a passenger by the derailment of a car occasioned by the breaking of an axle. Hegeman *v.* Western R. Corp. (N. Y.), 16 Barb. 353.

86. Repeated derailment.—The fact that a car, within a short distance, was twice derailed, shows prima facie negligence. Texas, etc., R. Co. *v.* Suggs, 62 Tex. 323.

87. Burden thrown on carrier.—Louisville St. R. Co. *v.* Brownfield, 96 S. W. 912, 29 Ky. L. Rep. 1097.

From the derailment of a car by which a passenger was injured, a presumption arises that it occurred by the carrier's negligence, and placed on it the burden of accounting for the derailment, and of showing that it was without negligence on the part of its servants. Sloan *v.* Little Rock R., etc., Co., 117 S. W. 551, 89 Ark. 574.

Where a prima facie case is made out to recover damages to a passenger through derailment of a train, the railroad company must show that the accident could not have been avoided by the exercise of the utmost human prudence. St. Louis, etc., R. Co. *v.* Posten, 124 Pac. 2, 31 Okla. 821.

88. Burden on carrier to equalize proof.—Parker *v.* Boston, etc., Railroad, 84 Vt. 329, 79 Atl. 865.

89. Engine tender leaving track.—Shaw *v.* Chicago, etc., R. Co., 173 Ill. App. 107.

90. Prima facie case of defective track.—Williams *v.* Chicago, etc., R. Co., 155 S. W. 64, 169 Mo. App. 468.

91. Application to street railways.—Hoffman *v.* Third Ave. R. Co., 61 N. Y. S. 590, 45 App. Div. 586.

Negligence is not to be imputed to a

Effect of Allegations of Specific Causes.—A passenger, in an action for personal injuries, is not deprived of the presumption that, on proving the derailment, negligence is presumed, simply because he alleged a number of specific causes of the derailment, proof of the relation of passenger and carrier, and the fact of a derailment, making a prima facie case; and such specifications only limited the grounds on which defendant must defend.[92] But it has been held that a passenger suing for personal injuries, claimed to have been received by a car being thrown from the track, caused by a defect in the latter, the burden of proof is on plaintiff to show the defect.[93] Thus, it is said that the character of an action is fixed by the allegations in the pleadings, and not by facts subsequently disclosed by the evidence.[94] Hence it is held that if plaintiff desires to avail himself of the presumption of negligence arising from a derailment, no matter how caused, he should plead negligence generally.[95]

§ 3186. Collision.—In an action for death or injury in a collision while riding on defendant's train, the general burden of making out the case as alleged is on plaintiff.[96] It is generally true that the mere fact of injury does not raise a presumption of negligence,[97] but where a collision, generally averred, is proven or admitted and contributory negligence does not appear,[98] the law presumes negligence on the part of the carrier, which presumption constitutes a prima facie case in plaintiff's favor and in effect casts the burden of proof on the defendant. This is the doctrine of res ipsa loquitur.[99] The rules applies where

street car company from the mere fact that the car left the track. Hastings *v.* Central Crosstown R. Co., 7 App. Div. 312, 40 N. Y. S. 93.

92. Specific allegations.—Southern R. Co. *v.* Adams (Ind. App.), 100 N. E. 773. Where a complaint clearly shows the relation of carrier and passenger, and it appears that the plaintiff, the passenger, was injured by a derailment, the rule of res ipsa loquitur applies, notwithstanding several causes are alleged to have produced the derailment. Southern R. Co. *v.* Adams (Ind. App.), 100 N. E. 773.

93. Burden on plaintiff to show defect.—Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

94. Mims *v.* Mitchell, 1 Tex. 443; Lemmon *v.* Hanley, 28 Tex. 219; Tinsley *v.* Penniman, 83 Tex. 54, 18 S. W. 718; Norton *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

95. Norton *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 1044.

96. General burden.—Southerland *v.* Texas, etc., R. Co. (Tex. Civ. App.), 40 S. W. 193.

97. Mere injury raises no presumption.—Eaton *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 435, 75 Atl. 369. See ante, "General Rule—Prima Facie Case," §§ 3169-3173.

98. Collision—Doctrine of res ipsa loquitur—Absence of contributory negligence.—Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

99. Negligence presumed. — *United States.*—Goble *v.* Delaware, etc., R. Co., Fed. Cas. No. 5,488a, 3 N. J. L. 176; Hopper *v.* Denver, etc., R. Co., 155 Fed. 273, 84 C. C. A. 21; Kirkendall *v.* Union Pac. R. Co., 200 Fed. 197, 118 C. C. A. 383.

Alabama.—Central, etc., R. Co. *v.* Geopp, 153 Ala. 108, 45 So. 65.

Arizona.—Southern Pac. Co. *v.* Hogan, 13 Ariz. 34, 108 Pac. 240, 29 L. R. A., N. S., 813.

Arkansas.—St. Louis, etc., R. Co. *v.* Osborne, 95 Ark. 310, 129 S. W. 537.

California. — Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747; Sambuck *v.* Southern Pac. Co., 138 Cal. xix, 71 Pac. 174; Bonneau *v.* North Shore R. Co., 152 Cal. 406, 93 Pac. 106; Osgood *v.* Los Angeles Tract. Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171.

Delaware.—Wood *v.* Philadelphia, etc., R. Co., 1 Boyce's (24 Del.) 336, 76 Atl. 613.

Illinois.—West Chicago St. R. Co. *v.* Martin, 47 Ill. App. 610; Wojczynska *v.* Chicago Consol. Tract. Co., 156 Ill. App. 587; Burgoine *v.* Chicago, etc., Co., 167 Ill. App. 59; Elgin, etc., Tract. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436, affirming judgment 120 Ill. App. 371; Pennsylvania Co. *v.* Purvis, 128 Ill. App. 367.

Indiana.—Indiana Union Tract. Co. *v.* Maher, 95 N. E. 1012, 176 Ind. 289, Ann. Cas. 1914A. 994; Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

Iowa.—Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622.

Kentucky.—Southern R. Co. *v.* Brewer, 105 S. W. 160, 32 Ky. L. Rep. 43.

Massachusetts. — Chaffee *v.* Consolidated R. Co., 196 Mass. 484, 82 N. E. 497.

Michigan.—Sewell *v.* Detroit United Railway, 158 Mich. 407, 123 N. W. 2.

Minnesota.—Smith *v.* St. Paul City R.

the collision is between parts of the same train,[1] between different trains or cars of same carrier on same track, or on connecting tracks,[2] regardless of which

Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Mississippi.—New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

Missouri.—Chlanda *v.* St. Louis Trans. Co., 213 Mo. 244, 112 S. W. 249; Wilbur *v.* Southwest, etc., R. Co., 110 Mo. App. 689, 85 S. W. 671; Miller *v.* United R. Co. (Mo. App.), 134 S. W. 1045; Price *v.* Metropolitan St. R. Co., 220 Mo. 435, 119 S. W. 932; Magrane *v.* St. Louis, etc., R. Co., 81 S. W. 1158, 183 Mo. 119; Robinson *v.* St. Louis, etc., R. Co., 103 Mo. App. 110, 77 S. W. 493; Estes *v.* Missouri Pac. R. Co., 85 S. W. 627, 110 Mo. App. 725; Haas *v.* St. Louis, etc., R. Co., 90 S. W. 1155, 111 Mo. App. 706.

Nevada.—Murphy *v.* Southern Pac. Co., 31 Nev. 120, 101 Pac. 322, 21 Am. & Eng. Ann. Cas. 502.

New York.—Kay *v.* Metropolitan St. R. Co., 51 N. Y. S. 724, 29 App. Div. 466.

North Carolina.—Curtis *v.* Southern R. Co., 151 N. C. 523, 66 S. E. 599.

Ohio.—Cincinnati, etc., R. Co. *v.* Brown, 9 O. C. C. 198, 6 O. C. D. 225; Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597; Cincinnati St. R. Co. *v.* Kelsey, 9 O. C. C. 170, 6 O. C. D. 209; Wittman *v.* C. H. & D. R. Co., 1 Iddings T. R. D. 114.

Rhode Island.—Parrent *v.* Rhode Island Co. (R. I.), 72 Atl. 865; O'Clair *v.* Rhode Island Co., 27 R. I. 448, 63 Atl. 238.

Tennessee.—Transit Co. *v.* Venable, 105 Tenn. (21 Pickle) 460, 58 S. W. 861, 51 L. R. A. 886.

Utah.—Dearden *v.* San Pedro, etc., R. Co., 93 Pac. 271, 33 Utah 147.

Washington.—Harris *v.* Puget Sound Elect. Railway, 52 Wash. 289, 100 Pac. 838; Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Russell *v.* Seattle, etc., R. Co., 47 Wash. 500, 92 Pac. 288.

Where a passenger on defendant's street car was injured by the car colliding with another, and there is no evidence explanatory of the collision, the negligence of defendant is presumed. Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

When a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and injury, if no contributory negligence upon the part of the passenger appear, makes a prima facie case for the resulting damages and costs upon the carrier. The onus of proving that the injury resulted from inevitable accident or some cause against which human prudence and foresight could not have provided is on the carrier. Barker *v.* Chicago, etc., R. Co., 149 Ill. App. 520, judgment affirmed in 90 N. E. 1057.

Proof that plaintiff was a passenger upon a car of defendant, that she was in her seat and that while there she was struck by another car of the defendant and injured, makes a prima facie case. Chicago City R. Co. *v.* Pural, 127 Ill. App. 652, judgment affirmed in 79 N. E. 686, 224 Ill. 324.

In an action against a carrier for injuries to a passenger, caused by a collision, in which defendant offered no explanation of the accident, a requested instruction that the mere fact of the collision was not evidence of negligence was properly refused. Savage *v.* Marlborough St. R. Co., 71 N. E. 531, 186 Mass. 203.

In an action for injuries to a passenger in a collision between cable trains, the only charge of negligence in the petition was that "the defendant carelessly and negligently caused and permitted the train on which plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said Twelfth street and on said incline as aforesaid, that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant." Held, to be a charge of general negligence, so as to render applicable the doctrine of res ipsa loquitur. Price *v.* Metropolitan St. R. Co., 119 S. W. 932, 220 Mo. 435.

1. Between parts of same train.—Galveston, etc., R. Co. *v.* Parsley, 6 Tex. Civ. App. 150, 25 S. W. 64; Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996.

Where a passenger was thrown from his seat and injured by a collision between sections of a train which in some way became uncoupled while running, a presumption of negligence on the part of the carrier arises. Steele *v.* Southern R. Co., 33 S. E. 509, 55 S. C. 389, 74 Am. St. Rep. 756.

That a mixed train on which plaintiff was riding as a passenger had broken in two, and that the collision of the parted sections caused injury to plaintiff, raised a presumption of negligence. Reeves *v.* Chicago, etc., R. Co., 24 S. Dak. 84, 123 N. W. 498.

Where the engine and water car were uncoupled from defendant's train, and a flying switch made with the water car, which became uncontrollable because of the breaking of the brake chain, and the car on that account collided with a passenger coach, causing plaintiff's injuries, there arose, in conformity with the maxim "res ipsa loquitur," a prima facie presumption that the accident was due to the negligence of defendant or its servants. Dearden *v.* San Pedro, etc., R. Co., 93 Pac. 271, 33 Utah 147.

2. Between cars on same track.—*Illinois.*—Sedoff *v.* Chicago City R. Co., 124 Ill. App. 609; Chicago City R. Co. *v.*

vehicle was at fault,[3] where the train runs upon a switch and collides with standing cars,[4] or between trains or cars, and portions thereof, running on parallel tracks, or switches adjacent to main line.[5]

Greinke, 136 Ill. App. 77, judgment affirmed in 234 Ill. 564, 85 N. E. 327; North Chicago St. R. Co. *v.* Boyd, 57 Ill. App. 535.

Minnesota.—Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

Missouri.—Hunt *v.* Metropolitan St. R. Co., 126 Mo. App. 79, 103 S. W. 1088; Goodloe *v.* Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482.

North Carolina. — Briggs *v.* Durham Tract. Co., 147 N. C. 389, 61 S. E. 373.

Rhode Island.—Enos *v.* Rhode Island Suburban R. Co., 28 R. I. 291, 67 Atl. 5, 12 L. R. A., N. S., 244.

In an action against a cable-railway company by a passenger for injuries by the collision of a grip car with another car, temporarily stopped upon the same track, the occurrence of the collision is sufficient to raise a presumption of negligence on defendant's part. North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899, affirming 41 Ill. App. 311

While a freight train was going up a steep grade on a curved track, the caboose became detached, and, running backward collided with the engine of a train following eight minutes behind the first. In a suit for an injury to a passenger on the caboose, held sufficient evidence of negligence. Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

A collision between defendant's horse cars, by which plaintiff, a passenger, was injured, was caused by the brake of a car failing to work because of the breaking of one of the links of the chain which operated it. The inspector of the running gear of defendant's road testified that he had examined the chain that morning, and found it all right to the eye and touch; but his testimony as to the method of his inspection was inconsistent with his testimony on a former trial. No latent defect in the link which broke was shown, nor other cause for its breaking. Held, that the burden was on defendant to prove that the defect in the chain, if any, could not have been discovered by the use of the care and skill required of a carrier. Wynn *v.* Central Park, etc., R. Co., 14 N. Y. S. 172, 38 N. Y. St. Rep. 181.

An electric car on an up grade stopped, and could not be moved. An employee of defendant (though in what capacity it did not appear) gave instructions to the motorman, sanded the track, and, when all attempts to move the car proved futile, told the motorman that he would procure another car, which he did. In bringing up the relieving car, from some cause it ran into the disabled car, and injured a passenger. Held, that the burden was on defendant to rebut the presumption that the injury was by its negligence, by showing that such employee in the relieving car was a mere intruder, acting without authority. Madara *v.* Shamokin, etc., R. Co., 43 Atl. 995, 192 Pa. 542.

Proof of a collision between two street cars operated by the same company injuring a passenger on one of them raises a presumption of negligence of the company, placing the burden of proving freedom from negligence. Simone *v.* Rhode Island Co., 66 Atl. 202, 28 R. I. 186, 9 L. R. A., N. S., 740.

3. Regardless of fault of vehicle.—Where a passenger on a street car is injured without fault of his own by a collision not due to any defect in the car on which he was riding, but by a broken appliance in the car that ran into it, there is a legal presumption of negligence to be rebutted by the carrier. Palmer *v.* Warren St. R. Co., 56 Atl. 49, 206 Pa. 574, 63 L. R. A. 507.

4. Car standing on switch.—Dempster *v.* Oregon, etc., R. Co., 37 Mont. 335, 96 Pac. 717.

5. Vehicles on parallel tracks.—The running of a freight train with a car the door of which is in such a damaged condition as to be a menace to the safety of passengers in a passenger train running in the opposite direction is evidence of negligence under the doctrine of res ipsa loquitur, and requires the carrier, in order to be relieved from the charge of negligence resulting in injury to a passenger, to excuse the condition of the car. Kuttner *v.* Central R. Co., 80 N. J. L. 11, 77 Atl. 470, judgment affirmed in 80 Atl. 1135.

The evidence in a passenger's action for personal injuries was that while a freight train was passing plaintiff's train he was injured by being struck by something over the eye, and that just prior thereto something rattled against the side of the coach, which sounded like a chain, and that the rattling continued after the injury, and there were marks on the side of the coach indicating that it had been struck by something having an irregular shape, but nothing was found in plaintiff's car by which he might have been struck, and it appeared that if he had been struck by something not attached to something else, such as a stone, it would have remained in the coach. Held, that under the laws of Pennsylvania the evidence raised a presumption of negligence which defendant was required to rebut. Pittsburg, etc., R. Co. *v.* Grom, 142 Ky. 51, 133 S. W. 977.

Where a passenger on a street car has his hand crushed by a collision with a freight car standing on an adjoining track,

Vehicles of Separate Carriers or Third Persons.—Where a collision occurs between the vehicles of different carriers, operated on intersecting tracks, the general rule seems to be that the carrier carrying the passenger injured will be presumed to have been negligent,[6] and this same rule has been applied in cases of collision between a carrier's vehicle and a road vehicle belonging to a third person.[7] But it has been held that where one of the colliding vehicles is beyond the control of the carrier, no presumption arises against the other carrier from the mere fact of the collision and the burden is on the plaintiff to show negligence.[8] Thus, it has been said that in such cases it is entirely possible, and also

the street car company has the burden of showing that the injury did not result from its negligence, or that it could have been avoided by the passenger with ordinary care. North Baltimore Pass. R. Co. *v.* Kaskell, 78 Md. 517, 28 Atl. 410.

A passenger injured by an iron bar on a construction train that collided with the one on which he was riding may recover without explaining how the bar was placed in the position that produced the injury. Walker *v.* Erie R. Co. (N. Y.), 63 Barb. 260.

6. Vehicles operated on separate tracks.—Nagel *v.* United R. Co., 169 Mo. App. 284, 152 S. W. 621; Levine *v.* Brooklyn, etc., R. Co., 119 N. Y. S. 315, 134 App. Div. 606; Stanbridge *v.* Nassau Elect. R. Co., 119 N. Y. S. 668, 135 App. Div. 38; Toledo Consol. St. R. Co. *v.* Fuller, 17 O. C. C. 562, 9 O. C. D. 123.

Where a passenger on a street car was injured by a train running into the car at a railroad crossing, the street car company must show that the injury did not result from its negligence. Chicago City R. Co. *v.* Engel, 35 Ill. App. 490; Central Pass. R. Co. *v.* Bishop, 9 Ky. L. Rep. 348; Central Pass. R. Co. *v.* Kuhn, 86 Ky. 578, 9 Ky. L. Rep. 725, 6 S. W. 441, 9 Am. St. Rep. 309.

Where a passenger is injured while in the car of a railroad company by a collision with the train of another company, the burden of showing that the accident was not due to the negligence of the company in whose car he was riding is on such company. Clark *v.* Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013.

7. Road vehicle and carrier's vehicle.—Houghton *v.* Market St. R. Co., 1 Cal. App. 576, 82 Pac. 972.

Where a street car collided with a wagon in a public street, it was proper, in an action for injuries to a passenger caused thereby, to refuse to instruct that plaintiff must establish negligence by a preponderance of the evidence, since, under the doctrine of res ipsa loquitur, proof of a collision raised a presumption of negligence on the part of defendant, requiring it to establish that the motorman was not in fact negligent. Shay *v.* Camden, etc., R. Co., 49 Atl. 547, 66 N. J. L. 334.

In an action for injuries received while a passenger on one of defendant's street cars, plaintiff testified that the car passed a truck standing beside the track, but struck the horse attached thereto, which was standing on the track, and that he sprang into the car, and injured her. No evidence was given on defendant's part, but the complaint was dismissed. Held, that the dismissal was error. Coulahan *v.* Metropolitan St. R. Co., 51 N. Y. S. 137, 28 App. Div. 394.

Fire apparatus.—The fact of a collision by a street car with an approaching hook and ladder wagon is sufficient proof of negligence to entitle a passenger free from negligence to recover for injuries caused thereby, in the absence of evidence to the contrary. Olsen *v.* Citizens' R. Co., 54 S. W. 470, 152 Mo. 426; Williamson *v.* St. Louis, etc., R. Co., 133 Mo. App. 375, 113 S. W. 239.

8. Car beyond carrier's control.—Lazer *v.* Chicago City R. Co., 152 Ill. App. 319.

Where plaintiff's intestate, a passenger in a street car, was killed in a collision between the car and a wagon, and it was a question of fact as to whether the railway company or the driver of the wagon was responsible, no presumption of negligence arose in a suit against the railway company and the owner of the wagon. Harrison *v.* Sutter St. R. Co., 66 Pac. 787, 134 Cal. 549, 55 L. R. A. 608.

In an action against a street railway company for injuries to a passenger caused by collision with a horse and wagon, the only evidence as to the cause of the accident showed that the horse ran into the rear of the car as it was coming to a stop, and struck its head through the window behind plaintiff, breaking the glass. Held, that this did not show that defendant could have prevented the accident, so that the rule res ipsa loquitur did not apply to charge defendant with negligence. Grant *v.* Metropolitan St. R. Co., 91 N. Y. S. 202, 99 App. Div. 422.

A horse, being driven along a street which intersected one in which defendant street railway company's tracks were laid, became frightened at a point 120 feet from the intersection, and, running toward the tracks, collided with a car in which plaintiff was a passenger, whereby he was injured. Held, in an action against the railway company and the one controlling the horse and wagon, that an instruction that the mere happening of the accident created

entirely probable, that the collision might have been due solely to the fault of one of the parties, and that the other might have been in no way to blame. Therefore, the presumption of negligence arising from the accident does not tend to inculpate either party, and consequently it is for the jury to decide, as a question of fact, whether under the circumstances of the case the happening of the collision shows negligence on the part of the carrier.[9] But even here the facts surrounding the collision may be such as to invoke the application of the rule of res ipsa loquitur.[10]

Presumption as to Rate of Speed.—In an action for injuries caused by the collision of a car with a locomotive at a crossing, where the rate of speed of the car while approaching the crossing had to be taken into account in considering whether the locomotive was visible to the motorman, and there was no evidence as to its rate of speed, the usual rate could be assumed.[11]

Specific Negligence Pleaded.—Where the complaint does not rely upon the general presumption of negligence arising from the collision, but charges specific acts, the presumption of negligence does not arise.[12] But this rule has no application where the complaint, in an action for injuries to a passenger on an electric railway, alleges that defendant so negligently operated the car on which plaintiff was a passenger and other cars that plaintiff's car was struck by another car, and that defendant could, by care, have prevented the collision; the

a presumption of negligence on the part of the carrier, and that the burden of proof was cast on it to overcome it, was erroneous. Munzer *v.* Interurban St. R. Co., 91 N. Y. S. 21, 45 Misc. Rep. 568.

Where an injury to a passenger on a street car is caused by a collison between the side of the car while on its own track and a wagon, not under the control of the street railway company, no presumption of negligence arises in favor of the passenger against the street car company. Blew *v.* Philadelphia Rapid Trans. Co., 76 Atl. 17, 227 Pa. 319. See Federal St., etc., R. Co. *v.* Gibson, 96 Pa. 83.

In an action for injuries to a passenger by a collision between a car in which he was riding and a vehicle which turned on the track from a country road, the fact of the collision raised no presumption of negligence. Fagan *v.* Rhode Island Co., 60 Atl. 672, 27 R. I. 51.

Collision between cars of different carriers on same track.—Elliott *v.* Brooklyn Heights R. Co., 111 N. Y. S. 358, 127 App. Div. 300.

Collision between two cars on intersecting tracks.—Kimic *v.* San Jose-Los Gatos, etc., R. Co., 156 Cal. 379, 104 Pac. 986.

9. Munzer *v.* Interurban St. R. Co., 91 N. Y. S. 21, 45 Misc. Rep. 568.

Upon that question, the burden of proof remained with the plaintiff. As was said in Goodkind *v.* Metropolitan St. R. Co., 93 App. Div. 153, 87 N. Y. S. 523, even where the maxim of res ipsa loquitur is applicable, there must still be a finding of negligence by the jury, based upon competent evidence, to entitle the plaintiff to a verdict, on the question as to whether negligence existed is a question which must be determined by the jury, and not by the court as a matter of law. Munzer *v.* Interurban St. R. Co., 91 N. Y. S. 21, 45 Misc. Rep. 568.

10. Collision with road vehicle.—Where an open street car approached a street crossing at a high rate of speed, and was driven over the same without reducing the speed, resulting in a collision with an approaching team, so that the pole of the wagon penetrated the car near the rear, and injured plaintiff, a passenger, the circumstances of the accident were sufficient to raise a prima facie case of negligence of the carrier under the doctrine, "Res ipsa loquitur." Bamberg *v.* International R. Co., 103 N. Y. S. 297, 53 Misc. Rep. 403, judgment and order reversed in 105 N. Y. S. 621, 121 App. Div. 1; Does *v.* Crosstown St. R. Co., 106 N. Y. S. 1122, 122 App. Term 896. See Vogel *v.* Bahr, 115 N. Y. S. 284, 130 App. Div. 732.

11. Presumption as to rate of speed.—Lindenbaum *v.* New York, etc., R. Co., 84 N. E. 129, 197 Mass. 314.

12. Specific allegations.—Jordan *v.* Seattle, etc., R. Co., 47 Wash. 503, 92 Pac. 284.

The rule that a passenger makes out a prima facie case against a carrier for personal injuries when he shows that he was injured by a collision, and was himself free from negligence, applies only where the petition charges negligence generally, and does not apply where it specifically pleads the negligent acts which caused the injury, in which case the burden is upon plaintiff to prove his case and continues with him throughout the case. Gardner *v.* Metropolitan St. R. Co., 122 S. W. 1068, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166.

complaint does not rely on any particular act of negligence.[13] The presumption is not waived by particularly alleging the cause of the accident; the plaintiff, to waive it, must rely solely on some specific allegation of negligence.[14]

§ 3187. Assaults, Insults, etc., by Carrier's Servants.—In General.—The doctrine of res ipsa loquitur is applicable, and negligence may be inferred on the part of a railroad company, where a passenger was injured by the conductor violently striking him in the face.[15] And in an action for an assault by defendant's conductor, provoked by plaintiff as the aggressor, the burden was on defendant to show that such conductor used no more force than appeared to him, as a reasonable man, necessary to repel plaintiff's assault on him.[16] In an action for injuries to a passenger who was assaulted by the company's conductor, where the petition alleged that the conductor made the assault while acting in the scope of his employment, the denial of that allegation places the burden of proof on the passenger.[17]

§ 3188. Duty to Protect Passengers from Third Persons.—The burden is upon the plaintiff assaulted at a railway station to show that the railroad company had actual or constructive knowledge of his assailant's vicious habits and employed or harbored him at the station, and that such acts were the proximate cause of the injury.[18]

Missile Thrown by Third Person.—In an action against a street railway by a passenger for injuries received through being struck by a missile thrown by a bystander, no presumption of negligence on the part of the defendant arises from the mere fact of the injury.[19]

Insults and Offensive Language.—In an action against a carrier for permitting other passengers to insult plaintiff with offensive language, plaintiff has the burden of showing as nearly as possible the language used; and that is not done by a mere statement that the passengers complained of cursed and used vulgar and obscene language and sang vulgar songs.[20]

§ 3189. Injury Resulting from Effort to Escape Danger.—The presumption of the common carrier's negligence is not confined to the case of injuries resulting from the actual negligent act, but extends to those caused by an effort on the part of the passengers to escape it, when made on a well-grounded belief that it will occur. A collision itself would admittedly be due to the presumed negligence of the company, and to no other cause can be attributed the manifest danger of it, from which the plaintiff may attempt to escape.[21] The same rule would apply in other cases of imminent danger superinduced by the carrier's facilities for transportation, servants, etc., and other things under its control.[22]

13. Allegation held general.—Jordan *v.* Seattle, etc., R. Co., 92 Pac. 284, 47 Wash. 503.

14. Must rely on specific allegation.—In an action against an electric railway company for injury to a passenger in a collision, plaintiffs did not waive their right to rely upon the presumption of negligence arising from the fact of the accident by particularly alleging the cause. Walters *v.* Seattle, etc., R. Co., 93 Pac. 419, 48 Wash. 233, 24 L. R. A., N. S., 788; Lobb *v.* Seattle, etc., R. Co., 93 Pac. 420, 48 Wash. 238.

15. Assaults, etc., by servants.—Kohner *v.* Capital Tract. Co., 22 App. D. C. 181, 62 L. R. A. 875.

16. Force used.—St. Louis, etc., R. Co. *v.* Berger, 44 S. W. 809, 64 Ark. 613, 39 L. R. A. 784.

17. Denial of servants authority.—White *v.* South Covington, etc., R. Co., 150 S. W. 837, 150 Ky. 681.

18. Failure to protect passenger.—Blaisdell *v.* Long Island R. Co., 136 N. Y. S. 768, 152 App. Div. 218, reversing order 131 N. Y. S. 14.

19. Missile thrown by third person.—Woas *v.* St. Louis Trans. Co., 96 S. W. 1017, 198 Mo. 664, 7 L. R. A., N. S., 231, 8 Am. & Eng. Ann. Cas. 584.

20. Insults and offensive language.—St. Louis, etc., R. Co. *v.* Wright, 33 Tex. Civ. App. 80, 75 S. W. 565.

21. Fear of collision—Imminent danger.—Palmer *v.* Warren St. R. Co., 206 Pa. 574, 56 Atl. 49, 63 L. R. A. 507.

22. Other injuries comprehended.—Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654; Louisville, etc., Tract. Co. *v.* Worrell (Ind. App.), 86 N. E. 78.

Blowing out of controller on car.—A

§ 3190. Willfulness or Wantonness.—While a presumption of negligence arises from proof of injury to a passenger, through any agency or instrumentality of the carrier, there is no presumption of willfulness or wantonness from that fact.[23]

Gross Negligence.—An accident may no doubt happen under circumstances which in the absence of any explanation, without anything more, would warrant a finding that it could not have occurred except for gross negligence and carelessness on the part of the defendant's servants or agents.[24] But negligence to be gross must include an element of carelessness so great that the court or jury can say that there was not only an absence of the due care that should have been exercised, but also a great degree of negligence materially greater than that which would constitute ordinary negligence.[25] No doubt what would be gross negligence under one set of circumstances might not be so under another; and no doubt, also, the highly dangerous consequences to be apprehended in one case might contribute to render that gross negligence which would not be such in another case.[26]

§ 3191. Passengers on Freight Trains.—The same presumptions arise in favor of a passenger injured on a freight train, while obeying the regulations of the company, as in the case of a passenger on any other train.[27] The plaintiff must, as in other cases, show that he was a passenger on the train on which he was injured, and in order to do this he must show that the carrier allowed freight trains to carry passengers.[28] He must show that he was rightfully there

passenger on a street car, who, on being placed in danger in consequences of the blowing out of the controller on the car, jumped from the car with a view of saving himself and was injured, was not deprived of the right to insist that proof of the accident presumptively showed actionable negligence on the company's part. Firebaugh *v.* Seattle Elect. Co., 82 Pac. 995, 40 Wash. 658, 2 L. R. A., N. S., 836, 111 Am. St. Rep. 990.

Where, in an action for injuries to a street car passenger, the complaint charges negligence in the care and operation of the controllers, whereby fire was produced, alarming plaintiff and causing her to jump from the car while in motion, the acts of negligence are such as legal inference tends to establish, and plaintiff is not deprived of her right to rely on the doctrine of res ipsa loquitur. Louisville, etc., Tract. Co. *v.* Worrell (Ind. App.), 86 N. E. 78.

23. Willfulness or wantonness.—Moore *v.* Greenville Tract. Co., 77 S. E. 928, 94 S. C. 249.

In an action by a passenger for injuries sustained while riding on a caboose, the fact that it was derailed while riding thereon would, at most, be only presumptive evidence of some negligent act or omission by the carrier. McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 1071, 81 S. C. 100, 18 L. R. A., N. S., 763.

24. Gross negligence.—Martin *v.* Boston, etc., St. R. Co., 205 Mass. 16, 91 N. E. 159. See McNamara *v.* Boston, etc., R. Co., 202 Mass. 491, 89 N. E. 131.

25. Martin *v.* Boston, etc., St. R. Co., 205 Mass. 16, 91 N. E. 159.

That an explosion occurs in the controller box of a street car, which, up to the time of the explosion, was running smoothly, is not, under the doctrine of res ipsa loquitur, a showing of gross negligence on the part of the operatives of the car. Martin *v.* Boston, etc., St. R. Co., 91 N. E. 159, 205 Mass. 16.

Where an accident happens on a railroad, it will be presumed, under the doctrine of res ipsa loquitur, to have resulted from the negligence of the carrier, which will warrant a recovery of compensatory damages, but the degree of negligence being unproved, ordinary and not gross negligence will be presumed. Southern R. Co. *v.* Brewer, 108 S. W. 936, 32 Ky. L. Rep. 1374.

26. Martin *v.* Boston, etc., St. R. Co., 205 Mass. 16, 91 N. E. 159.

27. Passengers on freight trains.—Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642.

Where a passenger is injured, while riding in the caboose of a freight train, by the engine and rest of the train, which had been severed from the caboose, coming back against it with such force as to throw the passenger down, the law presumes, in the absence of all explanation, that the injury was caused by the company's negligence, and casts upon it the burden of overturning the presumption or showing that diligence and careful observance of duty could not have prevented the injury. Georgia Pac. R. Co. *v.* Love, 91 Ala. 432, 2 So. 714, 24 Am. St. Rep. 927.

28. Must show relation of passenger and carrier.—Texas, etc., R. Co. *v.* Black, 87 Tex. 160, 27 S. W. 118.

and that the carrier owed him a duty to carry him safely,[29] and the rules as to when a presumption of negligence on the carrier's part will arise are substantially the same in their application to passengers on freight and other trains or vehicles not designated for passengers. Thus, as more or less jerking and jolting is incident to the operation of a freight train, negligence can not be inferred from the mere fact that a passenger thereon was injured from a jar occasioned by the sudden stopping of the train.[30] But even in the case of a freight train negligence will be presumed where the jolt to which the injury was due was so sudden and unusual that it bespeaks negligence.[31] And where the thing causing the injury is peculiarly within the control of the carrier, as where the train is derailed because of defective appliances,[32] where a collision occurs between parts of the train conveying the passenger injured,[33] or where the equipment in the caboose where the passenger is riding is defective,[34] the carrier is presumed to have been negligent, which must be overcome by the defendant's evidence.

Assumption of Risk.—See post, "Contract Assuming Risk or Releasing Liability," § 3193.

§ 3192. Passengers without Reward.—Where the law requires a carrier of persons without reward to use ordinary care for their safety, the injury of a passenger carried without reward by the happening of an accident only shows ordinary negligence by the carrier and not gross negligence.[35] And such a passenger must offer proof to supplement the presumption, in order to show gross negligence by the carrier.[36]

§ 3193. Contract Assuming Risk or Releasing Liability.—Where the acceptance of the ticket is a waiver of the common-law rule making the carrier liable for the passenger's safety, the plaintiff must affirmatively prove negligence on the part of the carrier. He can not avail himself of the presumption of

29 Must be rightfully on train.—All persons are required to take notice that railroad work trains are not intended for the transportation of passengers, and to recover for injuries to a person while traveling on such train it must be shown that he was rightfully there, and that the company owed him the duty of carrying him safely. Pennsylvania Co. *v.* Coyer, 72 N. E. 875, 163 Ind. 631.

30. Jerks and jolts by freight trains.—Erwin *v.* Kansas, etc., R. Co., 68 S. W. 88, 94 Mo. App. 289; Hawk *v.* Chicago, etc., R. Co., 130 Mo. App. 658, 108 S. W. 1119.

The fact that plaintiff was thrown from a freight train by a sudden movement of the train does not evidence negligence, in the absence of anything to show that the movement was unusual, or was caused by any unnecessary force applied to the train. Cincinnati, etc., R. Co. *v.* Jackson, 58 S. W. 526, 22 Ky. L. Rep. 630.

31. Act bespeaking negligence.—Hawk *v.* Chicago, etc., R. Co., 130 Mo. App. 658, 108 S. W. 1119; Mitchell *v.* Chicago, etc., R. Co., 132 Mo. App. 143, 112 S. W. 291.

32. Train derailed.—Where a drover, riding on a freight train, by a broken axle, the breaking of the axle raises a presumption of negligence in inspection, and the burden of rebutting such presumption by proof that the company used such care as was required under the circumstances was on defendant. Western Maryland R. Co. *v.* State, 53 Atl. 969, 95 Md. 637.

33. Collision between parts of train.—Where a freight train, with a caboose attached, in which passengers are seated, separates, and the separted cars collide with such force that a passenger is thrown from his seat and injured, the presumption is that the accident resulted from the company's negligence, and the burden of proof is on the company to establish want of negligence. Southern R. Co. *v.* Dawson, 36 S. E. 996, 98 Va. 577.

34. Falling bed frame.—Where a passenger, riding in a caboose on a mixed train, is injured by the falling of a bed frame was not there by its act. Stoody *v.* Detroit, etc., R. Co., 83 N. W. 26, 124 Mich. 420.

Where a passenger, riding by invitation in the caboose of a mixed train, is injured by the falling of bed frame fastened above him when the freight cars were backed against the caboose, the burden is on the carrier to show that the bed frame was properly secured. Stoody *v.* Detroit, etc., R. Co., 83 N. W. 26, 124 Mich. 420.

35. Passenger without reward.—John *v.* Northern Pac. R. Co., 111 Pac. 632, 42 Mont. 18, 32 L. R. A., N. S., 85.

36. Presumption must be supplemented.—John *v.* Northern Pac. R. Co., 111 Pac. 632, 42 Mont. 18, 32 L. R. A., N. S., 85.

negligence arising in favor of the passenger where an injury occurs.[37] It has been held that where a drover accompanying live stock on a railroad, is injured by a collision between his car and another on defendant's track, he sufficiently sustains the burden of proof to show negligence in order to relieve him from the effects of the release on the back of the contract of shipment, by which he assumed all risks of accident or damage to his person.[38]

Burden of Proving Release.—A railroad company relying on a release of liabilities contained in a provision of an alleged stock pass must clearly establish it.[39]

§§ 3194-3237. Admissibility of Evidence.—§ 3194-3199. Failure to Perform Contract or Duty in General—§ 3194. Evidence to Establish Contract.—Where the existence of the contract of carriage is in issue, the unused portion of the ticket is admissible as evidence thereof.[40] In an action founded on contract against several defendants, proof of acts or an agreement by one of them or by any number of them, not including all persons sued, is not admissible as proof to establish the authority of such persons to bind all.[41]

§ 3195. Failure or Refusal to Receive and Carry.—In an action against a carrier for failure or refusal to stop for or receive a passenger, the general rules of relevancy and materiality apply. So any evidence which goes to show that the carrier should have stopped, or received him, that the carrier's employees had notice of the passenger's rights,[42] or any statements of conduct or acts on the employee's part, which materially relates thereto, in the way of giving or refusing information, etc.,[43] should be admitted. Where the question in issue is whether the vehicle waited long enough to allow the plaintiff to get aboard, a rule of the carrier prohibiting trains from leaving the station within a certain time is admissible to substantiate the employee's testimony that the vehicle stopped the required time.[44]

37. **Effect of contract assuming risk.**—Crary *v.* Lehigh Valley R. Co., 53 Atl. 363, 203 Pa. 525, 59 L. R. A. 815, 93 Am. St. Rep. 778.

38. **Burden sufficiently sustained.**—Rowdin *v.* Pennsylvania R. Co., 57 Atl. 1125, 208 Pa. 623.

39. **Release of liabilities set up.**—McElwain *v.* Erie R. Co. (N. Y.), 21 Wkly. Dig. 21.

40. **Unused portion of ticket.**—In an action against a railway company for damages for negligently showing a passenger to the wrong car and carrying him out of his way, the unused portion of his ticket was properly admitted as evidence of the contract of transportation alleged. International, etc., R. Co. *v.* Evans, 70 S. W. 351, 30 Tex. Civ. App. 252.

41. **Joint contract of several carriers.**—The declaration in an action on the case alleged that the defendants, being joint proprietors of the line of stages running from Hartford to Albany, undertook, in consideration of a certain sum paid, to transport the plaintiff, with his baggage, from Hartford to Albany, in a specified time, but failed to perform their undertaking. Held, that evidence of the acts of one of the defendants was not admissible against the other, as proof to establish the authority of that one bind the others. Walcott *v.* Canfield, 3 Conn. 194.

42. **Failure to receive and carry.**—In an action against a carrier for failure to stop its car and admit plaintiff as a passenger, evidence as to the motorman seeing a woman with a child waiting for the car, and as to what was done by the conductor and motorman with respect thereto, was admissible. Godfrey *v.* Meridian R., etc., Co., 101 Miss. 565, 58 So. 534.

43. **Giving or refusing information.**—Plaintiff, suing for failure of defendant's train to stop at a station where he was waiting to board it, may testify that he told the station agent that he had a ticket and that the train did not stop for him, and asked what he should do about it, and that the agent replied the ticket was good on that road for the next twenty-four hours, and gave him no further satisfaction; it being the duty of the ticket agent to give passengers information about trains and answer reasonable inquiries on the subject, and the right of the passenger to ask information as to any relief the carrier could give him, and likewise his duty to seek such information, so as to enable him to minimize him damages. Bing *v.* Atlantic, etc., R. Co., 68 S. E. 645, 86 S. C. 528; Burckhalter *v.* Atlantic, etc., R. Co., 68 S. E. 647, 86 S. C. 532.

44. **Failure to hold vehicle reasonable time.**—Where plaintiff, having been pre-

As to Grounds for Refusal.—Where a person had frequently been guilty of obscene and indecent conduct on defendant's ferryboat, the refusal of defendant to furnish her transportation, unless she would promise to behave herself, was sufficient to apprise plaintiff of the ground upon which she was refused transportation, and made testimony as to her conduct on previous occasions competent.[45] Where a carrier is sued for refusal to transport plaintiff on its ferryboat, evidence that plaintiff on previous occasions, while a passenger on defendant's boat, had been guilty of obscene and indecent conduct, and was often intoxicated on the return trip, is admissible, though it is not shown that plaintiff was intoxicated when she was refused transportation as such evidence does not relate solely to the plaintiff's intoxication but also to her conduct in general.[46]

Refusal of Admittance to Car.—A passenger refused admission to a car because he proposes to take with him a small package of merchandise may put in evidence the custom of the carrier to permit passengers to carry personal baggage in the passenger cars as a step in his proofs, in a suit brought on account of such refusal of admission.[47] Where a passenger was refused admittance to a car because he carried a jug, evidence that passengers often carried articles which the porter of the car had stated were prohibited is admissible to disprove such statements.[48]

§ 3196. Failure or Refusal to Honor Ticket, Mileage, etc.—In an action against a carrier for damages for its refusal to accept a ticket, evidence as to the plaintiff's purchase of the ticket is admissible, as tending to show the real nature of the contract.[49] In such cases, facts which tend to recklessness and disregard for the passenger's rights are admissible.[50] And evidence is admissible which tends to show that defendant's carrier had assumed a contract of mileage issued by another carrier.[51] But where a carrier refused an excursion ticket presented by a passenger, on the ground that it had expired, testimony as to the difference between the excursion rate and the regular fare should be excluded as immaterial.[52]

Reasonableness of Time Limit—Diligence of Passenger.—Where the question in issue is whether the time limit in the ticket was reasonable and whether the passenger had been diligent in ascertaining the movements of trains

vented from boarding a regular train, tesified that he was unable to take the next train, because it did not stop long enough to allow him to board it, but the conductor and engineer of the second train testified that it waited ten minutes before following the preceding train, a rule of the company forbidding any train leaving the station within ten minutes of the train next preceding is admissible in evidence. Louisville, etc., R. Co. *v.* Crayton, 69 Miss. 152, 12 So. 271.

45. Admissibility of evidence.—Stevenson *v.* West Seattle Land, etc., Co., 22 Wash. 84, 60 Pac. 51.

46. Evidence as to prior conduct.—Stevenson *v.* West Seattle Land, etc., Co., 22 Wash. 84, 60 Pac. 51.

47. Refusal of admittance to car—Evidence of custom.—Runyan *v.* Central R. Co., 41 Atl. 367, 61 N. J. L. 537, 43 L. R. A. 284, 68 Am. St. Rep. 711.

48. To rebut employees testimony.—Galveston, etc., R. Co. *v.* McMonigal (Tex. Civ. App.), 25 S. W. 341.

49. Evidence as to purchase of ticket.—Illinois Cent. R. Co. *v.* Fleming, 146 S. W. 1110, 148 Ky. 473; Illinois Cent. R. Co. *v.* Roberts, 146 S. W. 1113, 148 Ky. 478.

50. Reckless disregard of rights.—Where a carrier sold a ticket which showed on its face that it was intended to have coupons attached, and no such coupons were in fact attached, and there was testimony that defendant's conductor told plaintiff that a ticket, in the form in which it was not good, such facts were admissible to show recklessness and disregard of plaintiff's rights. Bussey *v.* Charleston, etc., Railway, 55 S. E. 163, 75 S. C. 116.

51. Assumption of contract.—In an action against a carrier for breach of a contract contained in a mileage book issued by another company, evidence that defendant's conductor had accepted such mileage book for several months was admissible as tending to show that defendant had assumed the contract. Johnson *v.* Michigan United R. Co., 116 N. W. 529, 153 Mich. 65.

52. Failure or refusal to honor ticket.—Rutherford *v.* St. Louis, etc., R. Co., 67 S. W. 161, 28 Tex. Civ. App. 625.

over line of road, his testimony as to statements made by defendant's ticket agent when the ticket was purchased as to the movements of trains over the route covered by the ticket, and the advice of the agent to purchase over those lines, was admissible, without the facts being pleaded.[53]

§ 3197. Failure or Refusal to Put Off at Destination.—In an action against a carrier for compelling or inviting a passenger to alight before reaching his destination,[54] or in failing or refusing to stop, and carrying him beyond his destination, only relevant and material evidence is admissible.[55] Evidence as to the rules of the carrier as to when passengers are to get on and off, as to custom and usage of carrier in and about taking up tickets,[56] or as to custom or usage in calling out stations or announcing change of cars,[57] or any other evidence which materially tends to show a breach of duty in this regard,[58] is admissible. In an action to recover of a railroad company for refusing to stop its train at the station at which plaintiff was to get off, evidence that the train was a through freight, run on telegraphic orders, and that the station was not a telegraph station, is admissible.[59] Testimony of witnesses who have traveled considerably that they had observed defendant's conductors and porters assist ladies off and on the trains is incompetent where there is no evidence that plaintiff contracted for passage with reference to such custom.[60]

53. Time limit—Diligence of passenger.—Gulf, etc., R. Co. *v.* Wright, 2 Tex. Civ. App. 463, 21 S. W. 399.

54. Putting off prior to destination.—In an actoion by a passenger against a carrier for requiring plaintiff to get off the train before reaching the station called for by plaintiff's ticket, evidence that after plaintiff left the train the engine went to a water tank near such station was not admissible for the purpose of showing whether or not it was dangerous for the train to go to such station. Louisville, etc., R. Co. *v.* Quinn, 39 So. 756, 146 Ala. 330.

Declarations made to plaintiff by defendant's ticket agent that she might board the train without a ticket, and pay her fare on the car, are not admissible, where the pleadings, in an action for failuse to carry plaintiff to her destinations, contain no averment of such declarations. Wells *v.* Alabama, etc., R. Co., 6 So. 737, 67 Miss. 24.

55. In an action against a carrier for injuries to a passenger in consequence of being carried beyond the station of her destination, evidence of the undisclosed intention of the conductor to hire a conveyance for the passenger was inadmissible. Chesapeake, etc., R. Co. *v.* Lynch, 89 S. W. 517, 28 Ky. L. Rep. 467.

In an action against a carrier, evidence that it failed to stop a train at a flag station to let off a passenger having a ticket to such station, and that he was put off at another station, two miles distant, and was compelled to walk therefrom is to be considered in determining whether plaintiff has suffered any damage at common law. Roundtree *v.* Atlantic, etc., R. Co., 53 S. E. 424, 73 S. C. 268.

Evidence of custom held immaterial.—Southern R. Co. *v.* Hobbs, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

56. Evidence as to rules, customs, etc.—In an action by a passenger for being carried beyond her destination, it was proper to allow a witness to answer the question as to what became of plaintiff immediately after she came to witness' house, as the answer had a bearing on the condition of plaintiff, and evidence as to what the rules of the company are as to where passengers get on and off the train is admissible, as bearing upon the questions whether employees knew that plaintiff had boarded the train and whether she had an opportunity to inform the employees of her destination; and evidence as to what was the custom and usage of defendant about trains leaving the station at which plaintiff boarded the train was also admissible, but testimony of a witness that this was the first time he had ever seen a passenger carried by a flag station is inadmissible. Louisville, etc., R. Co. *v.* Seale, 160 Ala. 584, 49 So. 323.

57. Custom as to calling stations, etc.—Southern R. Co. *v.* Wooley, 158 Ala. 447, 48 So. 369.

58. Evidence as to requests.—Where, in an action against a carrier for carrying a female passenger beyond her station, the evidence showed that she had requested the employee in charge of the train to let her off at the station, evidence that the husband of the passenger asked the employee on the arrival of the train at the station whether his wife was on board was admissible, though the employee did not know that the person asking was the passenger's husband. Missouri, etc., R. Co. *v.* Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724.

59. Failure or refusal to stop at destination.—St. Louis, etc., R. Co. *v.* Rosenberry, 45 Ark 256.

60. Evidence as to custom.—St. Louis, etc., R. Co. *v.* McCullough, 45 S. W. 324, 18 Tex. Civ. App. 534.

Employee's Schedule.—In an action against a railroad company for damages for failure to stop a train at a certain place at which there is no station, the plaintiff can not show that such place was treated as a station, by means of a time schedule which on its face shows that it was for the government and information of the employees only, and that the company reserved the right to vary therefrom at pleasure, though it states that the train is due at such place at a certain time.[61]

General Knowledge as to Stopping of Train.—Proof of general knowledge of a custom of railway trains not to stop at a certain station is inadmissible as against a passenger who did not live in that vicinity, and had no means of acquiring knowledge of such custom.[62]

Duty of Employee.—Where the question whether defendant's porter invited a passenger to alight at a wrong station is in issue, evidence is admissible that the duties of the porter only required him to announce the stations, and to assist passengers to alight when requested to do so by the latter, and did not require him to notify the particular passengers of the places where they should get off.[63]

§ 3198. Protection and Accommodations.—Where a passenger sues for breach of contract or duty in regard to accommodations and protection furnished, any material and relevant evidence as to conditions on vehicle, conduct of employees and other passengers, is admissible.[64]

Placing in Car with Disorderly Persons.—Where a passenger sues for being compelled to ride in a car occupied by disorderly passengers, evidence that the conductor in charge of the train had, prior to the time that the plaintiff became a passenger, made efforts to suppress the disorder, was irrelevant, when the question to be determined was whether such conductor was diligent in the suppression of disorder which arose after the plaintiff became a passenger.[65]

Rebuttal Evidence.—Evidence which is material as tending to contradict evidence admitted in behalf of the plaintiff in regard to breach of duty or negligence as to accommodation in transit, is admissible in rebuttal thereof.[66]

§ 3199. Delay, Failure to Make Schedule, Connections, etc.—In an action for delay, etc., any evidence, responsive to the allegations of the com-

61. Schedule for government of employees.—Beauchamp *v.* International, etc., R. Co., 56 Tex. 239.

62. General knowledge.—International, etc., R. Co. *v.* Hassell, 62 Tex. 256, 50 Am. Rep. 525.

63. Duty of employee.—Texas Mid. R. Co. *v.* Terry, 65 S. W. 697, 27 Tex. Civ. App. 341.

64. In an action against a railroad company brought by a nine year old girl, who, though having a first-class ticket, was negligently compelled to ride in a second-class car, where the complaint alleged that the passengers used profane and indecent language on plaintiff's hearing and presence, and that she was damaged thereby, it was proper to receive evidence of the profanity of one of the passengers. Texas, etc., R. Co. *v.* Kingston, 68 S. W. 518, 30 Tex. Civ. App. 24.

Where plaintiff sued for injuries occasioned by his wife and child being compelled by defendant to ride in a cold, filthy car, in company with passengers who used vile and indecent language, the exclusion of testimony of a passenger that the cars were crowded and uncomfortable, and that some of the passengers were swearing and drinking, on the ground that it was not shown that plaintiff's wife was in the same car with the witness, was erroneous, since the testimony referred to all the cars in the train. Duck *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 63 S. W. 891.

65. Placing in car with disorderly person.—Southern R. Co. *v.* O'Bryan, 37 S. E. 161, 112 Ga. 127.

66. Evidence in rebuttal.—Plaintiff in an action against a carrier for negligent failure to properly warm the car in which she was riding having testified that, when she complained to the conductor, he replied that there was coal, and, if she wanted fire, she could make it, his testimony that he told her that she could go into, and he would assist her to, another car that was warm, and that she refused to go, was material as tending to contradict the effect of her testimony as to the manner in which her complaint of cold was received. Southern Kansas R. Co. *v.* Butler (Tex. Civ. App.), 131 S. W. 240.

plaint and material as to the issues of breach of duty made by the pleadings,[67] is admissible. Where the railroad agent guaranties connection at a certain place and the arrival at the destination at a certain time, the passenger having the right to rely on such contract with the agent, and not being obliged to consult timetables, schedules, etc., a timetable stating that the arrival and departure of trains was not guarantied is inadmissible to show a limited liability.[68]

§§ 3200-3208. In Actions for Ejectment—§ 3200. Relevancy and Materiality in General.—In actions for damages for unlawful ejection of passengers, the evidence must be both relevant and material to the issues made to be admissible.[69] Thus, it is held that evidence as to acts and statements of the

67. Civ. Code 1902, § 2170, as amended February 20, 1903 (Laws 1903, p. 85), requires railroad companies to keep posted, in stations along its line, bulletins of trains delayed for more than half an hour, and gives a remedy for any grievance for noncompliance with its terms. Plaintiff, in an action against a railroad company, because of the delay of a train upon which he expected to travel, was allowed to testify as to the posting of bulletins by the agent as to the time his train was expected, and that the agent told him of a telegram announcing that his train had been annulled, and that the agent said he did not know what the trouble was with the train. Held, that, although § 2170 gives an exclusive remedy for noncompliance with its terms, this testimony was admissible, it being responsive to the allegation of the complant; it also being the agent's duty to give a passenger, upon request, all reasonable information within his knowledge, and not known by the passenger, as to the arrival of a train which he was to take. Mulligan *v.* Southern R. Co., 84 S. C. 171, 65 S. E. 1040.

This evidence was relevant to show whether the railroad company had breached its duty to exercise proper care to carry plaintiffs to their destination with promptness. Mulligan *v.* Southern R. Co., 84 S. C. 171, 65 S. E. 1040.

68. Evidence to limit liability.—Hayes *v.* Wabash R. Co., 163 Mich. 174, 128 N. W. 217, 31 L. R. A., N. S., 229.

69. Evidence irrelevant and immaterial.—In an action by a passenger against a railway company for being ejected from a train, it appeared that the passenger bought a return trip ticket, and that the conductor retained the return part and returned the going part, and that on the return trip the going part of the ticket was refused. The company offered in evidence the report of the conductor on the train on which plaintiff took the original passage, who, it was contended, took the wrong end of the passenger's ticket. The report was made out after the conductor's arrival at his place of destination. There was no space in the report for entering errors of the character in controversy. The report was not offered for the purpose of corroborating that testimony of the conductor that he was the conductor on the train on which plaintiff was a passenger. Held, that the report was properly excluded. Pennsylvania Co. *v.* Bray, 25 N. E. 439, 125 Ind. 229.

In an action for the forcible ejection of plaintiff from defendant's car, a rule of defendant requiring conductors not to allow intoxicated persons to ride in the cars is not admissible, where it was not claimed on the trial that plaintiff was intoxicated, but it appears that he was afflicted with St. Vitus' dance, which produced involuntary motions, somewhat resembling those of an intoxicated person. Regner *v.* Glens Falls, etc., St. R. Co., 74 Hun 202, 26 N. Y. S. 625, 56 N. Y. St. Rep. 300.

In an action against a railroad company by a passenger for a wrongful ejectment it appeared that plaintiff's ticket had been extended by defendant's authorized agent by an alteration of the date, but that the conductor refused to honor it. Held, that it was proper to exclude testimony of the conductor who ejected plaintiff as to what would have been the result had he accepted the ticket, after he stated that defendant had no rules regulating such extensions. Spellman *v.* Richmond, etc., R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858.

Testimony by a witness in a suit against a street railway company for unlawful ejection by a passenger who boarded a car at the wrong transfer station, that he had never changed cars at any other point on the route that at one named by him, is inadmissible to prove a custom, and is also inadmissible to prove a custom, and is also inadmissible as evidence that some conductors had violated the regulations of the company. Shortsleeves *v.* Capital Tract. Co., 28 App. D. C. 365, 8 L. R. A., N. S., 287.

In an action for wrongful refusal to accept a transfer and expulsion from a street car, evidence by plaintiff that he was a successful business man offered on the theory of rebutting any suggestion that plaintiff had caused his expulsion to make a case against the company was irrelevant and inadmissible. Savannah Elect. Co. *v.* Badenhoop, 65 S. E. 50, 6 Ga. App. 371.

passenger, conductor or third persons prior to or at the time of the ejection should be excluded unless it has a relevant and material effect on the rights of the parties,[70] and the rules apply as to things which take place after the ejection.[71] Where the only issue is that the plaintiff was ejected on account of his boisterous conduct on the train, evidence relating to the boisterous conduct of other persons than the plaintiff, or showing that there was a subsequent difficulty

70. Acts, etc., held irrelevant or immaterial.—In action against a street railroad for ejection of a passenger on the ground that fare tendered was not legal tender, an objection to a question to plaintiff as to where he got money to pay his fare after he was put off should have been sustained. Mobile St. R. Co. *v.* Watters, 33 So. 42, 136 Ala. 227.

In an action against a railroad for wrongfully ejecting plaintiff from a car, testimony that on entering the car plaintiff went to his son, who was sitting down, and asked him to lend him fifteen cents; that cursing or profane language was used by others who were on the outside of the car; that after receiving the injuries plaintiff requested a witness to take care of him—was irrelevant. Moore *v.* Nashville, etc., Railroad, 34 So. 617, 137 Ala. 495.

In an action against a railroad company for wrongfully ejecting plaintiff from the train before he reached the station for which he supposed he had purchased a ticket, evidence that plaintiff tried to get the conductor to lend him money to buy a ticket, and that plaintiff had only a few cents, was improperly admitted. Southern R. Co. *v.* Bunnell, 36 So. 380, 138 Ala. 247.

Statements made prior to boarding train.—As the ground on which plaintiff sought to charge defendant railroad company was that the conductor had, by putting plaintiff's intestate in fear, caused him to jump from a rapidly moving train, what plaintiff's intestate and his companion said, before getting on the train, about riding on it without pay, was inadmissible as evidence. Louisville, etc., R. Co. *v.* Alumbaugh, 51 S. W. 18, 21 Ky. L. Rep. 134.

Prior attempts to evade payment.—In an action for damages for being improperly removed from the defendant's car after having paid fare, the defendant can not show that on other occasions the plaintiff had done acts indicating an attempt to avoid payment of fare. English *v.* Delaware, etc., Canal Co., 4 Hun 683.

Statements by third persons at time of ejection.—In an action against a carrier for the wrongful ejection of a passenger, declarations of passengers in the car that plaintiff was a "beat and bum," made as he walked out of the car behind the conductor, were incompetent. Southern R. Co. *v.* Hawkins, 89 S. W. 258, 121 Ky. 415, 28 Ky. L. Rep. 364.

Matter held relevant.—In an action against a railroad company for ejecting a passenger, evidence is admissible that a third person offered to pay plaintiff's fare, where the complaint alleged and the defendant denied that, on a friend offering to pay plaintiff's fare, the conductor cursed violently and said he should not ride. Weber *v.* Southern R. Co., 43 S. E. 888, 65 S. C. 356.

In an action for the unlawful expulsion of a passenger, the defendant, in explanation of its conduct, was entitled to prove plaintiff's misconduct on a prior trip, though such misconduct did not excuse the expulsion. Reasor *v.* Paducah, etc., Ferry Co., 153 S. W. 222, 152 Ky. 220, 43 L. R. A., N. S., 820.

71. Things happening after ejection.—Plaintiff presented his book to the agent at a station, and desired an exchange ticket, pursuant to a mileage ticket, which required that it be so presented for such exchange; but the agent was not supplied with such tickets, and promised an explanation of the fact to the conductor. Plaintiff got on board and presented his book to the conductor, who refused to give him an exchange ticket, and, on plaintiff's refusal to pay fare, he ejected him at the next station. The ticket office there was closed, and plaintiff called the conductor's attention to such fact, and desired to again enter the train, and was refused. Held that, in an action for damages for breach of the contract and wrongful ejection, it was error to permit plaintiff to testify to transactions and conversations between him and the ticket agent after his ejection, or between him and the conductor of the succeeding train; such evidence not being relevant to the issues. Pennsylvania Co. *v.* Lenhart, 120 Fed. 61, 56 C. C. A. 467.

Where, in an action for the wrongful ejection of a passenger at a station, plaintiff counted only on the wrongful acts at such staton, evidence of a conversation between plaintiff and the conductor at another station, and three hours after the train had left the station where the ejection occurred, was properly excluded. Pierson *v.* Illinois Cent. R. Co. 123 N. W. 576, 159 Mich. 110.

Statement, declarations, etc., after ejection.—It was error to allow plaintiff to testify that, some time after the ejectment, an acquaintance "guyed him about having been put off the train." Gulf, etc., R. Co. *v.* Copeland, 42 S. W. 239, 17 Tex. Civ. App. 55.

between the conductor who ejected the plaintiff, is wholly irrelevant and immaterial.[72] The subsequent conduct of the person ejected may be relevant and important.[73] But it is irrelevant that the passenger ejected got back on the train and paid fare to a station other than that called for by the ticket refused as an improper one.[74] The subsequent conduct of the carrier's employee may be admissible where it has material bearing on the case.[75] But the acts of the conductor with reference to the ticket subsequent to the ejection, which are outside the issues, should be excluded.[76] Thus, it is incompetent for defendant to prove that, on the next day the conductor, who had ejected him, offered to let him ride free to the point to which he had purchased a ticket and was entitled to ride at the time he was put off.[77]

Evidence as to plaintiff's character, which is not attacked or put in issue, is incompetent.[78]

Res Gestæ.—It seems that facts which are descriptive of the situation may be admissible, although they have no bearing on the rights of the parties under the relationship existing.[79] Where the issues of fact present all that occurred

72. Issue of boisterous conduct.—Southern R. Co. *v.* Lynn, 29 So. 573, 128 Ala. 297.

73. Subsequent conduct of plaintiff.—In an action for injuries alleged to have been sustained because defendant's servants threw plaintiff from its car, it may be shown by witnesses who attended plaintiff immediately after the accident that he did not then claim that the driver of the car threw him from it. Kummer *v.* Christopher, etc., R. Co., 20 N. Y. S. 116, 46 N. Y. St. Rep. 386.

The evidence, in an action against a railroad by one claiming to have been ejected from a train, and then robbed by defendant's employees, was conflicting as to the identity of the person ejected, whether it was plaintiff who had been ejected as testified by plaintiff and his son, or the son only, as testified by defendant's employees. Held, in view of the conflict, that it was error to strike out testimony of plaintiff showing that he had not complained to defendant until commencement of suit, nearly two years afterwards, and showing also that he had never complained to the district attorney about the robbery. Washburn *v.* Chicago, etc., R. Co., 84 Wis. 251, 54 N. W. 504.

74. Paying fare to another station.—Where a conductor erroneously claimed that plaintiff's ticket was not a proper one, and ejected him from the train, but plaintiff, after the ejection, got upon the train and paid the cash fare to a point beyond the one to which his ticket read, it was proper to sustain an objection to a question to plaintff as to how he happened to buy a ticket to the place to which the ticket in question read, instead of the place to which he paid a cash fare. McGhee *v.* Cashin (Ala.), 40 So. 63.

75. Subsequent conduct of defendant's agent.—In an action by a passenger for wrongful expulsion from a train by a conductor, evidence of the temper of the conductor on re-entering the train after the expulsion is admissible. St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

On trial of an action by a passenger for damages against a street railway company for assault and wrongful ejection from a car by its conductor, it is competent to show that the assault was continued when plaintiff tried to re-enter the car immediately after being ejected. Denver Tramway Co. *v.* Reed, 4 Colo. App. 500, 36 Pac. 557.

76. Acts outside issues.—In an action against a railroad company for wrongfully ejecting plaintiff from its train before he reached the station for which he had attempted to purchase a ticket, defendant's conductor testified that the tickets he took up on one trip he usually took back on his next trip and sent them to another city. The ticket on which plaintiff rode was introduced in evidence by defendant. Held, that evidence that the conductor made no effort to obtain the return of the ticket which plaintiff used was outside the issues. Southern R. Co. *v.* Bunnell, 36 So. 380, 138 Ala. 247.

77. Offer to carry to destination.—Louisville, etc., R. Co. *v.* Welsh, 13 Ky. L. Rep. 732.

78. Evidence of character.—A passenger, in an action against a carrier for a wrongful ejection, may not give evidence as to his character, it not being attacked. Breen *v.* St. Louis Trans. Co., 77 S. W. 78, 102 Mo. App. 479.

79. Matters descriptive of situation.—Defendant railway had a rule requiring passengers to pay extra for packages too large to be carried on the lap without incommoding others, and on plaintiff's refusing to pay the extra charge he was ejected. Held, that evidence as to the number of passengers in the car when plaintiff entered, though not bearing on the question of defendant's right to charge additional fare, was admissible as tending to show whether any passenger were incommoded by plaintiff's packages. Mor-

and was said between plaintiff and the conductor and brakeman, the language, and conduct of the parties during the conversation just before and leading up to the assault are competent as part of the res gestæ.[80] But the declarations of a brakeman when ejecting a person from a train are inadmissible to prove that he acted under orders from the conductor.[81] And the remarks and declarations by a passenger made several minutes after he had gone from the place where he was ejected from a train are not a part of the res gestæ.[82] Nor are the remarks of plaintiff's fellow passengers after the threatened expulsion, a part of the transaction and evidence of them is inadmissible to show the shame and mortification that plaintiff was made to suffer.[83]

§ 3201. As to Contract or Relation.—In establishing the contract of carriage, as in other cases, evidence which is immaterial should be excluded.[84] But relevant evidence which materially tends to show the relationship, such as a receipt given when the ticket was purchased,[85] or a previous surrender of the ticket upon the demand of the carrier's servant,[86] is properly admitted. And the fact

ris *v.* Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097.

Evidence that the conductor did not ask the ejected person whether she had money or ask her for any was admissible, where there was evidence that the conductor told her she could do nothing but get off, to show that the conductor was hasty. Southern Kansas R. Co. *v.* Wallace (Tex. Civ. App.), 152 S. W. 873.

80. Res gestæ.—Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

A complaint in an action against a railroad company alleged that defendant's conductor wrongfully compelled the plaintiff, who had taken passage and paid his fare on one of defendant's trains, to leave the train at an intermediate station, and that in doing so the conductor was abusive, using language which was derogatory to his character for honesty, and which imported a charge that he was attempting to proceed on his journey without paying his fare. The evidence was that the conductor, after an altercation with the plaintiff as to whether the latter had paid his fare, determined upon putting him off, and directed the flagman to look after him. The flagman, in the presence of the conductor, and as part of the said altercation, told the plaintiff that he would have to pay his fare or they would put him off. The flagman testified that he was in the habit of helping the conductor take up tickets, and that he was authorized by the conductor to put off passengers when they would not pay their fare. Held that, as this evidence tended to show that the flagman was acting for the conductor, and in execution of the latter's orders, it was admissible in support of the allegation that the conductor himself had wrongfully compelled the plaintiff to leave the train; and although nothing was claimed on account of the abusive language of the flagman, and damages therefore could not be imposed on account of it, it was nevertheless admissible as a part of the res gestæ attending the ejection of the plaintiff. Alabama, etc., R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236.

81. Declarations to show authority.—Lyons *v.* Texas, etc., R. Co. (Tex. Civ. App.), 36 S. W. 1007.

82. Plaintiff's subsequent declarations.—Ohio, etc., R. Co. *v.* Cullison, 40 Ill. App. 67.

83. Subsequent remarks by fellow passengers.—Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312.

84. Immaterial evidence.—It was immaterial whether plaintiff or any one else had previously been allowed to ride on the train for ticket fare paid on the train. Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771.

If the railroad company which issued to plaintiff a coupon ticket good over defendant's and other lines was defendant's agent in issuing it, it was immaterial that such agent was also the agent of an immigrant association in routing passengers from Europe, and that defendant was not one of the associated roads receiving such passengers; so that evidence of that fact was not admissible in an action for ejecting plaintiff from defendant's train because the time limit in the ticket had expired. Brian *v.* Oregon Short Line R. Co., 105 Pac. 489, 40 Mont. 109, 25 L. R. A., N. S., 459, 20 Am. & Eng. Ann. Cas. 311.

85. Receipt upon purchase of ticket.—In an action by a passenger for wrongful ejection, where the answer denied all the allegations of the petition, as it was incumbent on plaintiff to show that he had a right to be transported on defendant's train, it was proper for him to introduce in evidence a receipt given by defendant's agent to plaintiff when he purchased his ticket. Coine *v.* Chicago, etc., R. Co., 99 N. W. 134, 123 Iowa 458.

86. Previous surrender of ticket.—Under a declaration, alleging assault and battery and wrongful ejection of a passenger from a train, plaintiff could show that he purchased a ticket having three coupons, the first entitling him to ride to a

that a passenger bought a ticket over several lines of road with coupons attached may be shown by parol, the contents of the ticket not being involved.[87] Nor does the ticket issued to a passenger for his passage preclude him from showing, by parol testimony, a contract for such transportation.[88] However, where a passenger does produce and give up his ticket when demanded, the best evidence of his right to be on the train is the ticket itself, and until the nonproduction of the ticket is explained parol evidence of what such ticket entitled him to can not be admitted.[89]

Evidence as to Conditions in Ticket.—Where a person attempting to ride on a ticket; mileage, etc., is ejected for a violation of the conditions therein or a rule relating thereto, he can not in an action for damages for the ejection put in evidence irrelevant matter or matter which can in no way legitimately aid in determining the rights of the parties. This rule applies to customs, usuages, etc., which are immaterial to the rights of the parties under the contract.[90] And the same rule applies to evidence offered in behalf of the defendant.[91] Evidence that a carrier had furnished the public with a printed schedule showing a rule in regard to a limitation upon certain tickets is too uncertain and indefinite, unless it be shown that the purchaser was furnished with the schedule or had been notified of the rule.[92] In an action for the expulsion of plaintiff from defendant's train because of a violation of a condition in the ticket, a question by defendant's counsel of plaintiff, whether he knew the printed condition on the ticket and the construction of the contract between himself and the railroad company, was properly excluded.[93] But where the claim is that certain restrictions existed in the contract of transportation, the plaintiff may introduce any evidence materially tending to refute the carrier's claim.[94]

fair, the second to attend the fair, and the third to return passage; that on his return the conductor took, up his ticket; that on a change of conductors the new conductor refused to accept plaintiff's statement that he had already surrendered his ticket, and demanded the fare, and on plaintiff's refusal to pay it, forcibly ejected him. Wells *v.* Boston, etc., Railroad, 71 Atl. 1103, 82 Vt. 108.

87. Parol evidence to show purchase of ticket.—Central R. Co. *v.* Wolff, 74 Ga. 664.

88. Ticket as precluding parol evidence.—Van Buskirk *v.* Roberts, 31 N. Y. 661.

89. Ticket best evidence.—Memphis, etc., R. Co. *v.* Benson, 85 Tenn. (1 Pickle) 627, 4 S. W. 5, 4 Am. St. Rep. 776.

90. Regulations and customs.—Where the plaintiff sues for damages for wrongful ejection from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which plaintiff had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible. Oppenheimer *v.* Denver, etc., R. Co., 9 Colo. 320, 12 Pac. 217.

91. Where a passenger presents a ticket on which he is entitled to ride, and is ejected, the carrier can not show a custom to issue such tickets for certain days only, in the absence of any proof of knowledge of such limitation by the passenger or the purchaser of the ticket. Carvey *v.* Detroit, etc., R. Co., 95 N. W. 716, 133 Mich. 659.

92. Uncertain and indefinite.—In an action against a railroad company for wrongful ejection, it appeared that plaintiff, who was over twenty-one years old, but a member of his father's family, attempted to ride on a ticket issued for the exclusive use of his father and family, and was ejected from the car on the ground that he was not entitled to ride on the ticket. Held, that evidence, in behalf of the defendant, that certain schedules were printed and furnished to the public by defendant, with such tickets, which showed the rules and regulations under which they were sold, was improper, since such a schedule was not obligatory on plaintiff unless one was furnished by defendant to the purchaser of the ticket. Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584.

93. Evidence as to conditions in ticket.—Dagnall *v.* Southern R. Co., 48 S. E. 97, 69 S. C. 110.

94. Rule as to rights under contract—Published notice.—Public notices advertising an excursion from one city to another on defendant's road gave residents of T., a town on the line of another road connecting with defendant's road at E., the right to make the return trip to E. on the express train; the reason for the privilege being the opportunity to make connections, although not so limited.

Time Limit in Ticket.—Where there is a time limit in the ticket, if the ticket is mutilated so that it is not evidence of its own limitations, parol evidence which is relevant and material may be admitted.[95]

Identity of Ticket.—It is competent for plaintiff to show where the ticket has been since the day he was ejected, the identity of the ticket being in question.[96] And the admission of testimony of persons to whom the ticket was exhibited, descriptive of the same, when taken in connection with other evidence tending to identify it as the same ticket offered by plaintiff, is not erroneous.[97] Nor is there error in the admission in such a case of testimony of the plaintiff as to his exhibiting the ticket to other persons on the day he was ejected and after he had left the train.[98]

Evidence as to Representations by Employee.—Representations and statements made by ticket agents in selling a ticket, in connection with a sale thereof and as to the extent of the privilege thereby secured have often been held admissible as a part of the res gestæ, and as characterizing the subsequent conduct of the purchaser of the ticket.[99] This rule is based upon the fact that it is entirely proper for a passenger to make inquiries of the ticket agent and to rely upon what he is told with respect to his privileges.[1] On an issue as to whether certain representations were made to plaintiff as to tickets purchased by him, the testimony of the purchaser of similar tickets on the same occasion that such representations were made to plaintiff is admissible.[2] And in such a case a circular letter issued by the carrier's authorized agent directing the sale of tickets agreeable to such representations is properly admitted.[3]

Evidence as to Mistakes in Tickets.—Where the agent selling the passenger the ticket gave evidence tending to show that two tickets were called for to the point to which plaintiff desired to go, and that he made a mistake in issuing only one to that point, evidence that he had made such mistakes before was inadmissible.[4]

Validity of Transfer.—A street car conductor authorized to punch and deliver transfers to passengers upon request in consideration of cash fare paid stands, in relation to the carrier and passenger, very much like a ticket seller who supplies the public for a consideration with tickets. Hence, when the question of the validity of the transfer is under consideration what such con-

Plaintiff lived at T., but drove to E. in his carriage to take the train, and returned on the express train. There was no restriction as to the manner in which persons coming from T. should travel to E. Held, on trial for his forcible ejection therefrom, that evidence of the privilege given to residents of T. was properly admitted. Baltimore, etc., R. Co. *v.* Kirby, 46 Atl. 975, 91 Md. 313.

95. Time limit.—In an action for ejection from a train on refusal of the conductor to accept a ticket on the ground that it was a limited ticket and the time had expired, the ticket being mutilated at the time of trial so that it could not be told therefrom what the final figure therein was, the agent who sold it and wrote in the final figure should, after stating that he did not remember the actual date inserted, have been permitted to testify as to the limit he was permitted to sell tickets on. Dooley *v.* Burlington, etc., R. Co., 89 Iowa 450, 56 N. W. 543.

96. Identity of ticket.—McGhee *v.* Cashin (Ala.), 40 So. 63.

97. Testimony descriptive of ticket.—McGhee *v.* Cashin (Ala.), 40 So. 63.

98. Evidence as to exhibition of ticket.—McGhee *v.* Cashin (Ala.), 40 So. 63.

99. Representation by ticket seller.—Chicago Union Tract. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287, citing Erie, etc., Co. *v.* Winter, 143 U. S. 60, 36 L. Ed. 71.

1. Basis of rule.—Chicago Union Tract. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287, citing Hufford *v.* Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; Burnham *v.* Grand Rapid Trunk R. Co., 63 Me. 298, 18 Am. Rep. 220; Murdock *v.* Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307. In these cases evidence of what the ticket seller said to the purchaser at the time of the sale was admitted. See in this connection, Illinois Cent. R. Co. *v.* Davenport, 177 Ill. 110, 52 N. E. 266.

2. Representations by employee.—Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209, 20 Ky. L. Rep. 516.

3. Circular letter.—Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209, 20 Ky. L. Rep. 516.

4. Prior similar mistakes.—Southern R. Co. *v.* Bunnell, 36 So. 380, 138 Ala. 247.

ductor said in connection with the giving of the transfer and as to the extent of the privilege thereby secured is admissible as characterizing the subsequent conduct of the holder thereof.[5] Where a passenger was forcibly ejected from a street car on the conductor's refusal to accept a transfer, a municipal ordinance proving the validity of the transfer was admissible in evidence.[6]

Evidence as to Identity of Plaintiff.—As the question as to whether or not the passenger had reasonably identified himself according to the conditions in his ticket is a question for the jury, they should be put in possession of all facts upon which carrier's employee acted in requiring plaintiff to further identify himself, pay his fare, or be ejected. And under this rule it has been held that the fact that the ticket has been offered for sale to a scalper would be some evidence to the mind of the employee that the original purchaser had no further use for it and that he had said it.[7]

Evidence as to Knowledge of Rule.—On the issue whether the buyer of a ticket for his transportation over a railroad had notice of a rule of the railroad corporation restricting holders of such tickets to passage on special trains before he undertook to pass by it on a regular train, evidence is admissible that at the time of buying it he inquired of the seller whether he could pass on that train by it, and was answered that he could, although the seller was not an agent of the corporation.[8]

§ 3202. Ejection for Failure to Produce Ticket.—Where a passenger is ejected for an alleged failure to produce his ticket and he claims to have given his ticket to the conductor at the proper time, the defendant may establish by competent evidence the habit or custom of the conductor in regard to taking up tickets, and checking passengers in order to show that the conductor could not have overlooked the fact that he had once taken up the passenger's ticket.[9] Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the particular act which is the subject of the habit or custom, there can be no doubt.[10] And to rebut this, a negative habit may be shown by evidence tending to prove that there was no such habit or custom, or that the custom was the contrary. And it seems that the only way in which the value of an alleged custom can be judged is by subjecting it to the test of specific instances and such testimony is competent for that purpose.[11]

5. Representation as to transfer.—Chicago Union Tract. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287.

Where the validity of a municipal ordinance relating to transfers was being contested when plaintiff was forcibly ejected from defendant's car on the conductor's refusal to accept a regular transfer, and such ordinance was afterwards sustained, it was proper to admit testimony that when plaintiff obtained the transfer the conductor from whom he secured it stated it was good on the car from which he was ejected, over objection that defendant, regarding the ordinance invalid, had instructed its conductors not to receive such a transfer as plaintiff tendered. Chicago Union Tract. Co. *v.* Brethauer, 79 N. E. 287, 223 Ill. 521, affirming judgment 125 Ill. App. 204.

6. Validity of transfer.—Chicago Union Tract. Co. *v.* Brethauer, 79 N. E. 287, 223 Ill. 521, affirming judgment 125 Ill. App. 204.

7. Offer of ticket for sale to scalper.—Where a passenger purchased a ticket by which he agreed to identify himself as the original purchaser, when required by the carrier's conductors or agent, and that unless all the conditions of the ticket were fully complied with it should be void, the carrier having obtained information that the passenger had endeavored to sell the ticket to a broker, and proof of such fact having been admitted in an action for ejection while the passenger was attempting to ride on such ticket, because of his refusal to sufficiently identify himself as the purchaser, it was error for the court to exclude evidence that the train agent, who refused the ticket, had knowledge that an attempt had been made by the purchaser to sell the same. Brigham *v.* Southern Pac. Co., 84 Pac. 306, 2 Cal. App. 522.

8. Evidence as to knowledge of rule.—Maroney *v.* Old Colony, etc., R. Co., 106 Mass. 153, 8 Am. Rep. 305.

9. Ejection for failure to produce ticket.—Parrott *v.* Atlantic, etc., R. Co., 140 N. C. 546, 53 S. E. 432.

10. Probative value.—Parrott *v.* Atlantic, etc., R. Co., 140 N. C. 546, 53 S. E. 432, citing Mathias *v.* O'Neill, 94 Mo. 520, 6 S. W. 253.

11. Admissibility for specific instances.—Parrott *v.* Atlantic, etc., R. Co., 140 N.

§ 3203. Ejection for Refusal to Pay Fare.—Where a passenger, failing to get a credit slip from the agent in pursuance of a contract to give him a rebate after purchase of a ticket, boarded the train, and, on refusing to pay his fare unless the conductor would give him such credit slip, was ejected from the train, in an action for damages for the ejection is was competent to prove that it was the usual custom of conductors on defendant's road to issue to passengers, on payment of cash fares, credit slips on contracts for rebate.[12]

Good Faith and Honesty of Passenger.—Where the good faith of the passenger is immaterial, evidence to show it should be excluded,[13] and a person who is ejected because he refused to tender his fare to the conductor when it was demanded should not be permitted to testify that he was only joking, and that he really intended to pay his fare.[14] But testimony such as representations and statements by employees, attempt to purchase ticket, prior conduct, etc., is admissible, which tends to establish the fact that the plaintiff in good faith entered upon the train intending to ride as a passenger, under the belief that he was entitled to ride as a passenger, upon his ticket,[15] upon the payment of a

C. 546, 53 S. E. 432, citing State *v.* Railroad, 58 N. H. 411.

Where, in an action for ejection of a passenger, the carrier was permitted to prove the habit or custom of the conductor in question in regard to taking up tickets and checking passengers to show that the conductor could not have overlooked the fact that he had once taken up plaintiff's ticket, plaintiff was entitled to prove in rebuttal that there was no such infallible habit or custom, by showing specific instances where the custom failed, if it existed. Parrott *v.* Atlantic, etc., R. Co., 53 S. E. 432, 140 N. C. 546.

12. Refusal to pay fare—Custom as to issuing credit slips.—Holt *v.* Hannibal, etc., R. Co., 87 Mo. App. 203.

Evidence was admissible, in an action for ejection of passenger, that it was a custom among conductors of defendant's road to issue to passengers on payment of cash fares credit slips on contracts like the one exhibited by plaintiff. Holt *v.* Hannibal, etc., R. Co., 74 S. W. 631, 174 Mo. 524.

13. Good faith and honesty.—In an action against a railroad company for damages for failure to carry plaintiff to his destination after the regular price of a ticket had been tendered the conductor, who demanded an extra fare because paid on the train, the case being tried as one for breach of contract, testimony of plaintiff that he offered his fare in good faith, believing it to be the correct amount, was immaterial, for his belief could not affect the contract. Sage *v.* Evansville, etc., R. Co., 134 Ind. 100, 33 N. E. 771.

Good faith immaterial.—Where, in an action for ejecting a passenger for refusal to pay fare except by a ticket which he had purchased from a broker, and which was not transferable, the evidence showed that he refused to pay his fare or get off the train after he was informed that the ticket was invalid, evidence that the carrier had waived the nontransferable conditions in the ticket, and had encouraged the sale of the same through brokers, was not admissible as showing plaintiff's good faith in going on the train, his good faith at that time being immaterial. Clark *v.* Great Northern R. Co., 72 Pac. 477, 31 Wash. 658.

14. Evidence as to joking with conductor.—Louisville, etc., R. Co. *v.* Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871.

15. Plaintiff's good faith.—In an action to recover for being forcibly expelled from defendant's freight train it was proper for plaintiff to show that defendant's station agent informed him of the time of arrival of the next freight train, and represented that it carried passengers, for the purpose of proving that plaintiff boarded the train in good faith, supposing that it carried passengers; and such statements may be shown, though they were made in a place other than the office of said agent. Lake Erie, etc., R. Co. *v.* Matthews, 13 Ind. App. 355, 41 N. E. 842.

In an action for ejecting plaintiff from defendant's cars, evidence that he had made an ineffectual attempt to procure a ticket before entering the car is admissible to show his good faith in getting aboard without his ticket. Perkins *v.* Missouri, etc., Railroad, 55 Mo. 201.

Prior attempt to ride.—Where, in an action for the death of a passenger while on the track after his wrongful ejection from a train, the evidence on the issue whether the passenger intended to become a passenger by paying fare was conflicting, evidence of the conduct of the passenger in taking a train immediately before entering the train from which he was ejected and riding thereon without payment of fare was admissible. Powell *v.* St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 963.

cash fare,[16] upon mileage coupons,[17] or for the fare tendered by him upon the train.[18] So if he was ignorant of the fact that he was required to have a written permit, and was ignorant of the rules that required such permit to be issued and delivered to the passenger, he could act upon the assumption that an agent who sold him the ticket, under a knowledge of the fact that he was going to become a passenger on the train, who had promised to give him permission to ride thereon, had performed his duty, and had delivered to him such evidence of his right to ride as was necessary.[19]

§ 3204. Violation of Statutes, Rules, and Regulations.—In an action against a street railroad company for ejecting a passenger and causing him to to be arrested for violation of the law relating to the division of cars into separate compartments for the white and colored races, where the only evidence of a division of the inside of a car between the two races consisted of proof of an established custom, testimony to establish a custom of the company to permit passengers of both races to occupy the back platform of its cars is admissible.[20]

Rule of Carrier.—Where a passenger on an excursion train is ejected for

16. Cash fare.—Where the railroad sets up the failure of plaintiff to procure a ticket, in conformity with its rules, requiring passengers to procure tickets before entering freight trains, plaintiff may show that defendant's freight trains carried passengers for hire, and that no rule was enforced by defendant requiring the purchase of tickets before entering its trains, by evidence that certain persons had on a number of occasions taken passage on defendant's freight trains without first procuring tickets, and that they paid their fares to the conductors of said trains. Brown *v.* Kansas, etc., R. Co., 38 Kan. 634, 16 Pac. 942.

17. Mileage coupons—Effort to procure ticket.—Where plaintiff was ejected because he had failed to exchange his mileage coupons for a ticket and refused to pay his fare except with the mileage coupons on the train, he was entitled to testify whether he consented to the agent's giving him a ticket to a junction point instead of his destination, in order to show that plaintiff had not voluntarily withdrawn his application for a ticket to destination. Dorsett *v.* Atlantic, etc., R. Co., 72 S. E. 491, 156 N. C. 439.

18. Fare tendered on train.—In an action against a railroad for expulsion from its train because plaintiff refused to pay sixty cents fare, tendering fifty-five cents only, it was competent to show that plaintiff had traveled over the road between the same points for several years, with and without a ticket, and had never paid more than the sum tendered. Louisville, etc., R. Co. *v.* Guinan, 79 Tenn. (11 Lea) 98, 47 Am. Rep. 279.

In an action for the ejection of a passenger, the evidence showed that plaintiff, who was on his way to a point beyond the state limits, tendered to the conductor a sum equal to that at which tickets were sold to said point, at the same time explaining to the conductor that he could not procure a ticket at the station, because the ticket office was not open. Plaintiff offered the report of the railroad commission fixing the amount tendered as the rate, but it was excluded by the court. There was evidence that the rate fixed by the commission had been accepted by defendant, and that tickets were sold at such rates. Held, that the report was admissible in evidence. Although the commission could not fix rates beyond the state, there was evidence that the company had adopted such rates, and held them out to the public. Hall *v.* South Carolina R. Co., 25 S. C. 564.

As the report contained a regulation as to the hours of opening the ticket office, it was competent evidence, aside from the question of interstate commerce. Hall *v.* South Carolina R. Co., 25 S. C. 564.

Medium of tender.—In an action for ejection of a passenger, who tendered fare in Canadian money, evidence that the coin tendered was received by plaintiff from the defendant company through another conductor in change was admissible. Konkle *v.* St. Paul City R. Co., 137 N. W. 738, 119 Minn. 177.

19. Evidence of good faith admissible.—In an action against a carrier for injuries sustained by being ejected from a freight train, where it appeared that the agent of the carrier sold the plaintiff a ticket good on the train, and promised him a permit required by the rules of the carrier, testimony of the plaintiff was admissible to show that he did not know what a permit was, and did not understand that he would be given any evidence of it, other than the ticket, and that he did not know prior to entering the train that he was required to sign and procure a freight train permit. Houston, etc., R. Co. *v.* Berry (Tex. Civ. App.), 84 S. W. 258.

20. Violation of law, rules and regulations.—Waldauer *v.* Vicksburg R., etc., Co., 40 So. 751, 88 Miss. 200.

drinking on the train, evidence that the conductor announced publicly on the going trip that no drinking would be allowed is admissible as a regulation of the conduct of passengers in view of the statute, giving the carrier the right to eject passengers for refusal to comply with reasonable regulations, and the defense that plaintiff was misbehaving himself in violation of the law when he was ejected.[21]

§ 3205. Time, Place, etc., of Ejection.—Where the complaint avers negligence generally and states facts as to the dangers of the place of ejection, the age and infirmity of the passenger, etc., evidence as to the age and infirmity of the passenger ejected, the place of ejection, the time of ejection, the distance from the car steps to the ground, and other similar facts tending to show whether or not the carrier was acting within its rights, is relevant and competent.[22]

§ 3206. General Character and Disposition of Employee.—In an action by a passenger for ejection from a street car, evidence as to the general character and disposition of the conductor who ejected plaintiff is properly excluded, as the only subject for inquiry is the character and disposition of the conductor on the particular occasion.[23] And where a complaint for the ejection of a passenger is based merely on the breach of the contract of carriage, and does not allege the employment of an incompetent conductor, evidence of the general character and disposition of the conductor who ejected plaintiff is properly excluded.[24]

§ 3207. Evidence as to Authority to Eject.—When the petition alleged that plaintiff's expulsion from a moving car was caused by a servant of defendant, evidence in regard to what employees were authorized to eject persons from trains is relevant.[25] And evidence that a person deported himself as a brake-

21. Rule of carrier.—Magill *v.* Seaboard, etc., Railway, 66 S. E. 561, 84 S. C. 416.

22. Time, place, etc., of ejection.—Where, in an action for injuries to a passenger required to disembark because her ticket was defective and because she refused a fare, the issues were the negligence of the carrier in requiring her to disembark at a dangerous place, and whether she was guilty of contributory negligence, the testimony that the passenger was old and infirm, that she was required to leave the train in the early morning before good daylight, that she carried a suit case, and that the conductor who saw her offered no assistance, that she left the car from the rear platform, and that the distance from the steps of the platform to the ground was between three and four feet, etc., was competent under the issues. Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

23. General character and disposition of employee.—Braymer *v.* Seattle, etc., R. Co., 77 Pac. 495, 35 Wash. 346.

In an action for ejection of a passenger, evidence of the conductor's general habit or usual disposition concerning the treatment of passengers was inadmissible. Anderson *v.* Louisville, etc., R. Co. (Ky.), 120 S. W. 298, 301.

In an action against a carrier for the malicious act of a conductor in ejecting a trespasser from a train, evidence to show that the conductor had knocked passengers down theretofore, and that his company had been sued for it, and as to the frequency of such act, is not admissible in jurisdictions where a common carrier is liable for malicious acts of its servants done in the course of their employment, irrespective of knowledge of the servants' character. Louisville, etc., R. Co. *v.* Cottengim, 104 S. W. 280, 31 Ky. L. Rep. 871.

24. In action for breach of contract.—Braymer *v.* Seattle, etc., R. Co., 77 Pac. 495, 35 Wash. 346.

25. Evidence as to authority to eject.—Gulf, etc., R. Co. *v.* Kirkbride, 79 Tex. 457, 15 S. W. 495.

In an action for the forcible ejection of plaintiff from a train by a brakeman, evidence to show that it was the custom of the brakeman, and other employees engaged on its trains, to eject persons riding without paying their fare, is relevant as tending to show that the brakeman complained of was acting within the scope of his employment. St. Louis, etc., R. Co. *v.* Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220.

Testimony of a witness who, before and after plaintiff's ejection from a train, had been for fourteen years a foreman, brakeman, engineer, or conductor of the railroad company, that brakemen were subject to the orders of conductors, and had orders to eject trespassers from trains, and testimony of witnesses that they had

man on defendant's train, and acted as a brakeman between certain points on the road, is competent to show that he was a regular employee of the company.[26] But immaterial evidence in this respect should be excluded.[27]

§ 3208. Ratification of Conductor's Act.—It has been held that proof of the retention of a conductor by the company after his malicious ejection of a passenger from a car is admissible in showing such a ratification of his act as, under a given statute will render the company liable.[28] But it is held that as a railroad company is liable in damages, without notice or demand, for the action of a conductor in wrongfully ejecting a passenger, where the conductor acted without malice, evidence of negotiations between the parties for a settlement is not admissible on the theory that it shows a ratification by the company of the conductor's action.[29]

§§ 3209-3237. In Suits for Personal Injury—§ 3209. Relation of Carrier and Passenger.—In an action for the death of or injury to a passenger, evidence to be admissible on the question of the existence of carrier and passenger must, as in all other cases, be relevant and material.[30] Thus, it is held that a question which does cover the issue in controversy should not be allowed.[31] But where the existence of the relation of carrier and passenger comes in issue in a suit for death or personal injuries, any relevant and material fact may be offered and admitted by either party.[32] So a material fact which

seen brakemen eject trespassers, is, in an action against the company, competent evidence of the brakeman's authority. Marion *v.* Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86.

26. Evidence admissible.—St. Louis, etc., R. Co. *v.* Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. Rep. 220.

27. Immaterial evidence.—Under a petition seeking to recover damages for wrongful ejection of plaintiff from a train on which he was passenger, by orders of the conductor, proof of a general practice of brakemen on defendant's road to eject trespassers was immaterial. Lyons *v.* Texas, etc., R. Co. (Tex. Civ. App.), 36 S. W. 1007.

28. Retention of employee.—Perkins *v.* Missouri, etc., Railroad, 55 Mo. 201. Statute referred to is Wag. Stat., p. 307, § 28.

29. Ratification of conductor's act.—Pennsylvania Co. *v.* Lenhart, 120 Fed. 61, 56 C. C. A. 467.

30. Relatonship.—Evidence that decedent, a passenger, was in the habit of riding on the platform with knowledge that so riding was contrary to the carrier's rules, was not admissible to prove the terms of the contract of carriage, since it had no tendency to prove that intestate was not a passenger. Jones *v.* Boston, etc., R. Co., 90 N. E. 1152, 205 Mass. 108.

Immaterial that person was received and treated by conductor as a passenger.—On the question whether one injured by a railroad accident was a passenger or a servant of the company, held, that the fact that the conductor of the train received and treated him as a passenger was of no consequence. Texas, etc., R. Co. *v.* Scott, 64 Tex. 549.

31. Question not covering issue.—Where a carrier claimed that plaintiff, suing for injuries, was not a passenger because she was riding on a pass issued to another, a question to plaintiff as a witness, whether it was customary for her to ride on a pass, is properly excluded, since it did not cover the issue. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

Defendant's bus driver, having authority to accept and receive passengers, having requested plaintiff to ride with him without paying fare at the time plaintiff was injured by the driver's negligence, evidence that defendant's officers had forbidden plaintiff to ride on the bus was inadmissible. Palmer Transfer Co. *v.* Smith, 125 S. W. 725, 137 Ky. 319, 29 L. R. A., N. S., 321.

32. Matter relevant and material in general.—Where a carrier claimed that an injured passenger was a trespasser because riding on a pass issued to another given to the conductor by plaintiff's mother, who was sitting beside her, it is proper to ask the conductor whether he knew that the plaintiff and her mother were known by him to be the persons to whom the pass was issued, since if they were not, they would be trespassers, and not passengers. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

In an action by a passenger against a carrier for injuries sustained through the negligence of defendant's servant, defendant, in order to prove that plaintiff, was a trespasser, may ask plaintiff, on cross-examination, if he did not refuse to pay his fare or leave the coach, when plaintiff has testified that he was rightfully in the coach as a passenger under

tends to show that a person injured at a station, was a passenger, such as the possession of a ticket, mileage, etc., the time of arrival and departure of trains, or the character of the train he intended to take,[33] is admissible. And evidence relevant to refute any claim made by the carrier as to the plaintiff's character as passenger or trespasser while in a station [34] or on its vehicle,[35] should be admitted.

Person Riding on Pass.—Where the issue was whether persons riding on a train were trespassers because riding on a pass which was issued to others, the conductor of the train may properly testify as to what a passenger must have to entitle him to ride,[36] whether he was under duty to compel passengers to identify themselves as the persons named in the passes,[37] and whether he had any right to permit plaintiff to ride without paying her fare or being provided with a pass, since it was competent to show that the conductor did not knowingly permit plaintiff to ride on a pass not issued to her.[38]

Custom of Furnishing Pass as Gratuity.—On the issue, in an action for injuries to a railroad employee while riding on a pass, whether the pass was a gratuity or a part consideration for his wages, evidence that it was the carrier's custom to furnish other like employees like transportation, and that such trans-

the usual conditions. Gilmer *v.* Higley, 110 U. S. 47, 3 S. Ct. 471, 28 L. Ed. 62.

Where a carrier claims that one injured while riding on a train was a trespasser, because riding on a pass not issued to her, which pass was given to the conductor by her mother, who was traveling with her, testimony of the conductor that the mother stated that she was giving the pass for her daughter as well as herself, in tones loud enough for her daughter to hear, is not subject to a general objection that it was incompetent, immaterial, and irrelevant. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

33. Possession ticket—Character of train.—In an action for the death of intestate, who was struck by a train, defendant's bulletins stating the time of arrival of freight trains were competent to show that the stock train which intestate was awaiting carried passengers who had mileage tickets, in connection with proof that he had such a ticket and went to the station to become a passenger. Collison *v.* Illinois Cent. R. Co., 88 N. E. 251, 239 Ill. 532.

34. To refute carrier's claims.—Where, in an action for injures to a passenger while waiting for a train in a flag station, defendant denied that plaintiff intended to become a passenger on its train, and attempted to show that he was a mendicant, and while waiting for a train, as he claimed, had asked for money from a fellow countryman, the court did not err in permittng proof that plaintiff had $25 on his person at the time, was possessed of $300 or $400 in money, owned land in Austria, and to prove by receipts that he had made remittances to his wife there. Northern Pac. R. Co. *v.* Marinovich, 189 Fed. 328.

35. Person on vehicle.—Where plaintiff and his companion purchased tickets for a certain journey and attempted to use them for the return trip on a train which did not stop at their destination, and plaintiff was injured while attempting to alight from the train at such destination, while the train was in motion, evidence of conversations between defendant's ticket agent and the conductor and plaintiff's companion in his presence and hearing with reference to the passengers' right to ride on that train was competent. Glascock *v.* Cincinnati, etc., R. Co., 131 S. W. 779, 140 Ky. 720.

Where, in an action for death of a boy while attempting to board a street car, defendant introduced a witness who testified that deceased and his companion were attempting to steal a ride, and that the conductor was chasing the boys therefrom, evidence that intestate's companion had twenty cents in money at the time was admissible as tending to show that the boys had sufficient money to pay therefor. Chicago Union Tract. Co. *v.* Lundahl, 74 N. E. 155, 215 Ill. 289, affirming judgment 117 Ill. App. 220.

Custom of workmen to ride in baggage car.—In an action against a railroad company by a person employed in repairing their road, to recover for injuries received while being carried by them to his work, the defendants alleged that the plaintiff was negligent in riding in the baggage car. Held, that evidence that it was the custom for such workmen to ride in the baggage car was admissible. O'Donnell *v.* Allegheny R. Co., 50 Pa. 490.

36. Person riding on pass.—Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

37. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

38. Broyles *v.* Central, etc., R. Co., 166 Ala. 616, 52 So. 81.

portation was stated by its manager to be a part consideration for wages, is admissible.[39]

Persons Riding on Freight Trains.—Where a railroad company permits passengers to be usually carried on some of its freight trains, and a person boards one of them believing it one on which passengers are carried, and receives injuries as a result of mismanagement of the train, he may, in an action for such injuries, on an issue of the character of the train, prove conversations held by him and by members of the train crew, at about the time he boarded the train, with the person who directed him to board it, tending to show that such person was an employee of the company.[40]

Evidence of Relaxation or Abrogation of Rules.—An issue as to whether a rule forbidding the carrying of passengers on freight trains had been so generally disregarded that the public had the right to conclude that it had been abrogated could be determined only by inquiring as to the practice generally, and not at any particular time.[41] Where the plaintiff claims that such rules have been abandoned and proves an occasional or even frequent violations thereof, the carrier is entitled to show that such course of conduct is difficult to suppress.[42]

Age and Discretion Admissible as Determining Good Faith of Plaintiff.—Where a minor was riding by the brakeman's consent, in violation of a rule of the railroad forbidding the carrying of passengers on a freight train, the age and discretion of the boy should be considered in determining whether he got on the train in good faith believing he had the right to do so.[43]

Other Violations of Carrier's Rules.—Where it is alleged by plaintiff that the rule of defendant forbidding the carrying of passengers on its freight train was habitually violated, and the evidence shows that the rule was promulgated several years before the accident, evidence of persons having so ridden at other times both prior and subsequent to the accident is admissible.[44]

§§ 3210-3231. As to Negligence or Cause of Injury—§§ 3210-3218. In General—§ 3210. Relevancy and Materiality.—In an action for personal injury to a passenger, evidence to be admissible must be relevant to

39. Pass as gratuity—Custom.—Harris *v.* Puget Sound, etc., Railway, 100 Pac. 838, 52 Wash. 289.

40. Issue as to character of train.—Lucas *v.* Milwaukee, etc., R. Co., 33 Wis. 41, 14 Am. Rep. 735.

41. Evidence as to relaxation of rule.—Houston, etc., R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

Plaintiff, a passenger on one of defendant's cars, was by its conductor directed to leave the car and wait for an employees' car, which would take him to his destination While waiting for such car, another car ran off the track and into plaintiff, injuring him. Defendant contended that plaintiff could not be regarded as a passenger at the time, since passengers were not permitted to ride on the employees' car. Held, that evidence that for a long period of time defendant's conductors had carried passengers on the employees' car, on payment of the ordinary fare, was admissible to show that defendant had notice of the custom and acquiesced therein. East St. Louis, etc., R. Co. *v.* Zink, 82 N. E. 283, 229 Ill. 180.

It being alleged by plaintiff that the rule of defendant forbidding the carrying of passengers on its freight trains was habitually violated, and the evidence showing that the rule was promulgated several years before plaintiff's husband was killed while riding on a freight train, evidence of persons having so ridden at times varying from six months to three years previous to the accident is admissible. San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

42. Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110; Houston, etc., R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708.

43. Age and discretion.—Texas, etc., R. Co. *v.* Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331.

44. Other violations of carrier's rules.—San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 40 S. W. 631.

Violation of the rule subsequent to the accident are admissible. San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 40 S. W. 631.

the issues made by the pleading,[45] and material.[46] Thus, a fact which can have no bearing on the controversy,[47] such as a settlement with another person who claimed to have been injured at the same time,[48] the continued use of carrier's facilities after injury,[49] or subsequent changes, repairs, improvements, etc., made by the carrier,[50] should be excluded. Evidence which involves collateral

45. Dependent on allegation.—Richmond R., etc., Co. *v.* West, 100 Va. 184, 40 S. E. 643.

Where plaintiff showed that, while boarding a street car, it started forward with a jerk, throwing him to the ground, and the place of the accident was admitted, declarations by plaintiff's companions after the accident, made in plaintiff's presence, as to the place of the accident, were properly excluded when admittedly false, and merely offered to show that plaintiff was intoxicated. Formiller *v.* Detroit United Railway, 130 N. W. 347, 164 Mich. 653.

46. Materialty of evidence.—Where, in an action for injuries to a passenger while alighting from a train, the evidence showed that the passenger fell from the steps of the car, and was in a position of danger if the train moved, and the brakeman admonished her to move at once, evidence whether he spoke in a pleasant or angry tone, or what his manner was, was immaterial. Louisville, etc., R. Co. *v.* Lee, 130 S. W. 813, 140 Ky. 91.

In an action against a street car company for injury to a passenger, it is incompetent for the driver of the car to testify what his experience is with relation to motion given to cars when starting as affecting the passengers. Holmes *v.* Allegheny Tract. Co., 153 Pa. 152, 25 Atl. 640.

In an action for injuries to a passenger it was not competent to prove by plaintiff an injury to his hat after he left the place at which he was injured. Louisville, etc., R. Co. *v.* Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673.

In an action for injuries to a street car passenger by falling into a car barn pit, after being directed to take another car, in attempting to do so, where defendant's witness testified that there was no change of cars made upon the trip in question, a record of the changes made to and from other cars on other trips was not admissible in evidence. Gurley *v.* Springfield St. R. Co., 92 N. E. 714, 206 Mass. 534.

In an action against a street railway company for personal injuries, evidence as to the purpose handholds were designed to serve held inadmissible. Gerlach *v.* Detroit United Railway, 171 Mich. 474, 137 N. W. 256.

47. Fact not bearing on controversy.—Whether or not such suit was brought by plaintiff's attorney for a contingent fee was irrelevant. Freeman *v.* Puckett, 56 Tex. Civ. App. 126, 120 S. W. 514.

In an action for injuries to a street car passenger, a question to plaintiff whether the conductor asked him to write his name on a slip of paper was properly excluded. Meek *v.* Metropolitan St. R. Co., 91 Pac. 681, 77 Kan. 842.

In an action for injuries to a passenger on a street car, it was proper to refuse to permit the motorman to answer a question as to whether he remembered whether he "had on another white lady," as if he had answered it in the affirmative it would have corroborated the plaintiff, and if he had answered it in the negative the answer would have amounted to nothing, and there was no duty on plaintiff's part to introduce such white woman as a witness. Birmingham R., etc., Co. *v.* Moore, 151 Ala. 327, 43 So. 841.

48. Evidence as to settlement with other persons injured by same accident.—In an action by a passenger for personal injuries caused by a collision, evidence that defendant had settled with another person injured by the same collision is inadmissible. Missouri, etc., R. Co. *v.* Vance (Tex. Civ. App.), 41 S. W. 167.

49. Continued use of facilities.—In an action for damages for injury to the person of a drover traveling on a stock pass, by the negligent act of a railroad company, evidence that the plaintiff had continued since the injury to make contracts for the shipment of stock, and to ride on stock passes in the same manner as at the time of the injury, is inadmissible. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

50. Subsequent repairs, etc.—It has often been held in Texas that measures taken by a railway company, after an accident, by which it has changed the condition existing at the time of the accident, can not be received as implying an admission of negligence. Gulf, etc., R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336; Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608; Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684.

In an action by a mail clerk for injuries received through a collision with a mail post, evidence that after the accident the railway company moved the post further from the track is not admissible. Georgia, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118, reviewing and overruling former decisions upon this question.

The question here raised is treated in the appropriate sections hereinafter considering the particular points in controversy.

issues or is too remote should not be admitted.[51] Nor is evidence as to matters not due to the neglect of the carrier alleged by the plaintiff admissible.[52] The rule is that the theory of the case as made in the pleadings must be adhered to in the admission of evidence.[53] But any evidence which tends to establish the facts constituting the gist of the acton is competent.[54]

§ 3211. Degree of Care.—In all cases where the degree of care for which the carrier is liable is dependent upon the surrounding circumstances, evidence of any facts which tend to show the existing circumstances is relevant as an aid in determining the carrier's liability.[55] Evidence that a railroad company furnished its road, ran its trains, and inspected its trestles in the manner which is generally believed to be safe and prudent should go to the jury with other evidence on the question of due care.[56] And in an action against a logging road for injury to a passenger, evidence of the care customary among well constructed and operated roads of the same class is admissible.[57] But testimony of witnesses as to the comparative equipment of passenger trains of defendant railroad company, used on a branch line, where the injury occurred, and the trains used on the main lines as to being modern, should be excluded as having a tendency to prejudice the jury.[58] And in an action for personal injuries, a

51. Collateral issues involved—Remoteness.—Where plaintiff was injured, while alighting from a crowded street car, by tripping over something on the rear platform, and there was no evidence that she was jostled by any one, evidence that the button on her companion's jacket was torn off by brushing against the passengers as she was alighting just before plaintiff was properly excluded as irrelevant. Jacobs *v.* West End St. R. Co., 59 N. E. 639, 178 Mass. 116.

52. Evidence as to matters not due to carrier's neglect of duty inadmissible.—In an action against a railroad company for injuries caused by the exposure resulting from its failure to open its depot, evidence that plaintiff was insulted while waiting for the depot to be opened is inadmissible. Texas, etc., R Co. *v.* Pierce, 10 Tex. Civ. App. 429, 30 S. W. 1122.

Where it appeared that plaintiff, a passenger, did not tell the railroad company's servants that she was injured, evidence that they did not assist her from the coach was improperly admitted. Chicago, etc., R. Co. *v.* Rowell, 151 S. W. 950, 151 Ky. 313.

53. Theory must be adhered to.—A declaration which alleges that while deceased was "attempting to get off said car, as he was ordered and forced to do by said conductor, he was violently, with great force, struck and knocked off said car" by a building placed close to the tracks on which the train was running, plainly pleads the negligent proximity of the building to the tracks as the proximate cause of the injury, and does not warrant the admission of evidence to support the theory that the deceased was injured in consequence of being pushed off the moving car by one of defendant's servants. Chicago, etc., R. Co. *v.* McDonough, 112 Ill. App. 315.

54. Evidence of conductor's language.—Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. 713.

In an action for injuries to a passenger alleged to have been caused by the lack of proper repairs, the jury, in determining the question of diligence, may consider the condition of the track and rolling stock, the speed at the time and place, and every other fact or circumstance disclosed by the evidence shedding any light on the subject. Wright *v.* Georgia R., etc., Co., 34 Ga. 330.

55. Degree of care.—See Campbell *v.* Duluth, etc., R. Co., 107 Minn. 358, 120 N. W. 375, 22 L. R. A., N. S., 190.

The obligation of a stage proprietor, in regard to carrying passengers safely, has respect to the team, the load, the state of the road, as well as the manner of driving. Therefore, where a declaration in case alleged that it was the duty of the defendant, being a stage proprietor, to use due and proper care in carrying passengers, and that he had not used such care, evidence in reference to each of the above-mentioned points was held admissible. Taylor *v.* Day, 16 Vt. 566.

In suit against railroad for injuries from negligence in permitting a depression on the side of the track, admission of testimony of plaintiff that he had got off at the station where the accident occurred once, but that this was the only time he got off at the landing where the accident occurred, was not error. Central, etc., R. Co. *v.* Brown, 138 Ga. 107, 74 S. E. 839.

56. Evidence as to general belief.—Nickles *v.* Seaboard Air Line Railway, 54 S. E. 255, 74 S. C. 102.

57. Custom among roads.—Campbell *v.* Duluth, etc., R. Co., 120 N. W. 375, 107 Minn. 358, 22 L. R. A., N. S., 190.

58. Comparative equipment of trains.—Atlantic, etc., R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318.

railway company will not be permitted to show that it had furnished its passengers with a more expensive road and equipment than its business would justify.[59]

§ 3212. Facts Constituting Transaction.—Where plaintiff sues a street-railroad company for injuries sustained by being thrown from a car by the conductor, and the complaint alleges that the injuries were caused by the negligence of the defendant, evidence on the part of plaintiff which showed that he had an altercation with the conductor, who willfully pushed plaintiff off the car, is not open to objection, inasmuch as it constitutes the transaction by reason of which plaintiff claims that defendant was guilty of negligence.[60]

Parts of Transaction.—In an action by a passenger against a carrier for injury it seems that any part of the transaction is admissible. The plaintiff has the right to set before the jury the entire transaction wherein the injury was sustained.[61]

§ 3213. Statements and Declarations.—In order for statements and declarations of other passenger to be admissible, except perhaps for the purpose of contradicting them, they must be a part of the res gestæ.[62]

Hearsay.—The declarations of the mother of an injured child passenger immediately after the accident, are mere hearsay and no more binding on the estate of the child than would be declarations of a stranger.[63]

§ 3214. Matter to Show Notice to Carrier.—Notice to a railroad of a defect from which injury to a passenger has resulted is competent and cogent evidence in an action for the injury, irrespective of the source of the notice.[64]

§ 3215. Rules of Carrier.—Where a carrier is sued for injury resulting from the negligent operation of its vehicles, a rule of the carrier directing the method of operation in respect of which the suit is brought is competent evidence,[65] to show either due care or negligence by its employees toward passengers.[66] Thus, it is held that the printed rules of a railroad company as to the movements of trains, "for the government and information of employees only," are admissible, in actions for personal injuries as admissions by the company.[67] But violated rules of a carrier for the regulation of the conduct of employees are not admissible in evidence to show liability for negligence to third persons, who were ignorant thereof, and did not rely thereon.[68]

Passenger Not Relying on Rule.—The rule of a carrier prescribing the duties and powers of its servants are not admissible where it does not appear

59. Value of equipment.—Gulf, etc., R. Co. *v.* Southwick (Tex. Civ. App.), 30 S. W. 592.

60. Facts constituting transaction.—Block *v.* Third Ave. R. Co., 69 N. Y. S. 1107, 60 App. Div. 191.

61. Part of transaction.—Hall *v.* Connecticut River Steamboat Co., 13 Conn. 319.

62. Statements of other passengers.—A card signed by passengers the day after a railroad accident, exonerating the officers of the train from all blame, is not admissible evidence in a suit against the corporation by the widow of a person killed by such accident. Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

63. Hearsay.—Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

64. Matter to show notice to carrier.—Baruth *v.* Poughkeepsie, etc., R. Co., 85 N. Y. S. 822, 89 App. Div. 324.

This question will be taken up and treated in its proper place under the particular sections treating injuries arising from different defects, acts of omission and commission, and assaults and insults by emplyees, etc.

65. Rule regulating operation of vehicle.—Frizzell *v.* Omaha St. R. Co., 124 Fed. 176, 59 C. C. A. 382.

66. To show care of negligence.—Louisville, etc., R. Co. *v.* Dyer, 152 Ky. 264, 153 S. W. 194, 48 L. R. A., N. S., 816.

67. Admissible as admissions.—Lake Shore, etc., R. Co. *v.* Ward, 35 Ill. App. 423, affirmed in 135 Ill. 511, 26 N. E. 520.

68. To show liablity for negligence of third persons.—Hoffman *v.* Cedar Rapids, etc., R. Co. (Iowa), 139 N. W. 165.

that the persons injured knew of the existence of such rule or relied or acted thereon.[69]

Passenger without Knowledge of Rules.—Rules affecting the conduct of passengers are not competent against a passenger in an action for personal injuries, in the absence of evidence of knowledge thereof by him or by the public.[70]

Dependent on Degree of Care Required by Rule.—Where the rules of a carrier for the conduct of trainmen do not require more than the law requires of the carrier, the admission in evidence of the rules is not prejudicial; but, where such rules require more than the law requires, or require the performance of acts which the law does not recognize as a duty imposed on the carrier, they are inadmissible.[71]

Rule Regulating Conduct of Passengers.—In order for a rule regulating the conduct of passengers aboard a vehicle to be admissible, it must be such as to throw light on the issues involved.[72]

Rule Requiring Notice of Accident—Evidence Show No Report.—It has been held that a carrier who maintains a system of reporting by employees of accidents and of claims against it therefor, may show such system and that its employees did not report to it the happening of any accident and that the first notice of the claim was from plaintiff.[73] The lack of such report does not prove the absence of the accident, but it is admissible as tending to contradict the plaintiff's witnesses.[74] The only probative force of lack of report is to excuse the defendant from calling witnesses who might explain the situation or contradict the testimony of those produced by a plaintiff. Never having had any report that an accident has happened, the defendant does not know what driver, or motorman, or conductor to call as a witness; and it can prove the lack of report for the purpose of excusing itself from the imputation of

69. **Passenger not relying on rules.**—Illinois Cent. R. Co. *v.* Downs, 122 Ill. App. 545.

70. **Passenger without knowledge of rule.**—Merrill *v.* Michigan Cent. R. Co., 158 Ill. App. 38.

71. **Dependent on degree of care required.**—Chicago, etc., R. Co. *v.* Lampman, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

Where the court can say as a matter of law that the failure of trainmen to comply with the rules of a carrier for the protection of its passengers is not a violation of any duty imposed by law on the carrier, the rules should be excluded. Chicago, etc., R. Co. *v.* Lampman, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1812C, 788.

Testimony showing rule of law.—Testimony of the driver that the rules of the company required him not to take any passengers when the car became damaged en route shows the rule of law on that subject irrespective of any rule of the company, and is properly admitted. Allen *v.* Dry-Dock, etc., R. Co., 2 N. Y. S. 738, 19 N. Y. St. Rep. 114.

72. **Rule regulating conduct of passengers.**—Where two passengers on defendant's boat engaged in a quarrel over a game of cards, which ultimately resulted in a shooting which injured plaintiff, an innocent third party, evidence that the game was for money, and that gambling was prohibited on the boat by defendant's rules, was not admissible, though the captain may have had knowledge that the rule was being violated, as it could not be said that the shooting was a necessary or probable result of the gambling. Tall *v.* Baltimore Steam Packet Co., 44 Atl. 1007, 90 Md. 248, 47 L. R. A. 120.

73. **Failure of employees to report accident.**—Sturgis *v.* Fifth Ave. Coach Co., 107 N. Y. S. 270, 122 App. Div. 658.

In an action against a street railway company for injuries sustained by a passenger, evidence that one of its rules required a report of the happening of an accident was admissible as supplementing the evidence that the conductor in charge of the car had made no report of the accident, and that none occurred. Field *v.* New York City R. Co., 96 N. Y. S. 457, 109 App. Div. 831.

74. In an action against a street railroad company for injuries to a passenger, received while alighting from a car, evidence by defendant's accident clerk that defendant had received no report of the accident is admissible as tending to show that no such accident occurred, and also to explain why defendant failed to call as witnesses its employees in charge of the car. McArthur *v.* New York City R. Co., 103 N. Y. S. 102, 53 Misc. Rep. 292.

not having called witnesses who might have explained the situation.[75] But other authorities agree that evidence offered by the defendant, to show that no reports of the accident had been made by its employees, and that it had not been able to hear of any one who knew anything about the accident, is inadmissible, when objected to by the plaintiff.[76] Thus, it has been said that such evidence, to show the existence, of a rule requiring reports, will not be allowed when the effect thereof is to afford counsel an opportunity in argument to discredit plaintiff's claim regarding the accident, though it was not attempted to show that no report was made.[77] It is held that evidence of the rules and regulations of the defendant in relation to reports of accidents to be made by conductors and motormen is properly excluded.[78] Where the defendant actually had notice of an accident the day after its occurrence, it is not error to refuse to permit it to show its system of receiving reports from its employees, and the fact that it had received no report of the accident in question.[79]

§ 3216. Habit or Custom.—The admissibility of evidence showing a habit or custom in order to establish or rebut the claim of negligence will be treated in the following appropriate specific sections. A custom may be proven to show a waiver of a stipulation in the contract of carriage.[80]

Negative evidence of a custom or habit as to a certain fact is of little or no probative value and immaterial, where there is positive evidence that such was not the case. Thus, it is held that there is no error in rejecting evidence that it was the custom and habit of the company to have a stool in its proper place up to the time of starting the train when there is positive evidence in behalf of plaintiff that it was out of place when he was injured.[81]

§ 3217. Evidence of Other Accidents, Transactions, etc.—In General.—The general rule is that, when a party is sued for damages arising from a particular act of negligence imputed to him, disconnected, though similar, negligent acts are not inadmissible. It seems that evidence of other accidents or transactions are not relevant to establish the existence of negligence in the particular transaction on which the suit is based,[82] and such evidence can not be admissible for the purpose of establishing willful injury.[83] But a different

75. Sturgis *v.* Fifth Ave. Coach Co., 107 N. Y. 270, 122 App. Div. 658.

76. Evidence of reports held inadmissible.—Guenther *v.* Metropolitan R. Co., 23 App. D. C. 493.

77. Rule requiring report not allowed.—Hardin *v.* Fort Worth, etc., R. Co., 49 Tex. Civ. App. 184, 108 S. W. 490.

78. Rules and regulation as reports of accidents.—Becker *v.* Buffalo, etc., Tract. Co., 52 Pa. Super. Ct. 93.

79. Where defendant has actual notice.—Smith *v.* Chicago City R. Co., 169 Ill. App. 570.

80. In an action for personal injuries received by a shipper while riding in a stock car with a horse shipped by him, evidence of a custom on the part of defendant's conductors in permitting shippers of live stock to ride in the car with the stock is admissible to show a waiver by defendant of a stipulation in the shipment contract requiring plaintiff to ride in the caboose. Missouri, etc., R. Co. *v.* Cook, 12 Tex. Civ. App. 203, 33 S. W. 669.

In an action for injuries while riding on a stock train, defendant pleaded the contract on which plaintiff was shipping his stock, and showed that it stipulated that plaintiff would remain in the caboose while the train was in motion, and that his failure to observe the regulation should be prima facie evidence of negligence on his part. Plaintiff pleaded that defendant through its conductor waived the contract, and had authority to do so. Held, that evidence that it was customary for shippers of stock to ride on the engine was admissible as showing that the conductor had authority to waive the contract. Missouri, etc., R. Co. *v.* Avis, 41 Tex. Civ. App. 72, 91 S. W. 877, judgment affirmed in 93 S. W. 424.

81. Negative evidence.—Atlanta, etc., R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751.

82. Other acts, transactions, etc.—Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

83. Willful injury.—In an action for injuries to a street car passenger, by the sudden starting of the car as he was attempting to board it, evidence of a similar accident to witness on the same evening at about the same place was inadmissible under a count charging a willful injury. Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 Pac. 136.

rule applies when the purpose of the evidence is to establish a previous and continuous defective condition of a thing, and knowledge or notice thereof upon the part of the person sought to be charged,[84] or, perhaps, when its purpose is to charge one with notice of another's incompetency and probably in a few other instances.[85] It is only in a few jurisdictions that the character of a person for negligence or prudence may be used to show that he probably was or was not careful on a given occasion. But the law seems to permit the use of single acts of an employee, etc., for the purpose of establishing notice of incompetency, and this rule does not seem to be inconsistent with that rejecting particular acts as evidence of the objective fact.[86]

Evidence by Comparison.—Evidence is admissible of the rate of speed at which a train was run at the time of the accident by comparison with the speed of trains at other times, as is also evidence of the condition of the track at the time of the accident by comparison with its condition at other times.[87]

Evidence to Rebut Negligence.—Evidence in relation to negligence and improper construction would not be rebutted by proof that such construction had never before happened to result in an accident, nor would evidence as to the want of skill or the negligence of the employee be met by proof that he had never before suffered any disaster. Such evidence would only tend to distract the attention of the jury by raising a multitude of collateral issues having no material bearing on the questions to be decided.[88]

§ 3218. Character of Parties.—The general rule seems to be that it is not competent to give evidence of the general character of the parties to proceedings, much less of particular facts not in issue in the cause, with a view of raising a presumption either favorable to one party or disadvantageous to his antagonist.[89]

§ 3219. Stations and Stopping Places.—Where evidence of a particular fact or condition of things can have no relevant, material bearing on the question of the carrier's liability, it is immaterial and its exclusion is proper.[90] Hence in

84. Other accidents and transactions.—Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 Pac. 136.

In an action by a passenger against a railroad company for injuries caused by the derailment of its train, evidence that the train on which the accident occurred, and of which witness was a conductor, had run off the track seven or eight times within a month before the accident, was admissible. Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15.

In an action to recover for injuries occasioned by the upsetting of the defendant's coach, evidence of former accidents occurring under the same driver is admissible to prove a bad condition of the road, or a want of familiarity with it. Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450.

Where a passenger, in attempting to have her baggage checked in a part of the depot under the control of the railway company, was knocked down by scuffling cabmen who were not servants of the company, evidence of previous similar occurrences, to the annoyance and injury of passengers, was admissible to show the danger to passengers existing at that place, and that servants of the company in charge of the depot had knowledge thereof. Judgment 42 Atl. 486, 62 N. J. L. 7, affirmed in Exton *v.* Central R. Co., 46 Atl. 1099, 63 N. J. L. 356, 56 L. R. A. 508.

85. To show notice of incompetency.—Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 Pac. 136, citing Rio Grande, etc., R. Co. *v.* Campbell, 44 Colo. 1, 96 Pac. 986.

86. Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 Pac. 136.

87. For purposes of comparison.—Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471, 17 Am. Rep. 719.

88. Rebuttal evidence.—Hodges *v.* Bearse, 129 Ill. 87, 21 N. E. 613.

In an action for injuries sustained by the negligence of a street car company in allowing a car to dart down a grade after being uncoupled, evidence that defendant's servants had stopped cars at the same point without accident is inadmissible, since it does not tend to rebut evidence of negligence on the occasion in question. Joliet St. R. Co. *v.* Call, 42 Ill. App. 41.

89. Berger *v.* Chicago, etc., R. Co., 97 Mo. App. 127, 71 S. W. 102; Breen *v.* St. Louis Trans. Co., 102 Mo. App. 479, 77 S. W. 78. See post, "Assaults, Insults, etc., by Servants," § 3231.

90. Irrelevant and immaterial evidence.—On a stormy night plaintiff attempted to board defendant's train, which had

an action against a street car company for injuries to a passenger, resulting from a trench in the street at which a car was negligently stopped, evidence that the trench was not dug by defendant, but by a gas company, is immaterial.[91] Where a carrier holds out a station as a proper place for its passengers to go for the purpose of taking its cars, and the passengers have the right to regard themselves as having come to the station by its invitation, the carrier, though not controlling the station, but using it for his own benefit under an agreement with a lessee thereof, is liable to the passengers for injuries caused by defects in the rules regulating the use of the station, and the details of an agreement with the lessee are inadmissible.[92] And where the question is whether or not defendant was negligent in failing to provide proper platform facilities, whether or not, in determining the plan of operating a street railway, it is proper to consider the desires of the traveling public, where they can be taken into consideration without interfering with safety in the operation of the road, is properly excluded.[93]

Evidence to Establish Degree of Care Required.—Special Circumstances.—Any fact which materially tends to show the existence of special circumstances and notice thereof on the carrier's part is admissible on the question of degree of care required.[94] In an action against a railroad company for injuries received near a station, the facts that defendant advertised an excursion, and that the train was late, and a crowd had assembled at the depot were material on the question of the amount of care and diligence required of defendant.[95]

Evidence as to Accommodations at Other Places.—Where the question is as to the sufficiency of the accommodations provided by a railroad company for passengers alighting from its trains, under usual and ordinary conditions, testimony as to accommodations furnished by the same company for like purposes at other nearby stations is competent.[96] Thus, evidence to show precautions taken at other stations and upon other roads to prevent passengers being forced against and between moving cars is properly admitted.[97] But

stopped with the caboose several rods north of the depot platform and two car lengths north of an uncovered cattle guard, which was constructed across both tracks of the road and between them. Plaintiff asked the night watchman if he would have to walk that far back, and was answered affirmatively. While on his way to the caboose, he met the conductor, who said nothing to him of the danger, and before he reached the caboose he fell into the cattle guard. In an action to recover for his injuries, held, that the question whether the cattle guard was properly situated and constructed was immaterial, as the evidence established negligence independent of that question. Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.

Fact intended to provoke merriment.—In an action for injury sustained by a passenger in attempting to alight from a train, defendant was properly not permitted to ask her as to the height of her shoe heels at the time of injury, where the question was not pertinent and was evidently asked to provoke merriment at her expense. St. Louis, etc., R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644.

91. Evidence as digging of trench.—Walsh *v.* Richmond, etc., R. Co., 108 N. Y. S. 950, 124 App. Div. 533.

92. Details of agreement in lease.—Kuhlen *v.* Boston, etc., R. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A., N. S., 729.

93. Propriety of considering wishes of public.—Beverley *v.* Boston Elev. R. Co., 194 Mass. 450, 80 N. E. 507.

94. Special circumstances.—In an action against a street car company for personal injuries to a passenger by the jostling and turning of the seats by a crowd which rushed onto the car at a public amusement place, where it stopped on the Sunday on which plaintiff was injured, evidence that at about the same hour on Sundays in the amusement season of proceeding years the crowd had customarily rushed upon the cars and jostled passengers, was admissible on the question of the degree of care the company should have exercised to protect passengers in alighting at such place on such occasions. Glennen *v.* Boston Elev. R. Co., 93 N. E. 700, 207 Mass. 497, 32 L. R. A., N. S., 470.

95. Particular facts to show degree of care required.—International, etc., R. Co. *v.* Foster, 63 S. W. 952, 26 Tex. Civ. App. 497.

96. Evidence as to accommodations at other places.—Chesapeake, etc., R. Co. *v.* Barger, 112 Va. 688, 72 S. E. 693.

97. Precautionary measure taken at other points.—Reschke *v.* Syracuse, etc., R. Co., 139 N. Y. S. 555, 155 App. Div. 48.

where the propriety of the arrangement of the tracks, or the construction of the platform, or the practice in discharging passengers under ordinary circumstances is not in issue, the defendant's offer to prove that at other places an arrangement of tracks and the method of drawing up trains for the discharge of passengers are substantially the same as at the place of the accident, is properly rejected.[98] So where a passenger was caught between the car and a railing parallel to the track extending over a viaduct, evidence is not admissible to show how similar viaducts are protected by railings in other cities, as the question in issue is whether the construction and maintenance of this particular railing is negligence, which must be decided from evidence showing its construction.[99] The rule is applicable when a passenger is injured while alighting from a street car at a dangerous place.[1]

Evidence as to Degree of Care Used.—Where it is alleged that an injury resulted from the carrier's failure to use the required amount of care as to its station, stopping place, facilities for boarding, etc., relevant and material facts, such as condition of the premises,[2] the provisions made for passengers in the connections set forth in the pleading,[3] the extent of the defective condition and the amount necessary repairs would have cost,[4] the carrier's permitting the use of or adopting as its own particularly dangerous facilities, and the carrier's notice of the defective and dangerous conditions, are admissible.[5] As the extent of accommodation at a station is dependent upon whether the station is a regular stop or a flag stop, evidence as to the passenger's business handled there is admissible.[6]

To Show Condition of Premises or Facilities.—To be admissible to show the condition of the premises or facilities at the time of the injury, the evidence must be relevant to the case as laid,[7] material in its effect upon the rights of the

98. Under special conditions.—Ranney *v.* St. Johnsbury, etc., R. Co., 67 Vt. 594, 32 Atl. 810.

In an action for injuries to plaintiff, a passenger, while alighting from a car, owing to defendant's alleged negligence in failing to provide plaintiff a safe means to alight, the car steps being alleged to have been at an unsafe distance from the platform, evidence that defendant's platform at the station was a greater distance below the car steps than at other places, and, by reason of that fact, necessarily dangerous, was inadmissible. Louisville, etc., R. Co. *v.* Mount, 101 S. W. 1182, 31 Ky. L. Rep. 210.

99. Particular circumstances.—Joyce *v.* Metropolitan St. R. Co., 118 S. W. 21, 219 Mo. 344.

1. Dangerous stopping place.—In an action by a passenger for injuries sustained while alighting from a street car, which it was alleged was stopped at a dangerous place, evidence that there were a great number of other places in the city just as dangerous, and at which passengers were constantly alighting without injury, was not admissible. Mobile, etc., R. Co. *v.* Walsh, 40 So. 560, 146 Ala. 295.

2. This question is taken up at length in a subsequent paragraph.

3. Provisions made for passengers.—Testimony with reference to a step, placed by a conductor on the wrong side, as alleged, of a railroad train, so as to bring passengers in alighting upon another track, is competent, in an action for the death of one struck by a train on said track, to show what provision had been made for passengers, though deceased was not shown to have been misled into getting off on that side by seeing the step, where he was in fact shown to have gotten off in such a manner as necessarily to have seen it. Lustig *v.* New York, etc., R. Co., 65 Hun 547, 20 N. Y. S. 477, 48 N. Y. St. Rep. 916.

4. Cost of repairs.—In an action against a street railway company for injuries caused by a defect in a car used as a waiting place for passengers, evidence that the defect could have been remedied by the expenditure of $2 was admissible as proving want of care on the part of the company in not making repairs before the accident. Haskell *v.* Manchester St. Railway, 64 Atl. 186, 73 N. H. 587.

5. These questions are treated in subsequent paragraphs.

6. In an action against a railroad company for illness caused by lack of accommodations at a station, evidence that all regular passenger trains except fast trains stopped, that from ten to one hundred passengers used it daily, that hacks attended trains regularly, and that the deed to defendant's predecessor had been drawn to the land for a station, held competent to show whether the station was a regular or only a flag station. Choctaw, etc., R. Co. *v.* Stanford, 106 S. W. 205, 84 Ark. 406.

7. To show condition.—Where, in an action for injuries while alighting, evi-

parties,[8] and not too remote in point of time or use.[9] Where the question is as to the distance from the step of the car to the ground below, a witness can testify as to the existence of a fill at the place of the accident, the evidence tending to show that there is no platform, and to show the distance to the ground;[10] and for the same reasons testimony that there is a ditch at the place of the accident is admissible.[11] Where it is alleged that the distance of the car steps from the platform is unsafe, evidence of plaintiff's witnesses as to their measuring the distance from the car steps to the platform is inadmissible without proof either that the measurement was made on the car from which plaintiff fell, or from others commonly used by defendant, and that defendant's cars are supplied

dence showed that the train's approach to the depot had been properly announced, and the way from the train to the platform was lighted, evidence of the extent of the carrier's freight business, conducted at its freight depot on the other side of the track, and on the side that the passenger attempted to alight, was inadmissible, at least in the absence of evidence that the passenger knew of the existence of the freight depot, or that he had business to transact there. Louisville, etc., R. Co. *v.* Payne, 118 S. W. 352, 133 Ky. 539, 19 Am. & Eng. Ann. Cas. 294.

Condition at other times.—In an action for injuries incurred in alighting from a train at a station at night, under an allegation that the station was not properly lighted at the time, testimony that it was not lighed at times before and after the injury is not competent. Agulino *v.* New York, etc., R. Co., 43 Atl. 63, 21 R. I. 263.

In an action against a railroad company for injuries to a passenger from slipping on a station platform, evidence that shortly after the accident great crowds arrived at and departed from the station without accident was properly excluded. Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

Defendant's depot was surrounded by a platform, with a plank incline at the freight-room door, over which plaintiff passenger fell in the evening, the platform not being lighted, as testified by plaintiff. Held, in an action for the injuries, it was proper to reject evidence to show that the incline, while it had been there for thirty years, had never caused an accident, where the element of darkness was not contained in the evidence, as it did not present substantially the same conditions. Sullivan *v.* Delaware, etc., Canal Co., 47 Atl. 1084, 72 Vt. 353.

Other defects.—Evidence that, some time before plaintiff was injured by falling into a hole in defendant's passenger platform, there were other holes in the platform, to which the attention of defendant's station agent was called, is inadmissible. Louisville, etc., R. Co. *v.* Henry, 44 S. W. 428, 19 Ky. L. Rep. 1783.

8. Evidence immaterial.—In an action for injuries sustained in attempting to alight from a car upon defendant's depot platform, the mere fact that such platform is higher than the one at another station is immaterial, and evidence of such fact is inadmissible. Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44.

9. Evidence too remote.—On an issue whether a platform on which plaintiff slipped while jumping from a moving train was greasy at the time, evidence as to whether there was grease on it five months before was too remote. Newcomb *v.* New York, etc., R. Co., 69 S. W. 348, 169 Mo. 409.

On an issue whether a platform on which plaintiff slipped while jumping from a moving train was greasy at the time, evidence as to whether there was grease on the platform a week afterwards was inadmissible. Newcomb *v.* New York, etc., R. Co., 69 S. W. 348, 169 Mo. 409.

In an action for injuries to a passenger while alighting from defendant's train, evidence of the condition of the pavement where defendant alighted, four or five weeks after the accident, tending to show the existence of lumps of coal and clinkers, should be excluded. Missouri, etc., R. Co. *v.* Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500.

Evidence not too remote.—In an action against a company for injuries received on its station platform, evidence that obstructions were there an hour after the accident was admissible to corroborate evidence that they were there at the time of the accident. New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

Evidence of the existence of a hole in a depot platform ten hours after an accident caused thereby, was properly admitted to prove the condition of the platform at the time of the accident, where limited by the charge of the court to that purpose. Texas Mid. R. Co. *v.* Brown (Tex. Civ. App.), 58 S. W. 44.

10. Distance from step to ground.—International, etc., R. Co. *v.* Clark (Tex. Civ. App.), 71 S. W. 587, judgment reversed in 72 S. W. 584, 96 Tex. 349.

11. Existence of ditch.—International, etc., R. Co. *v.* Clark (Tex. Civ. App.), 71 S. W. 587, judgment reversed in 72 S. W. 584, 96 Tex. 349.

with steps of uniform size and depth.[12] Where a passenger is injured while attempting to alight, resulting from the stool on which he stepped turning over, evidence was admissible which tended to show that the stool was improperly constructed, and as to the frequency with which such stools turned and caused passengers to fall.[13]

Other Accidents and Transactions.—In an action to recover for injuries received by a passenger who fell from a station platform while waiting for a train, evidence that other persons had so fallen from the same platform, and under similar circumstances, was admissible.[14] Where the defendant gives in evidence that he has carried a large number of persons from its station without accident, testimony that others had met with accidents at the same place when attempting to board defendant's train, at a time before the accident to plaintiff, is proper rebuttal.[15]

Explanation of Situation and Surrounding Circumstances.—Where a passenger is injured by being pushed into a pit as she is endeavoring to board a street car at defendant's terminal station, evidence of defendant's superintendent, explaining the arrangements for the transfer of passengers at that point, and describing the necessary steps they are required to take to effect the change, is admissible to explain the situation and to show the volume of travel and the sufficiency of defendant's mode of service adopted for the protection of passengers.[16]

Failure to Use Precautionary Measures—Collateral Matters.—Where the carrier's liability is predicated upon a particular act, alleged to be negligent, evidence of collateral matters which have a relevant and material bearing on the case, such as the failure to take other precautionary measure to avoid injury,[17] is admissible. And any evidence such as a custom of the passengers,

12. Evidence as to measurement of distances.—Louisville, etc., R. Co. *v.* Mount, 101 S. W. 1182, 31 Ky. L. Rep. 210.

13. Condition of stools or boxes for alighting.—Missouri, etc., R. Co. *v.* Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500.

14. Other accidents from same cause.—Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304.

In an action for injuries caused by plaintiff's slipping between the car step and a platform while alighting from a car, evidence that other persons had been injured by slipping or falling between a car step and the same platform is admissible. Judgment in 42 N. Y. S. 1046, 11 App. Div. 141, affirmed in Rogers *v.* New York, etc., Bridge, 54 N. E. 1094, 159 N. Y. 556.

In an action against an elevated railway company for injuries to a passenger, it appeared that plaintiff, on alighting from the car, and while pressed in front and behind by other passengers, stepped into an open space between the car and the station platform. Held, that evidence of similar accidents was admissible to show that the defendant had notice of the dangerous condition of its platform. Brady *v.* Manhattan R. Co., 6 N. Y. S. 533, 25 N. Y. St. Rep. 585, 15 Daly 272, reversed in 127 N. Y. 46, 27 N. E. 368.

In an action for personal injuries sustained on leaving the rear car of a train at a station, evidence that others had previously been directed to take that car, and, in alighting from it as the plaintiff did, had been injured, is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff. Bullard *v.* Boston, etc., Railroad, 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367.

15. Other accidents in rebuttal.—Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290.

In an action for injury to a passenger hurt on the steps of a station platform connecting two levels, the admission of evidence that within a year and a half about a dozen others had slipped off without noticing the steps as did plaintiff, though without being injured, was not error, though it might have been excluded as matter of discretion; such evidence being a direct answer to defendant's claim of freedom from fault because of the platform's long use without accident or inconvenience, and the instances being numerous enough to authorize the conclusion that they were known to defendant's employees. Fisher *v.* Boston, etc., Railroad, 72 Atl. 212, 75 N. H. 184.

16. Explanation of situation, etc.—Kelley *v.* Boston Elev. R. Co., 96 N. E. 1031, 210 Mass. 454.

17. Failure to take precautionary measures.—Evidence that defendant failed to erect a guard rail along a station platform is admissible in an action for negligently overcrowding the platform, so that plaintiff was pushed off. McGearty

which materially tends to show that a failure to take such precautionary steps was negligent, is competent.[18] But where plaintiff's injuries are owing to her having stepped into a hole in the street on alighting from a car the testimony of a witness that conductors on former occasions had warned her to look out for the hole is inadmissible.[19]

Showing Usual Stopping Place.—Where plaintiff's injury was caused by stepping into an uncovered box, set in the ground, on alighting from a train at a station in the darkness, the admission of evidence to show the place where the train usually stopped is not error, where there is also testimony that on the occasion of the injury it stopped at the usual place.[20]

Running Trains or Cars by Stopping Places.—Where the question at issue is the negligent operation of trains or cars along intervening and parallel tracks at stopping places the general rules of relevancy and materiality apply; hence, any fact which materially tends to show or rebut negligence in the operation of the train or car,[21] or in furnishing various other precautionary

v. Manhattan R. Co., 43 N. Y. S. 1086, 15 App. Div. 2.

Where a complaint by a passenger for injuries sustained by falling from a depot platform insufficiently lighted alleged as a ground for recovery that defendant failed to station a guard on the platform to warn passengers of the danger of falling therefrom, testimony of the conductor that he did not station any one on the platform to notify passengers of the danger is relevant. Texas, etc., R. Co. *v.* Taylor (Tex. Civ. App.), 58 S. W. 166, reversed on rehearing 58 S. W. 844.

In an action against a railroad company to recover for injuries caused by plaintiff's attempting to alight from a moving train, which he had taken under directions from an employee of defendant, but which proved to be the wrong train, evidence that the station was without signs to direct passengers to their proper trains is admissible to show negligence on defendant's part. Jones *v.* Baltimore, etc., R. Co., 10 Mackey (21 D. C.) 346.

18. Custom of passengers.—In an action against a street railroad company, by a passenger, to recover damages for injuries received in stepping off a car from its side furthest from a station platform, evidence is admissible on behalf of the plaintiff of a custom of passengers, even though it was unknown to the plaintiff, to get off cars from that side at such station, as tending to show negligence on the part of the defendant in failing to provide means to put an end to the practice, by maintaining a gate or some other effective device. Great Falls, etc., R. Co. *v.* Hill, 34 App. D. C. 304.

19. Evidence of warning by other conductors.—Miller *v.* International R. Co., 102 N. Y. S. 254, 52 Misc. Rep. 344.

In this case the court said: "I think his final ruling was correct, upon authority of the cases of Clark *v.* Manhattan R. Co., 77 App. Div. 284, 79 N. Y. S. 220; Taylor *v.* New York, etc., R. Co., 63 App. Div. 586, 71 N. Y. S. 884; White *v.* Lewiston, etc., R. Co., 94 App. Div. 4, 87 N. Y. S. 901; Goetz *v.* Metropolitan St. R. Co., 54 App. Div. 365, 66 N. Y. S. 666; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751. In the case of Chapman *v.* Erie R. Co., 55 N. Y. 579, relied on by plaintiff's counsel, the conversation testified to and held admissible, for the purpose of establishing notice of the habits of an employee, was had with the division superintendent. Notice to a superintendent is one thing, but notice or knowledge by some conductor other than the one on the car at the time of the accident is quite another thing. I think this distinguishes the case at bar, and that the ruling on the trial court was correct." Miller *v.* International R. Co., 102 N. Y. S. 254, 52 Misc. Rep. 344.

20. Showing usual stopping place.—Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50.

21. Facts tending to show or rebut negligence.—In an action for injuries sustained by one who was about to take passage on a train in being struck by another train running on a track between the depot and the track on which the train stood that he was intending to board, it was competent for him to testify that he knew it was the custom to have the intervening track between the depot and the track upon which the train stood open and free of moving trains while a train was receiving or discharging passengers. Illinois Cent. R. Co. *v.* Proctor, 102 S. W. 826, 31 Ky. L. Rep. 494.

Plaintiff could show that the motorman, after being put upon notice that decedent intended to cross, could have stopped the car in time to have avoided the injury. Canham *v.* Rhode Island Co., 85 Atl. 1050, 35 R. I. 177.

Speed of car.—In an action against a street railway company for injury to an alighting passenger, injured while crossing a track, that the car which struck him was running from six to ten miles an hour and ran two or three car lengths

means,[22] is admissible. But matter which is irrelevant and immaterial and for which no proper foundation is laid should be excluded.[23] Where it is alleged that the carrier negligently ran a freight train by the passenger train, which had stopped at a station to discharge passengers, and the passenger injured testified in support thereof, the rule of the carrier, requiring a train approaching a station where a passenger train is receiving or discharging passengers to stop before reaching the passenger train, is admissible, when accompanied by testimony that the passenger, prior to the accident, knew of the existence of such rule.[24] And the passenger in such a case may disclose the source of his information.[25]

after striking him may be considered on the question of the company's negligence. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

Evidence of rules as to speed.—Evidence as to the company's rules at the time of the accident, as to the proper speed of the car at stations, was admissible on the question of negligence, though not conclusive thereon. Canham *v.* Rhode Island Co., 85 Atl. 1050, 35 R. I. 177.

If plaintiff showed that rules as to the proper speed of cars were in force at the time of the accident in 1907, evidence as to what such rules were, for five years prior to 1905, was admissible. Canham *v.* Rhode Island Co., 85 Atl. 1050, 35 R. I. 177.

In an action for an injury to a passenger caused by his being struck by a car on a parallel track while he was alighting at a crossing, a rule of the company requiring its motormen to slow up when they see that they are about to meet another car at a crossing is admissible, as tending to show whether the company considered a crossing as more or less dangerous to passengers. Atlanta Consol. St. R. Co. *v.* Bates, 30 S. E. 41, 103 Ga. 333.

Rules as to stopping.—In an action against a carrier for personal injuries to a passenger, where the negligence charged is that defendant carelessly and improperly managed its locomotive, and failed to provide suitable platform and railing for the safety of its passengers, a rule of the defendant forbidding trains and engines to pass between a station and a passenger train which is receiving or discharging passengers is admissible in evidence as tending to establish the charge of negligence, though not set out in the declaration. Lake Shore, etc., R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520.

22. In an action for death of plaintiff's intestate by being struck by a street car while intestate was waiting at a station to take a car, evidence of a former motorman as to the distance which the headlight of cars operated on that line cast their rays was not admissible, not relating to the headlight of the car in question. Canham *v.* Rhode Island Co., 85 Atl. 1050, 35 R. I. 177.

In an action by an alighting electric railway passenger struck in the nighttime by an unlighted train running in the opposite direction, it was not error to receive testimony on the commonly known fact that trolley poles frequently become detached, and that lights in cars are thereby extinguished. Washington, etc., R. Co. *v.* Vaughan, 69 S. E. 1035, 111 Va. 785.

In an action by an alighting passenger for injury to one struck in the nighttime by an electric car, involving an issue whether the car was lighted, it was not an abuse of discretion to exclude testimony showing that the lights were burning about fifteen minutes after the accident. Washington, etc., R. Co. *v.* Vaughan, 111 Va. 785, 69 S. E. 1035.

Carrier's rule admissible.—In an action for death of deceased, killed by a train while crossing an intervening track to the depot from a train from which he has just alighted, plaintiff is entitled to introduce a rule of defendant that when a passenger train is at a depot receiving or discharging passengers on double track no other train will attempt to pass till the train at the station has moved on. Baltimore, etc., R. Co. *v.* State, 81 Md. 371, 32 Atl. 201.

23. No foundation laid—Irrelevant.—In an action against a carrier for death caused by being hit by a train approaching on one track, and which the deceased was awaiting, and thrown under the running board of a shifter moving slowly on a parallel track, there being between the tracks but a few feet of planking, upon which passengers were accustomed to wait for trains, the court properly refused to allow a witness to answer the question whether such planking or platform was an unusually unsafe crossing for persons to use and wait upon for north bound trains; such question being clearly improper and irrelevant, because it implied that such planking had been provided by defendant as a place for passengers to wait for northbound trains, for which implication there was no warrant in the evidence. MacFeat *v.* Philadelphia, etc., R. Co. (Del.), 6 Pen. 513, 69 Atl. 744.

24. Rule of carrier.—Yates *v.* Philadelphia, etc., R. Co. (Del.), 7 Pen. 472, 82 Atl. 27.

25. Source of information.—Yates *v.* Philadelphia, etc., R. Co. (Del.), 7 Pen. 472, 82 Atl. 27.

Condition of Vehicle.—Where plaintiff, while waiting for a street car at defendant's street railway station, is run into and injured by a defective car which left the track, evidence that it had left the track on several occasions while being carefully operated, and where the track was in good condition, is proper to show that defendant had knowledge of the defective condition of the car.[26]

To Show Liability for Particular Facilities Used.—As it is the duty of the carrier to provide safe stations, platforms, approaches, etc., any evidence which materially tends to show that it, with a full knowledge of the facts, provided or permitted an unsafe means to be used, is admissible.[27] In an action against a railroad company for injuries received by failure to provide steps to the platform of its station, evidence as to the use of steps at such platform is admissible to show that they were adopted by defendant as a part of its accommodations for the public.[28] Evidence as to the extent of the use of a particular means or the length of time such means had been used is admissible.[29]

To Show Notice of Condition of Premises or Facilities.—In an action for injuries caused by defects in the platform at a railway station, evidence of statements of a member of the railroad commission to an official of the railroad company as to the depot and its platform is admissible to show notice of its condition to the company.[30] Where a passenger is injured by the upsetting of a step box placed on a rough pavement as the means for alighting, he may show that step boxes used at the station had upset on other occasions when passengers stepped on them.[31]

Subsequent Repairs or Changes.—In an action against a street railway company for injury to an alighting passenger, caused by a defective flight of steps near the track, evidence of subsequent repairs of the steps by defendant was admissible on an issue as to whose duty it was to make the repairs, but not on an issue of negligence.[32] And the fact that an elevated railway took steps to prevent a repetition of an accident occasioned by a passenger falling into the space between the car and the platform while attempting to board the car is not evidence of prior negligence.[33]

Abandonment of Original Stopping Place.—The fact that, after the occurrence of an accident at a station the carrier prepared a new stopping place, a short distance from the old, which abandoned, is no admission by the carrier that the place originally provided was unsuitable.[34]

26. Defective condition of car.—East St. Louis, etc., R. Co. *v.* Zink, 82 N. E. 283, 229 Ill. 180.

27. To show that way was used by passengers.—In an action against a railroad company by a passenger injured by defective steps in a depot platform, evidence that passengers from other railroads usually passed over such steps was admissible to show that plaintiff was not endeavoring to reach the cars by an unfrequented way. McDonald *v.* Chicago, etc., R. Co., 29 Iowa 170.

Where a passenger was injured while crossing the tracks to board a departing train, evidence that other passengers customarily took the same route is admissible. Brooks *v.* New York, etc., R. Co. (N. Y.), 21 Wkly. Dig. 464.

28. Use of steps to platform.—Smoak *v.* Savannah, etc., R. Co., 43 S. E. 662, 65 S. C. 299.

29. Evidence as to extent or use of particular means.—Plaintiff, in ascending the platform at defendant's depot, had her foot injured by the falling of a plank on which she was walking. The plank was unfastened, one end resting on the platform and the other on the ground. It had not been placed there by defendant, but a well beaten path led to it, and it had been adopted by both the public and defendant, and no other step was provided. In an action to recover for plaintiff's injuries, held, that evidence as to the length of time the plank had been used by the public was admissible. Collins *v.* Toledo, etc., R. Co., 80 Mich. 390, 45 N. W. 178.

30. To show notice.—Smoak *v.* Savannah, etc., R. Co., 43 S. E. 662, 65 S. C. 299.

31. Upsetting of step boxes.—Missouri, etc., R. Co. *v.* Dunbar, 57 Tex. Civ. App. 411, 122 S. W. 574; S. C., 49 Tex. Civ. App. 12, 108 S. W. 500.

32. Subsequent repairs.—Carleton *v.* Rockland, etc., St. Railway (Me.), 86 Atl. 334.

33. Subsequent changes.—Anshen *v.* Boston Elev. R. Co., 91 N. E. 157, 205 Mass. 32.

34. Abandon of original stopping place.—Galveston, etc., R. Co. *v.* Walker (Tex. Civ. App.), 48 S. W. 767.

Evidence that a new stopping place

§ 3220. Condition of Track or Roadbed.—Where the negligence alleged consists in a defective condition of the carrier's roadbed and track, the evidence to be admissible must be relevant and material to the issue as made. Hence, it is held that evidence that the land along the track where an accident occurred was low and wet is inadmissible to show a defective construction of the roadbed.[35] Evidence as to matters not in issue and for which no proper foundation is laid is incompetent.[36] Where, in an action against a railroad company, the petition alleges that plaintiff's injuries were caused by a defect in defendant's track, plaintiff may show a defect in the track at any place if such defect contributed to the injury.[37] Where the specific negligence is averred, any evidence which tends to prove the existence of the particular negligence[38] or which shows the result of such specifically alleged negligence,[39] is admissible. So where it is claimed that the accident was caused by the breaking of a car wheel by reason of the excessive speed of the train over a rough and uneven track, evidence of the condition of the track for such a distance as the excessive speed was kept up is admissible.[40] And evidence which shows notice on the part of the carrier or its servants is competent.[41]

General Condition of Road.—Where there is evidence tending to show that the accident was caused by a worn out rail or other similar defect, evidence as to the general condition of the track, and that it had been in use a great many years, is admissible as tending to show the cause of the accident, and that defendant had neglected to repair the defect.[42] And such evidence seems

which a carrier provided in place of an old one was imperfectly constructed is inadmissible to show negligence in the construction of the first one. Galveston, etc., R. Co. *v.* Walker (Tex. Civ. App.), 48 S. W. 767.

35. Condition of land along track.—Pattee *v.* Chicago, etc., R. Co., 5 Dak. 267, 38 N. W. 435.

36. Matter not in issue—No foundation.—It is not error to exclude a question whether, if a switch be worn, the flanges of the engine wheels might not throw it open, when there is no evidence that the switch was worn. Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

There being no sufficient evidence that the water came into a car window, injuring a passenger, at W., evidence as to water escaping from a tank at that place is immaterial. Spencer *v.* Chicago, etc., R. Co., 81 N. W. 407, 105 Wis. 311.

37. Any defect contributing to injury.—Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

38. Specific allegations of negligence.—In an action by a passenger against a railroad company for personal injuries alleged to have been caused by defective cattle guards, evidence of their condition is admissible. Galveston, etc., R. Co. *v.* Goodwin (Tex. Civ. App.), 26 S. W. 1007.

39. Result of negligence.—Under a petition for personal injuries by passenger, alleging general dilapidation of track "that straps holding said rails together were loose and not properly bolted," evidence is admissible that as result rails got out of line. Houston, etc., R. Co. *v.* Summers, 92 Tex. 621, 51 S. W. 324, affirming 49 S. W. 1106.

40. Coextensive with allegation.—Jacksonville, etc., R. Co. *v.* Southworth, 32 Ill. App. 307, affirmed in 135 Ill. 250, 25 N. E. 1093.

41. Notice of servants of condition.—In an action for injuries to a passenger by derailment of the train, caused by a washout, evidence of a passenger on the wrecked train that he heard one of the crew of a passing train say to one of the trainmen of the train which was wrecked, "You had better not pull out from El Reno, as I believe you will go into the river," was admissible to show notice to the crew of the wrecked train of the probably dangerous condition of the track, the wreck having occurred in that vicinity. Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682.

42. Evidence of bad condition of road.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 30 L. Ed. 257, 7 S. Ct. 1.

In an action against a railroad company for injuries caused by the derailment of a car, where the evidence tends to show that the derailment was caused by the breaking of a rail, which gave way because of the defective condition of the cross ties under it, and of the rail itself, evidence of the defective condition of other rails and cross ties near by is admissible Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

Where, in an action for injuries to a passenger caused by a broken railroad rail, plaintiff claimed that the track at and near the point of the accident was defective, in that the rails used were too light, evidence of the breaking of rails at other near-by points on the line, where the conditions generally were the same as at the point of the accident, was competent. Judgment 90 N. W. 516, reversed on rehearing in Whittlesey *v.* Burlington,

to be admissible for the purpose of showing notice and knowledge on the part of the company.[43] And the same is of equal application to bridges and trestles along the road.[44] In some cases it is held that where injuries to a passenger result from a railroad accident caused by a broken rail or similar defect in the track, evidence that other parts of the road were in bad condition is inadmissible.[45] Where the injuries to a passenger are caused by a derailment of the train, it is proper to confine the evidence as to the condition of the roadbed to the place and time of the accident; and evidence that accidents had previously occurred on other parts of the road is inadmissible.[46] Thus, it is said that where injuries are sustained by a passenger by a derailment of the train, evidence as to the condition of other portions of the track, remote from the scene of the accident, that could not have contributed in any degree to the injury, is incom-

etc., R. Co., 90 N. W. 516, 97 N. W. 66, 121 Iowa 597.

In an action for injuries to a railroad passenger caused by the running of the cars off the track, evidence that ties were decayed in the vicinity of the accident is admissible, where the condition of the ties at the point where the train left the track can not be ascertained. Murphy *v.* New York Cent. R. Co. (N. Y.), 66 Barb. 125.

In an action against a railroad company to recover for injuries received by reason of defendant's cars running off the track, a witness testified that he had passed over the road two days before plaintiff was injured, and that, at some point on the road between A. and B., which were twenty-five miles apart, he had felt a severe jar, and that on the day of the accident he was in the cars, and predicted that at a point ahead the passengers would feel a severe jar, and that such prediction was verified. Held, that the evidence was admissible, although the point at which the jar occurred was not shown to be the point at which the accident happened. Hedges *v.* Wilmington, etc., R. Co., 73 N. C. 558.

43. Notice of carrier.—In an action for personal injuries occasioned by the overturning of a car, plaintiff's evidence being very strong to show that the condition of the track was bad, the rails being badly worn and ends of sleepers rotten, and that its condition had not materially changed for several months, and defendant's witnesses virtually admitting that the condition of the track was bad, but endeavoring to account for it by the prevalence of bad weather, the admission, for the purpose of showing knowledge on the part of the company, of evidence of the reputation as to condition of the track in the community along the line, and of a letter written to a local treasurer, for the production of which no notice was given, is harmless error. Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

44. Bridges and trestles.—In an action against a railroad for injuries to a passenger caused by the fall of a portion of a bridge with a train passing over it, it appeared that the bridge was one continuous structure of bents and stringers fastened by bolts with nuts, but without longitudinal braces, the entire length being 1,500 feet, of which 600 feet had fallen. Held that, on the issues of defendant's negligence in constructing the bridge and failing to properly repair, and in using it though the materials were worthless and decayed, and to disprove defendant's claim that the wrecked portion had been previously rebuilt, plaintiff might prove defects in the portion still standing, to show that both portions were of the same age, construction, and condition, and in the structure so near the wrecked portion that the defects might have contributed to the accident. Leonard *v.* Southern Pac. Co., 21 Ore. 555, 28 Pac. 887, 15 L. R. A. 221.

45. Injury from broken rail.—Louisville, etc., R. Co. *v.* Fox (Ky.), 11 Bush 495.

In an action to recover damages for injuries to the plaintiff while a passenger upon the defendants' railroad, alleged to have been caused by the defective condition of the track, held that evidence of the condition of the road at a point half a mile from the scene of the injury and other points in the vicinity was inadmissible. Reed *v.* New York Cent. R. Co., 45 N. Y. 574, reversing 56 Barb. 493.

In an action for injuries to a passenger, caused by a broken rail, evidence that witnesses had seen broken rails on other sections of the road was inadmissible to show that the rail was broken before the train went on it. Whittlesey *v.* Burlington, etc., R. Co., 90 N. W. 516, 121 Iowa 597, reversed in 97 N. W. 66.

Where a passenger was injured by reason of a broken rail, evidence that witnesses had seen broken rails lying untouched in position was inadmissible to rebut defendant's testimony that its servants had passed over the track a short time before the wreck, and discovered no broken rails, and that they would have noticed a broken rail had there been one. Whittlesey *v.* Burlington, etc., R. Co., 90 N. W. 516, 121 Iowa 597, reversed in 97 N. W. 66.

46. Limited by time and place.—Hipsley *v.* Kansas, etc., R. Co., 88 Mo. 348.

petent.[47] While other cases say that on the issue of the condition of a railroad track at the spot where an accident occurred, evidence of the condition of the track for a short distance on either side of the spot,[48] or, as some say, in the immediate vicinity of the place,[49] is admissible. Where the injury results from the precipitation of a night train over an embankment at a curve, in which the negligence alleged is a failure to keep the track in suitable repair, evidence that the track, for many miles from the curve, had many decayed ties and battered rails, is properly admitted if guarded with proper instructions as to the remote legal bearing upon the question of gross negligence.[50] Evidence of the condition of the road two or three weeks previous to the accident, together with evidence showing that it continued in such condition up to near the time of the accident, and that, at or near the same point on the road, other accidents had occurred a short time previous, is admissible.[51] But evidence relating to the condition of the track and roadbed, without limit to any particular time or to the exact place of the accident, is incompetent.[52] Where injuries resulted by reason of an alleged defective switch, and there is evidence that the switch was in the same condition at the time it was examined by a witness, eight days after the accident, as it was at the time of the accident, his evidence as to its condition when he examined it is not objectionable as too remote.[53]

Piece of Broken Rail.—Where it is alleged that the train was thrown from the track by a broken rail, pieces of the broken rail, picked up after they had been exposed to the weather for six months after the accident, are not ad-

47. Remote defects.—Louisville, etc., R. Co. *v.* Fox (Ky.), 11 Bush 495.

Defects in the track at other times and places than that where the accident occurred are inadmissible. Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

48. Short distances on either side.—Nashville, etc., R. Co. *v.* Johnson, 83 Tenn. (15 Lea) 677.

Evidence concerning the unsafe condition of the roadbed near as well as at the place of an accident, which resulted from the derailment of a train alleged to have been caused by such defective roadbed, is competent where the evidence is conflicting as to the condition of the road at the point of the accident. Although defective rails or cross ties one hundred feet from the place of the accident could not have caused it, still the evidence concerning the roadbed at such distance to some extent corroborates the statements of one party or the other as to the condition of the road where the derailment occurred. Evidence relating to rotten cross ties within one hundred feet of the place of the derailment was competent in this case; but such evidence relative to the condition of the roadbed at a much greater distance, such as a mile, would be incompetent. Ohio Valley R. Co. *v.* Watson, 93 Ky. 654, 21 S. W. 244, 14 Ky. L. Rep. 611, 19 L. R. A. 310, 40 Am. St. Rep. 211.

In an action for injury received by a passenger on a railroad from a broken rail, evidence of other defects in the road in the vicinity of the accident held admissible to show that the company did not take due care of their road. Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194.

In an action by a railroad passenger for injuries occasioned by the train leaving the track, evidence of the general condition of the road at or near the place of the accident is admissible on an issue whether the track was kept in proper repair. Missouri Pac. R. Co. *v.* Collier, 62 Tex. 318.

49. Immediate vicinity.—In an action against a railroad company for injuries to a passenger claimed to have been caused by the bad condition of defendant's track at the place of the accident, the condition of the roadbed at the place or in the immediate vicinity of the accident may be shown; but evidence as to its condition a mile and a half from the place of the accident is incompetent and inadmissible. Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

50. As bearing on the question of gross negligence.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

51. Time and place of condition.—Union Pac. R. Co. *v.* Hand, 7 Kan. 380.

52. Must be limited to time and place.—Pattee *v.* Chicago, etc., R. Co., 5 Dak. 267, 38 N. W. 435.

In an action against a carrier for injuries to a passenger owing to derailment of the train, evidence as to the condition of the track at the time of the trial, thirteen months after the accident, was incompetent. Cronk *v.* Wabash R. Co., 98 N. W. 884, 123 Iowa 349.

53. Evidence not too remote.—Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126.

missible in evidence, for the purpose of permitting the jurors to draw a conclusion as to the soundness or unsoundness of the rail therefrom.[54]

Other Accidents and Transactions.—Where injuries are received in an accident caused by a broken switch or similar defect, evidence that similar accidents had occurred at the same place, both before and after the time in question, is admissible, when it is shown that at the time such accidents occurred the switch or other facility was in substantially the same condition as respects the particular defects complained of.[55] Some courts hold that for the purpose of showing the defective character of a switch referred to, the plaintiff may show that other engines and cars missed the track at the same point, both before and after the accident complained of. The competency of such evidence under any circumstances is by many courts denied.[56] It has been held that where a passenger was thrown from her seat as the car rounded a curve, and there was evidence that the car was being run in the usual way, a question if similar accidents had occurred at the same place was competent as relating to the structural condition of its road.[57] Such evidence is, of course, not competent for the purpose of showing independent acts of negligence, but in principle it is clearly admissible when it tends to show that the common cause of these accidents was a dangerous or unsafe thing. It would certainly be competent to prove by an expert that at a time either before or after the accident when the instrument claimed to have caused it was in the same condition as when the accident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence, there seems no reason for excluding ordinary experiments, when confined with the same limits and for the same purpose. These effects are in the nature of experiments to show the actual condition of the instrument.[58] Upon an issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue; its only importance is that it bears on the main issue, and, if it does, it is competent.[59] But to render such evidence

54. Pieces of broken rail.—Stewart *v.* Everets, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

55. Other accidents, etc.—Clapp *v.* Minneapolis, etc., R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629.

56. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168; Kelly *v.* Southern, etc., R. Co., 28 Minn. 98, 9 N. W. 588.

In an action against a street railway company for injuries sustained by a passenger by being thrown from his seat in the car owing to a sudden jolting of the car caused by a defective frog in the track, it appearing that for several months the track at that point had been in the same condition as at the time of the accident, it was proper to admit the testimony of witnesses that they had nearly been thrown from the car at that point on previous occasions, and the testimony of a witness that he had seen cars derailed at that point and helped to put them back on the track. Nashville Railroad *v.* Howard, 78 S. W. 1098, 112 Tenn. 107, 64 L. R. A. 137.

In an action for injury to plaintiff, while waiting to board defendant's street car, by the falling of a piece of an electric lamp situate over the street and struck by the trolley slipping from the wire as the car was rounding a curve, evidence that such lamps had previously been broken under like circumstances is relevant and material on the questions of notice and consequent negligence. Nelson *v.* Union R. Co., 58 Atl. 780, 26 R. I. 251.

57. Passengers thrown from car.—Judgment 41 N. Y. S. 931, 10 App. Div. 364, 75 N. Y. St. Rep. 1302, affirmed in Wilder *v.* Metropolitan St. R. Co., 57 N. E. 1128, 161 N. Y. 665.

58. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

59. Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

Evidence of similar accidents resulting from the same cause had often been held competent for the purpose referred to. Kent *v.* Lincoln, 32 Vt. 591; Quinlan *v.* Utica, 11 Hun 217; Willey *v.* Portsmouth, 35 N. H. 303; Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418; Piggott *v.*

competent, it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency whose condition is in issue was in substantially the same condition at such times as it was at the time when the accident complained of occurred.[60]

Reports made by the superintendent of the road to the board of directors in the course of his official duty are competent evidence, as against the corporation, of the condition of the road.[61]

Recommendation of State Railroad Commissioner.—A law which provides that no examination, request, or advice of the board of commissioners shall impair in any manner or degree the legal rights, duties, or liabilities of a railroad corporation, does not operate to render inadmissible, in an action for injuries to a passenger, a communication to an electric railroad from the railroad commissioner, made after inspection about a year before the accident, recommending the adoption of certain safeguards at the place of the accident.[62]

Obstructions.—Where the injury is caused by obstructions on or along the track, either negligently placed there or negligently permitted to remain there, as where a pipe attached to a water tank is permitted to swing out of place over the track,[63] where a cross beam is so placed as to come close to passing cars,[64] or where a gate is permitted to swing too close to the vehicle,[65] any evidence which relevantly and materially tends to support the allegation of negligence is competent.

Parallel Tracks—Cars Passing Each Other.—Where it is alleged that a passenger's injury was due to his being struck by a car or part of the equipment on an adjacent track, a portion of his body being protruded out of a window, any evidence which tends materially to establish negligence in that respect on the part of the carrier, such as evidence whether the surface of the rails and tracks at the point of the injury were even or uneven,[66] the width of space between the tracks, etc.,[67] is admissible.

Eastern Cos. R. Co., 3 C. B. 229; House *v.* Metcalf, 27 Conn. 631; Hill *v.* P. & R. R. Co., 55 Me. 438; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

60. Conditions must be similar.—Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. 358, 11 Am. & Eng. R. Cas. 168.

61 Reports of superintendent to show bad condition of road.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 30 L. Ed. 257, 7 S. Ct. 1.

62. Recommendation of railroad commissioner.—Baruth *v.* Poughkeepsie, etc., R. Co., 85 N. Y. S. 822, 89 App. Div. 324. So held with reference to Railroad Laws, 189, p. 1131, c. 565, § 162 as amended 1892, p. 1416, ch. 676.

63. Plaintiff was traveling on defendant's train in charge of cattle, and, when the train stopped to take water, plaintiff, as was customary, left the caboose to look after the stock. The train started without giving him time to re-enter the caboose, whereupon he climbed to the top of the train, and, while walking to the caboose, was struck by a pipe attached to a water tank. In an action to recover for his injuries, held, that it was not error to permit plaintiff to state the position of the pipe when it struck him, and that it would not have struck him had it been placed in its usual position when not used to conduct water. Missouri Pac. R. Co. *v.* Callahan (Tex.), 12 S. W. 833.

64. Brass beam.—In an action for injuries to a street car passenger struck by a cross beam near the track on a curve, evidence that one track at that place was higher than the other causing a car passing the beam, in rapid motion, to lurch, throwing the car near to the beam, was admissible on the question of the company's negligence. Gardner *v.* Metropolitan St. R. Co., 122 S. W. 1068, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166.

65. Gate too close vehicle.—While plaintiff's son was leaning out of a window, he was struck by an open gate on a stock shed near defendant's track. One of defendant's employees testified that he had closed the gate, and thought that he had fastened it, and that just before the train came he saw some small boys near the track, and then noticed that the gate was open. Held, that such evidence was admissible to show the previous condition of the gate. Gulf, etc., R. Co. *v.* Phillips, 74 S. W. 793, 32 Tex. Civ. App. 238.

66. Condition of adjacent tracks.—Gage *v.* St. Louis Trans. Co., 211 Mo. 139, 109 S. W. 13.

67. Space between tracks.—Where the width of the space between defendant's tracks at the place of the injury has been shown in a personal injury action against

Intersecting Tracks.—Where, in an action for injuries to a passenger in a collision between his train and a freight train on another road at a grade crossing, the evidence showed that the signal at the crossing was set at safety for the passenger train, evidence of the use at grade crossings of interlocking signals and switches so arranged that the signal, when set against a train, opened a switch and either derailed or side-tracked the train before it could reach the crossing, and that the carrier was negligent because it did not employ such device at the crossing, was inadmissible.[68]

Subsequent Repairs.—Evidence of subsequent repairs and alterations is competent to show the carrier's control over the place of the accident.[69]

§ 3221. Condition of Vehicle and Appliances.—Where the question in issue is the negligence of the carrier in failing to keep his vehicle in good condition, furnishing improved appliances, etc., only relevant and material facts should be admitted in evidence.[70] Evidence descriptive of the condition in which the vehicle was run is competent and properly admitted.[71] And it is held that testimony that other persons had previously ridden on the seat on which plaintiff was sitting is admissible for the purpose of showing that plaintiff was on a seat provided for passengers.[72] Where the specific negligence is alleged, evidence which tends to materially support the allegation is compe-

an electric railway company, evidence offered on behalf of the plaintiff, that beyond the place of the injury the width between the tracks was the same, is irrelevant. Chapman *v.* Capital Tract. Co., 37 App. D. C. 470.

68. Intersecting tracks.—Gorman *v.* New York, etc., R. Co., 194 N. Y. 488, 87 N. E. 682, reversing 106 N. Y. S. 1127, 122 App. Div. 896.

69. Subsequent repairs.—Tipton *v.* Topeka R. Co., 89 Kan. 451, 132 Pac. 189.

70. Testimony held relevant.—In an action by a passenger for personal injuries from the cars running off the track, evidence is admissible to prove the insufficiency of the car bell rope, and that the conductor's attention had been called to the fact of its having been hit by sacks thrown by other servants of the company. Mobile, etc., R. Co. *v.* Ashcraft, 49 Ala. 305.

A passenger on a street car, while passing along the outside running board, was injured by being struck by a passing car. In an action for the injury, he offered to show that the car which struck him was one of several new ones, which were of greater width than the other cars. Held, that it was proper to exclude evidence that a rail was used on the inside of new cars purchased by defendant; the fact that it was on the new cars, and not on the old ones, being no proof of negligence. Moody *v.* Springfield St. R. Co., 65 N. E. 29, 182 Mass. 158.

In an action against a railroad company for damages from a collision, caused, as alleged, "by the negligence of the defendant and its servants," it is not error to allow the plaintiff to testify as to the construction of the cars, to show how the accident occurred. Lakin *v.* Oregon Pac. R. Co., 15 Ore. 220, 15 Pac. 641.

Failure to use spark arrester.—A passenger injured by a live spark coming through the car window may show that a proper spark arrester would prevent the throwing of live sparks. Schlag *v.* Chicago, etc., R. Co., 139 N. W. 756, 152 Wis. 165.

Rule applied to elevators.—In an action to recover for personal injuries received while in defendant's elevator, where the only question of negligence upon which plaintiff was entitled to recover was defendant's negligence in the operation, and failure to have the most improved safety appliances, or to keep them in good working order, evidence as to the carrying power of the car was properly excluded. Judgment 70 Ill. App. 166, affirmed in Hartford Deposit Co. *v.* Sollitt, 50 N. E. 178, 172 Ill. 222, 64 Am. St. Rep. 35.

Facts held irrelevant.—In an action against a street railway, where plaintiff claims that a passenger was injured by his fingers having been bruised in the slot used for opening the door of the car, there was nothing to show that the injury to his hand was caused by any difficulty in opening the door. Held, that testimony of a witness as to whether he had observed any difficulty in opening the door in that car, or one like it, was incompetent. Williams *v.* Citizens' Elect. St. R. Co., 68 N. E. 840, 184 Mass. 437.

71. Descriptive of situation.—Evidence as to the absence of a conductor and existence of steps in front, the broken door being in the rear, is descriptive of the situation under which the car was run, and properly admitted. Allen *v.* Dry-Dock, etc., R. Co., 2 N. Y. S. 738, 19 N. Y. St. Rep. 114.

72. To establish rights of passengers.—Fitch *v.* Mason City, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

tent.[73] Thus where it is averred as grounds of negligence that a wheel was unsound and by reason thereof broke and caused the derailment, and that the car was run at an excessive speed which contributed to the derailment, it is proper to admit evidence that one of the wheels bumped along on the rail on which it ran, and that there was a bumping motion in the car.[74] And the defendant carrier may introduce, in rebuttal of an allegation of negligence, relevant and material facts which tend to show the degree of care it has exercised in that respect.[75] Thus, where injury to a passenger is caused by the fall of an elevator, defendant can show by the engineer in charge of the building whether he made an inspection of the elevator appliances immediately after the accident, disclosing the cause of the action of the elevator.[76] But testimony which has no tendency to show an absence of negligence in permitting the situation to arise where the accident happened, is incompetent.[77]

73. Where specific negligence alleged.—Evidence is admissible in an action against a street railway company by a passenger injured by catching her foot in a ring on the floor of the car that the ring was standing erect immediately after the accident, and, on being pushed down, would rise and remain upright on the starting of the car, as such evidence tends to show that the ring was in such condition and operated in such manner when the car left the barn, some time before, which would charge the company with notice of the defect, or show negligence on the part of the conductor in failing to discover its condition. Kingman *v.* Lynn, etc., R. Co., 64 N. E. 79, 181 Mass. 387.

In an action for injury, the question, "How long, how wide, and how thick is a sack of guano?" is relevant and admissible, where the answer tends to show that a car containing the fertilizer was too heavily loaded, which was one of the grounds of negligence imputed to defendant. Kansas, etc., R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, 24 Am. St. Rep. 753.

In a passenger's action for injuries by falling by her dress catching on a sandplunger in the vestibule, which projected above the floor, evidence that the motorman pressed the sandplunger into place immediately after the accident held properly admitted. Martin *v.* Old Colony St. R. Co., 98 N. E. 579, 211 Mass. 535.

74. Evidence as to condition of wheel.—Cleveland, etc., Tract. Co. *v.* Ward, 27 O. C. C. 761.

75. Rebut evidence.—On the trial of an action by a passenger against the proprietors of a steamboat, for an injury sustained by the fall of a small boat, which was hung over the deck, and fell by the breaking of a bolt, which the plaintiff contended that the defendants negligently provided of insufficient strength, held, that the defendants might show what instructions they gave the builder concerning the construction of the small boat, relative to the strength of the bolt. Simmons *v.* New Bedford, etc., Steamboat Co., 100 Mass. 34.

In an action for injuries to a passenger in an elevator, where defendant proved that the brake rod was broken and that that was the cause of the fall of the elevator, and that sufficient inspection had been used by it, and plaintiff introduced evidence that screws of the safety device were rusty and interfered with the operation thereof, the exclusion of evidence that the screws were not rusty was erroneous, though defendant's witnesses had stated on cross-examination that the screws were not rusty. Keller *v.* Wove Realty Co., 112 N. Y. S. 538, 128 App. Div. 154; Diepenbrock *v.* Wove Realty Co., 112 N. Y. S. 539, 128 App. Div. 888.

76. Immediate inspection to determine cause of injury.—Cohen *v.* Farmers' Loan, etc., Co., 127 N. Y. S. 561, 70 Misc. Rep. 548.

77. Evidence incompetent to rebut negligence.—Where it was not claimed that defendant's claim agent had ever seen an accident, his information being derived entirely from reports made to him by other people not under oath, evidence in an action for injuries to a passenger by his feet becoming entangled in the end of a trolley rope as he was endeavoring to alight, that he had been claim agent for defendant for a long period of time prior to the trial, that all reports of accidents had been made to him; that he investigated them, and that in his experience as claim agent he had never received any report nor had any claim ever been filed on account of injury sustained by a person becoming entangled in the trolley ropes until the accident in question, was incompetent, even though it was not hearsay. Denver City Tramway Co. *v.* Hills, 50 Colo. 328, 116 Pac. 125, 36 L. R. A., N. S., 213.

Facts immaterial as constituting no defense.—Where the injury is alleged to have been caused by cars jerking on the grip iron on a grip car becoming caught, the carrier can not show that it had employees who had particular duties to perform, it being permitted to prove everything that was in fact done by any employee in the way of inspection, superintendence, and care of the track and appliances, as no matter how many

As to Guage of Wheels.—Where it is alleged that the injury was caused by the derailment of cars, evidence that defendant used car wheels of too narrow a gauge for the track, and therefore likely to be battered by defective rails, is admissible in proof of gross negligence.[78]

Failure to Use Proper Precaution.—As it is the duty of a street railway to prevent children from getting on or off the front platform, or from riding in a place of much danger, if negligence is not imputable to it as a matter of law, because it does not enclose the front platform with a screen or fender, the fact that it is not so enclosed is a matter proper to be considered, in connection with the other facts of the case, in determining whether, or not, it is guilty of negligence in allowing the front door to remain open, when the car is filled with passengers, some of whom are children, unattended by their parents or guardians, and who, from their youth and inexperience, may not know there is greater danger in getting off the front, than there is in getting off the rear platform.[79] And where injury results to a passenger by other passengers pushing him from the running board at a junction point, evidence that passengers could have been restrained by putting up bars on the cars and the erection of a fence is admissible.[80] And where the failure to have a chain properly fastened across the open space on the platform is alleged to have resulted in the injury, a rule of the carrier requiring platform chains to be kept hooked up at all times, constituting a means relied on to show negligence, is properly received in evidence, where the circumstances shown indicate that it might become material.[81]

To Show Condition of Vehicle—Nature of Defect.—In order to show the condition of the vehicle and its fitness for use, evidence as to its condition over a continuous period of time from the accident seems to be competent.[82] And it has been held that under the rule that, when a condition is once shown to exist, it will be presumed to continue until the contrary appears, evidence in an action against a street railroad for injury to a passenger alighting from a car as to the condition of the step of the car and the grating at the back of the step seven months prior to the accident is admissible.[83] But where a passenger, by mistake, boarded the wrong train, and was injured by jumping from it while in motion, evidence as to whether there were signs or placards on the car five months previous is too remote to afford a basis for an inference as to the condition at the time of the accident.[84]

Subsequent to Accident.—Where the injury is alleged to have resulted from a defective car step, evidence of the condition of the step at times after the date of the accident is immaterial, in the absence of proof that it was in the same condition as when the accident occurred.[85] And where it is claimed that the

employees the company had, or what their duties were, it would be liable to the passenger for their neglect of such duties, and since duties unperformed would constitute no defense. Wyckoff *v.* Chicago City R. Co., 85 N. E. 237, 234 Ill. 613, affirming judgment 136 Ill. App. 342.

78. As to guage of wheels.—Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

79. Philadelphia City Pass. R. Co. *v.* Hassard, 75 Pa. 367.

80. Failure to use bars to prevent injury.—Coy *v.* Boston Elev. R. Co., 212 Mass. 307, 98 N. E. 1041.

81. Violation of rule.—Crowley *v.* Boston Elev. R. Co., 90 N. E. 532, 204 Mass. 241.

82. Condition over continuous period.—In an action for injuries to a passenger in an elevator, through the falling thereof, evidence relating to the condition of the elevator as far back as two years prior to the injury and on down to within a few days thereof, and tending to show that the elevator would not run properly that the cable was rusty and rotten, that bolts were loose, that the guide shoes were constantly getting out of place, and that the rod governing the safety appliances was so bent they would not properly perform their functions, was admissible. Orcutt *v.* Century Bldg. Co., 112 S. W. 532, 214 Mo. 35.

83. Condition of vehicle prior to accident—Presumption basis of admission.—Corcoran *v.* Albuquerque Tract. Co., 103 Pac. 645, 15 N. Mex. 9.

84. Evidence too remote.—Newcomb *v.* New York, etc., R. Co., 69 S. W. 348, 169 Mo. 409.

85. Subsequent to accident.—Walling *v.* Trinity, etc., R. Co., 48 Tex. Civ. App. 35, 106 S. W. 417.

injury resulted from slipping on ice and snow in the vestibule of a car, evidence that snow and ice was in the vestibule on the car making its subsequent trip in charge of the same crew is admissible only to show the climate conditions and that snow was tracked that day and was congealing.[86]

Prior Accidents.—Evidence that other accidents were caused by the same defect is competent.[87]

Evidence to Show Vicious Propensities of Horse Attached to Stage Coach.—In an action for an injury sustained owing to the misbehavior of a horse attached to a stage coach in which the plaintiff was riding, evidence having been given that a horse had been restive and unmanageable at a time before the accident, evidence of the habits of the horse subsequent to the accident are also admissible.[88] And where injuries are alleged to have resulted from the negligence of the carrier in failing to furnish a suitable team, testimony as to the general reputation of one of the horses, among defendant's drivers and employees, for being unsafe, is admissible as tending to show the negligence of defendant in using him.[89]

To Show Notice of Defect.—Where an injury is sustained by one riding in a passenger elevator in consequence of the fall of the elevator, a letter written by the agent of the nonresident owner to the owner prior to the accident, stating that the elevator was out of order, and that a third person had stated that the whole machine ought to be built over before it would work right, is admissible as showing that the owner had notice of defects therein.[90] And where the injury results from the defective condition of a street car, a conversation between a motorman and a supervisor of the company in which the supervisor made remarks tending to show that the car in question which caused the injury was out of repair is competent on the question of negligence.[91] Where a personal injury is alleged to have been caused by the defective condition of a passenger elevator in defendant's building, which caused it to rise or fall suddenly and prevented its proper control by the operator, if there is evidence tending to show that such effect would follow leaking valves, and that the valves were found leaking immediately after the accident, evidence is admissible to show that sudden movements of the elevator, similar to that at the time of plaintiff's injury, had previously been observed by others in order to show knowledge of the defect on the part of the owners.[92]

Comparative Evidence.—In an action by a passenger on a steamboat for injuries caused by the negligence of the employees in allowing a bale of cotton to fall on him while standing near the foot of a stairway, evidence as to how the stairway compared with stairways in other boats was inadmissible.[93]

Evidence of Recurring Accidents.—A street car company, using electricity, is bound to employ the best mechanical contrivances and inventions; and

86. Ice and snow on subsequent trip.—Dorrance *v.* Michigan United R. Co., 175 Mich. 198, 141 N. W. 697.

87. Prior accidents.—When plaintiff was leaving the street car in the usual manner, her dress caught in the sheet iron covering of the car wheels, which had been unscrewed, and was projecting above the floor, throwing her forward to the ground. In an action to recover for her injuries, evidence of previous accidents occurring from the same cause was properly admitted to show the character of the defect. Chase *v.* Jamestown St. R. Co., 60 Hun 582, 15 N. Y. S. 35, 38 N. Y. St. Rep. 954.

88. To show vicious propensities of horse attached to stage coach.—Kennon *v.* Gilmer, 131 U. S. 22, 33 L. Ed. 110, 9 S. Ct. 696.

89. General reputation of horse.—Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

90. To show notice.—Ferguson *v.* Truax, 132 Wis. 478, 110 N. W. 395, 14 L. R. A., N. S., 350, 13 Am. & Eng. Ann. Cas. 1092, rehearing granted in 111 N. W. 657, and judgment reversed in 112 N. W. 513.

91. Remark previously made by supervisor.—Healy *v.* Chicago City R. Co., 160 Ill. App. 7.

92. Prior conduct of elevator.—Oregon Co. *v.* Roe, 176 Fed. 715, 100 C. C. A. 269.

93. Comparative evidence.—Memphis, etc., Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71.

evidence that a particular trolley wire has been the subject of frequently recurring accidents is admissible, as showing that the company had notice of its unsafe condition.[94] Where injury is caused by the cars becoming uncoupled because of defective couplings, it appearing that the couplings used were the same as those used at a time when a witness was employed by defendant, it is proper to permit him to be asked how often in his experience couplings had become uncoupled or broken loose.[95]

Failure to Use Known Devices.—Where the omission to provide a safety device is charged as negligence, it is proper to admit evidence to show that this improvement had been extensively known and used prior to the time the accident occurred, and also to show its utility as a safeguard against accidents.[96] And where the issue is whether the space between passenger cars on a train was negligently left uncovered, evidence as to whether any cars had been constructed within the last five years with platforms like those on the car in question is admissible.[97]

Subsequent Inventions.—Evidence that, after an injury to a passenger, a skillful mechanic connected with defendant's road devised a patent to prevent similar accidents, is immaterial, unless by reasonable diligence defendant could have discovered the new device before the injury.[98]

Subsequent Changes.—Where it is claimed that the acts of horses, drawing a street car, caused the accident sued for, evidence that the company, after the accident, separated the horses, is incompetent for the purpose of raising a presumption that they were vicious, and that proper care had not been taken in their selection.[99]

§§ 3222-3223. Receiving and Discharging Passengers—§ 3222. In General.—Where the passenger sues for injury received while boarding or alighting from the carrier's vehicle, evidence which can have no material bearing on the issues involved should be excluded.[1] Testimony is inadmissible as primary evidence which tends to raise a collateral and immaterial issue.[2] Thus,

94. Recurring accidents.—Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388.

95. Prior similar accidents.—Birmingham R., etc., Co. *v.* Bynum, 36 So. 736, 139 Ala. 389.

96. Failure to use known devices.—Hegeman *v.* Western R. Corp. (N. Y.), 16 Barb. 353, affirmed in 13 N. Y. 9, 64 Am. Dec. 517.

97. To rebut negligent failure to adopt device.—Central, etc., R. Co. *v.* Storrs, 169 Ala. 361, 53 So. 746.

98. Subsequent inventions.—Carter *v.* Kansas City Cable R. Co., 42 Fed. 37.

99. Subsequent changes.—Noble *v.* St. Joseph, etc., R. Co., 57 N. W. 126, 98 Mich. 249.

1. Evidence must be material.—Where, in an action for injuries sustained by a street car passenger while attempting to alight, there was evidence that after the passenger was thrown off her balance she held to a stanchion and was dragged some distance, the testimony that, in response to call by passengers to ring the bell, some one answered that it was no use to ring the bell, as the car would not stop unless the conductor rang it, was immaterial. Boone *v.* Oakland Trans. Co., 73 Pac. 243, 139 Cal. 490.

Testimony of the conductor of a train on which a passenger was injured that he thought a passenger had alighted is immaterial; it appearing that he would not have done differently if he had known he was aboard, and that the accident occurred through failure of the engineer to obey signals. Rehearing, 69 Pac. 440, denied in Simmons *v.* Oregon R., etc., Co., 69 Pac. 1022, 41 Ore. 151.

Announcement of station.—Where in an action for injuries to a passenger while attempting to alight from a train at a station, plaintiff testified that she was acquainted with the station, and knew when the train stopped there, and that she at once left her seat to alight, evidence of the failure of the trainmen to announce the station on the arrival of the train, and of the rule of the carrier requiring such announcement, was immaterial. Chicago, etc., R. Co. *v.* Lampman, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

2. Raising collateral and immaterial issues.—In an action for injuries to a passenger while attempting to board a street car, the refusal to let him testify that his boy knew he had fallen was not erroneous. Birmingham R., etc., Co. *v.* Selhorst, 165 Ala. 475, 51 So. 568.

In a suit for personal injuries sustained while alighting from a train, evidence

in an action against a street car company to recover compensatory damages for personal injuries alleged to have been caused by the sudden starting of the car while plaintiff was alighting, evidence as to what occurred when plaintiff got on the car, tending to prove malice on the part of defendant's driver, is not admissible.[3] And it is inadmissible as impeaching evidence, where the matter sought to be contradicted, is immaterial matter drawn out on cross-examination.[4] Evidence which is relevant and material to rebut other testimony admitted by the adverse party should be admitted.[5] And, as in other cases, any evidence which tends in a material degree to assist in the proper determination of the issues involved should be admitted.[6] So where the question arises as to whether or not the passenger's injury was caused by the movement of the train, if the evidentiary fact offered prevents a reasonable inference in support of the issue it should be admitted.[7] In an action for injuries received while entering a street car, plaintiff may testify that the driver suddenly started the car when she attempted to leave it, as bearing on the competency of the driver.[8] On the

that at the preceding station plaintiff got off the train, and remained out till it started, and then boarded it while moving, is immaterial and inadmissible. Lake Erie, etc., R. Co. *v.* Morain, 36 Ill. App. 632, affirmed in 140 Ill. 117, 29 N. E. 869.

In an action against a railway company for negligent injury to an alighting passenger, the company can not show that some of the passenger's party alighted without accident. Merryman *v.* Chicago, etc., R. Co., 113 N. W. 357, 135 Iowa 591.

Prior injury.—In an action against a railway company for the death of a passenger, killed while alighting from a train, plaintiff could not show whether decedent was "disabled in the war." Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210.

Collateral issues.—In an action for injuries while alighting, by the sudden starting of the train, evidence of negligent failure to properly light the depot was inadmissible. Louisville, etc., R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352, 19 Am. & Eng. Ann. Cas. 294.

In an action against a carrier for personal injuries by a fall in alighting from a train, admitting evidence to sustain the allegation of the complaint that plaintiff, while trying to keep from falling, "was laughed at by other passengers," is reversible error. Campbell *v.* Alston (Tex. Civ. App.), 23 S. W. 33.

In an action against a railroad company to recover for injury to plaintiff's wife, caused by the conductor's want of proper care in putting her off a train which she had taken by mistake, evidence tending to show that such mistake was due to defendant's failure to provide signs or call trains was irrelevant. Gary *v.* Gulf, etc., R. Co., 42 S. W. 576, 17 Tex. Civ. App. 129.

3. Evidence as to malice.—Grisim *v.* Milwaukee City R. Co., 84 Wis. 19, 54 N. W. 104.

4. As impeaching evidence.—Lake Erie, etc., R. Co. *v.* Morain, 140 Ill. 117, 29 N. E. 869.

5. Rebuttal testimony.—In an action by a passenger against a horse car company for personal injuries received while alighting from defendant's car while it was passing over a curve, evidence as to the rate of speed at which defendant's cars were driven around curves is admissible in rebuttal of the testimony of defendant's witnesses that its cars never passed around curves in the manner testified to by plaintiff. Saffer *v.* Dry Dock, etc., R. Co., 53 Hun 629, 5 N. Y. S. 700, 24 N. Y. St. Rep. 210, 2 Silvernail 343.

6. Relevant and material evidence.—In an action against a railway company for the death of a passenger, killed while alighting from a train at his station, plaintiff could show how long decedent had lived near the station, as tending to show whether he was familiar with the place where he attempted to alight and whether he was negligent in attempting to alight. Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210.

In an action for injuries in boarding a train, evidence held to show that one who announced that everybody wanting to board the train must hurry was an employee of the carrier, so that evidence of the announcement was admissible as of an act of an agent. Texas Cent. R. Co. *v.* Wheeler, 52 Tex. Civ. App. 603, 116 S. W. 83.

7. Injury from movement of train.—In an action for injuries to a passenger from a sudden movement of the train, where a witness had testified that all the passengers had left the car save himself and plaintiff at the time of the violent movement of the train, his testimony was properly admitted that before he got out of the coach he saw two men picking up an old lady from the ground just outside of the coach and near the steps. Kansas, etc., R. Co *v.* Young, 50 Tex. Civ. App. 610, 111 S. W. 764.

8. Evidence as to competency of driver.—Fuller *v.* Jamestown St. R. Co., 75 Hun 273, 26 N. Y. S. 1078, 58 N. Y. St. Rep. 206.

issue of willfulness or wantonness in the injury to plaintiff by the starting of defendant's street car, where the evidence tended to show that as plaintiff was in the act of boarding the car, the motorman saw or could with diligence have seen him and that the motorman was notified of plaintiff's physical infirmity and his consequent slowness of gait, and was requested by plaintiff's son not to start the car till plaintiff got on, testimony of the motorman that it was the motorman's duty to see that every one ready to get on the car got on before he started was admissible.[9]

Inferences from Facts.—A witnesses' inferences from facts are immaterial and should not be admitted.[10]

Surrounding Circumstances.—It is competent for a passenger suing for an injury received in boarding or alighting from a vehicle to testify as to matters tending to show the circumstances attending the accident.[11]

Public Rules as to Alighting, etc.—In an action against a street railway company for injuries, a witness should be allowed to testify as to a public rule to ring the bell to stop the car at crossings, at the time plaintiff was injured.[12]

Conduct, Usage, or Manner of Operation.—The rule seems to be that when evidence of conduct, usage, or manner of operation is offered for the purpose of throwing light on the particular transaction, the circumstances must be shown to be identical or so nearly so as to require a similar course of conduct in both cases.[13]

Boarding or Alighting from Moving Car.—In actions for injuries in attempting to board or alight from a moving vehicle, the evidence to be admissible must be relevant and material to the issues involved.[14] Any fact which ma-

9. Issue of willfulness.—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 79, 45 So. 292, citing Montgomery, etc., R. Co. *v.* Stewart, 91 Ala. 421, 8 So. 708.

10. Inferences from fact.—In an action by a street car passenger thrown from the car step, while preparing to alight on the near side of a cross street, by a sudden increase of speed, the car having slowed up for the crossing, the question to a witness, "What do you say as to where you expected the car would stop?" was properly excluded; the witness' inference from the facts being immaterial. Stevens *v.* Boston Elev. R. Co., 85 N. E. 571, 199 Mass. 471.

11. Surrounding circumstances.—As circumstances under which the accident happened to plaintiff, she may testify that, in going out of the car, the people ahead of her got off the east side thereof, that her little boy came out of the car with her, and that her two other boys were near when she alighted, in doing which she was injured. Werner *v.* Chicago, etc., R. Co., 81 N. W. 416, 105 Wis. 300.

12. Public rules as to ringing bell, etc.—McDonald *v.* Montgomery St. Railway, 110 Ala. 161, 20 So. 317.

13. Conduct, usage, or manner of operation.—Buck *v.* Manhattan R. Co., 10 N. Y. S. 107, 32 N. Y. St. Rep. 51, 15 Daly 550; Fillo *v.* Jones, 2 Abb. Dec. 121, 43 N. Y. 328; Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101.

In an action against an elevated railroad company for injuries to a passenger, who, while leaving the car, was thrown down by other passengers entering, where the evidence showed that only plaintiff and one other passenger alighted at the station where the accident occurred, and that only three passengers attempted to get aboard, evidence that on other occasions, on different trains, at other stations, plaintiff had heard the guards warn persons not to enter the train until the outgoing passengers had alighted, was properly excluded, in the absence of proof that the situation was identical with the circumstances in the case at bar. Buck *v.* Manhattan R. Co., 10 N. Y. S. 107, 32 N. Y. St. Rep. 51, 15 Daly 550.

Custom as signalling car to start or stop.—Evidence tending to show a habit of passengers on defendant's road to give the signals for stopping and starting cars was competent, because defendant had reasonable cause to know anything that was habitually and openly done on its cars, and the evidence bore directly on the question of defendant's due care in permitting, or failing to guard against, such acts. Nichols *v.* Lynn, etc., R. Co., 47 N. E. 427, 168 Mass. 528.

14. Relevant and material to issues.—In an action for injuries alleged to have been caused while attempting to board a moving street car, the speed of which had been reduced in response to plaintiff's signal, and then, before plaintiff could get aboard, suddenly increased, it is not proper for defendant, the gist of the action not being an injury caused by fault of plaintiff, to interrogate witnesses as to whether the place was a safe one to board a moving car, or how they would have done under the circumstances had

terially tends to show that the carrier's duly authorized agent invited the passenger to board the moving car or knew of his intention to do so is admissible.[15] Evidence is admissible to show that at the place where the plaintiff ran along the train as it was moving and tried to get on the car, passengers frequently did so and that the carrier's employees received passengers in that way and encouraged the practice.[16] The plaintiff in such case would not be entitled to prove the mere fact that other persons boarded defendant's cars while in motion, for the purpose of establishing a standard of care, regardless of whether such persons were reasonably prudent or negligent in so doing.[17] It is not competent to show, as an excuse for an act of negligence, that others are accustomed to be equally negligent. But evidence which tends to prove notice to the defendant of such practice and that it induced rather than discouraged or prohibited such practice is admissible for the purpose of establishing the defendant's duty to run its vehicles with reference to the practice and consistently therewith.[18] In an action for injuries to a street car passenger while attempting to board a street car, plaintiff having shown that the motorman asked him to board the car while it was moving, testimony of a third person that as the car was coming to a stop he boarded it, but that before others could do so it started with a jerk, is admissible to corroborate plaintiff's theory.[19]

Issue as to Stopping of Vehicle.—Where defendant denies that the car stopped, claiming that it had only slackened speed before crossing an intersecting track and was proceeding to the "far" crossing in accordance with its rules when plaintiff endeavored to alight, certain city ordinances requiring that, at all points where street railway tracks intersect or cross each other, the car should be stopped immediately before crossing the same so as to avoid danger or collision, and should be stopped to take or discharge passengers on the "far" side of the intersecting streets are admissible.[20]

Usual Stopping Place.—Where the issue in an action for injuries received

they wanted to board the car, although such questions are not materially prejudicial. Woo Dan *v.* Seattle Elect. R., etc., Co., 5 Wash. 466, 32 Pac. 103.

15. Invitation or knowledge of agent.—In a passenger's action for injuries sustained in attempting to board a moving train, evidence of a previous conversation on board the train with the conductor, in which the passenger was told to have his baggage rechecked himself, that the station where the accident occurred would be the proper place to do it, and that the train would stop a sufficient time therefor, is admissible. Chicago, etc., R. Co. *v.* Gore, 66 N. E. 1063, 202 Ill. 188, 95 Am. St. Rep. 224.

The passenger's evidence that, as he attempted to remount the car steps, a voice, coming from a place where a moment before he had left the conductor alone, cried, "Hurry up! Get on there!" with the testimony of another witness that it was the conductor who spoke, is admissible. Chicago, etc., R. Co. *v.* Gore, 66 N. E. 1063, 202 Ill. 188, 95 Am. St. Rep. 224.

A passenger's evidence that a brakeman stationed at the car steps told her she would have time to buy a ticket, and that on her returning he told her to board the already moving train, is admissible in the passenger's action for injuries; it being shown that the conductor awaited the brakeman's signal before directing the train to start. Chicago, etc., R. Co. *v.* Flaherty, 66 N. E. 1083, 202 Ill. 151.

16. Custom of passengers.—North Chicago, etc., R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849.

17. Inadmissible to establish standard of care.—North Chicago, etc., R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849.

18. To prove notice and duty.—Plaintiff was a passenger entitled to the degree of care due from the defendant to a passenger, and if the defendant knew that persons would probably be getting on the moving trains at that place and consented to the practice, the law imposed upon it the duty to not expose the plaintiff to unnecessary danger in adopting the practice and to manage the train accordingly. Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713; Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131. The defendant might have had the effect of the evidence properly limited when it was admitted, or by instruction, but as it was competent for one purpose it was not error to admit it. North Chicago, etc., R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849.

19. Corroborating testimony.—Fults *v.* Metropolitan St. R. Co. (Mo. App.), 148 S. W. 210.

20. Ordinance requiring stop.—Grady *v.* St. Louis Trans. Co., 169 Fed. 400, 94 C. C. A. 622.

from falling over an embankment in attempting to alight from a train is whether the train was stopped at the usual place, evidence is admissible to prove the usual stopping place of similar trains at the station.[21]

Evidence Whether Car Stopped at Place Claimed.—Where plaintiff claims that the car was stopped when he attempted to board it, while defendant claims that he attempted to board the car while in motion, evidence that prior to the day of the accident defendant had adopted a rule requiring all cars to stop at the point in question, and that they did in fact so stop is admissible.[22] And evidence of defendant's rules requiring cars to stop at another point is admissible to corroborate the operator's testimony that the car did not stop at the point claimed.[23] And evidence of the carrier's custom at that point is admissible.[24] But the fact that another car stopped at that point a year after the accident is too remote.[25]

Establishment of Stopping Places.—Where, in an action for injuries to a passenger while attempting to alight from a street car, the testimony as to the cause of the accident was conflicting, evidence that defendant had established stopping places at the time of the accident, and the relations of such fact to defendant's rules as to stopping and starting of cars for passengers to alight, was admissible.[26]

Alighting at Other than Usual Place.—Where a passenger is injured in alighting a short distance from the station, evidence of a custom of alighting at such place with the consent of the carrier, is admissible.[27] Where the evidence shows that the conductor and brakeman by their acts led plaintiff to believe she had reached the station, and made no attempt to prevent her alighting, though they saw her passing out of the car apparently for the purpose of alighting, evidence on plaintiff's behalf of a rule of the carrier requiring conductors to prevent passengers from endangering themselves by imprudent exposure is competent.[28]

Misleading or Implied Invitation.—Upon the question of whether or not the carrier misled the passenger to board or alight at the improper time and

21. Usual stopping place.—McGee *v.* Missouri Pac. R. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706.

Where it is contended, that plaintiff was injured while alighting from the train before it reached its usual stopping place, and while in motion, the plaintiff denying such contention may show what had been the stopping place at that station. Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289.

22. Rule as to stopping car.—Nassau Elect. R. Co. *v.* Corliss, 126 Fed. 355, 61 C. C. A. 257.

23. Evidence as to whether car stopped at point claimed.—Moffitt *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16.

24. Custom.—On an issue that one of defendant's street cars did not stop at the point where plaintiff claimed it did, and where he attempted to board it, evidence that it was the uniform custom of defendant's operatives to stop their cars on the opposite side of the street was admissible. Moffitt *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16.

25. Too remote.—Moffitt *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16.

26. Establishment of stopping places.—Moore *v.* Woonsocket St. R. Co., 63 Atl. 313, 27 R. I. 450, 114 Am. St. Rep. 59.

Where, in an action for injuries to a passenger while attempting to alight from a street car, defendant introduced a plan showing the street where the accident occurred, with its intersecting streets, track, location of "white poles," and various distances between "white poles," it was error for the court to exclude a question as to whether the defendant had any established stopping places on that street, for the purpose of explaining the meaning of the "white poles" already shown to exist. Moore *v.* Woonsocket St. R. Co., 63 Atl. 313, 27 R. I. 450, 114 Am. St. Rep. 59.

27. Evidence of custom.—Pickett *v.* Central, etc., R. Co., 74 S. E. 1027, 138 Ga. 177, Ann. Cas. 1913C, 1380.

Custom of alighting at place other than depot.—In an action for injuries in alighting from a train, evidence to show a custom—known and consented to by the company—of passengers to alight at places other than the depot is admissible. Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713.

28. Evidence of rule as to preventing passengers exposing themselves.—Southern Kansas R. Co. *v.* Pavey, 48 Kan. 452, 29 Pac. 593.

place, the evidence must be relevant and material to be admissible.[29] Any evidence which tends to show that the name of the station or direction to change cars had or had not been announced or that any other act so calculated to mislead the passenger had been done, is competent,[30] and any evidence which tends to rebut or contradict evidence admitted to establish such issues is competent.[31] Evidence of a custom of defendant not to stop on other occasions is not admissible, on the theory that it shows an implied invitation to the passenger to board the car while in motion, where such passenger does not claim that he knew of such custom or that he found the car moving when he stepped upon it.[32] When the train stopped at a switch before reaching the station, if the carrier shows that it was the custom to let passengers know on coming out of a station what the next station would be, and that the next time, according to

29. Must be relevant and material.—The defendant's train, upon which the plaintiff was a passenger, ran a short distance beyond the station where she was to alight, stopped for a moment, and then backed to the station. As soon as the train stopped, the plaintiff who supposed it was at the station, without the knowledge of any one in charge of the train, left the car by the rear door, and was on the steps getting off when, by a sudden jerk of the train, she was thrown off and injured. It was very dark, and there was no station platform or light where the plaintiff attempted to leave the car. The name of the station had not been announced, no notice had been given to alight, and there was no brakeman at the end of the car where the plaintiff attempted to get off. Held, that the plaintiff could not testify that she understood trains stopped at the station but a short time, and that the station agent's wife had told her so. Taber *v.* Delaware, etc., R. Co., 4 Hun 765.

30. To show announcement of station, etc.—Testimony of a brakeman that he did not hear an authorized announcement of the station accompanied by a direction to "change" for another station is competent as bearing upon the question whether it was his duty to warn passengers who appeared to be about to leave the train that it had not stopped to allow them to alight. Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff while alighting from a train, it appeared that the train had arrived within the station, but not at that portion of it where passengers were expected to leave the train. The stop was made, not to deliver passengers, but to allow another train to deliver its passengers. The plaintiff's evidence tended to show that three passengers preceded him and had alighted, and that while the train remained stationary he had one foot off the lower step, when the train started without warning and threw him upon the platform. The defendant's evidence tended to show that the train stopped from thirty seconds to a minute, and that it was again in motion when the plaintiff was on the second step from the top, the car having four steps, and that the train continued in motion while he descended the remaining steps and stepped from the train. The plaintiff offered evidence to show that, when the train reached the station and before it stopped, the words: "Lynn, change for Boston"—were called by some one so as to be audible to the passengers, and in the manner in which stations are usually announced. The evidence was excluded because it did not appear that the call was made by any person employed by the defendant. Held that, whether the announcement was made by a railroad man or by another person, it was competent both upon the question whether the plaintiff's conduct was careful, and upon the question whether the defendant's servants used due care to prevent him from alighting at a time when the train was not stopped to deliver passengers. Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797.

Though the only negligence averred was the statement of the conductor that the train was at a station, relying on which plaintiff attempted to alight and was injured, the train being in fact over a trestle, the fact that the conductor was in the caboose, and might have seen plaintiff attempting to alight, was admissible, as an attending circumstance characterizing such statement as negligence. International, etc., R. Co. *v.* Downing, 41 S. W. 190, 16 Tex. Civ. App. 643.

In an action for injuries to a passenger who alighted from a moving train in the belief that it had arrived at his destination, plaintiff should have been allowed to testify as to whether the action of the brakeman in making room for plaintiff, and stating to others that plaintiff wanted to get off, had anything to do with his getting off. Long *v.* Red River, etc., R. Co. (Tex. Civ. App.), 85 S. W. 1048.

31. Rebuttal.—Floytrup *v.* Boston, etc., Railroad, 163 Mass. 152, 39 N. E. 797.

32. Evidence as to custom.—Greer *v.* Union St. R. Co., 193 Mass. 246, 79 N. E. 267.

custom the passenger's destination was announced, was after the train had passed the switch, evidence that it was the custom of the carrier to call such station before reaching the switch is admissible in rebuttal.[33]

Stopping of Train and Calling of Station.—Where a passenger on a train which stopped before it reached his station, the name of the station having been called out, got off and was killed by a train going in the opposite direction, evidence by passengers on the same train but in different cars from deceased, that the train stopped before it reached the station and the name of the station was called, and that people then went towards the car door, is admissible as part of the occurrence, and to show that the train had stopped when deceased got off.[34]

Crowded Condition of Car.—In an action against a street-railway company for personal injuries by the sudden starting of a car when plaintiff was alighting, evidence of the crowded condition of the car at the time was admissible.[35] But where it appears that plaintiff was a car length from the platform where other witnesses alighted, evidence as to the condition of the platform as to being crowded where such witnesses alighted is inadmissible.[36] And evidence that a passenger, hesitating to board a crowded car, was forced upon the rear platform by defendant's employee is inadmissible in action for injuries received in alighting at an alleged dangerous platform.[37]

Negligence Preventing Passenger Entering Car.—Where a passenger was injured while attempting to enter a railway train after a signal had been given to start it, evidence that the car doors were locked until just before starting was admissible as bearing on the question of due care on the part of the passenger in not attempting to enter the train sooner, and also on defendant's negligence in not having the door opened sooner.[38]

Assistance of Passengers.—In an action for injuries to a passenger while alighting from a train at a station, if it is not alleged or proved that the passenger required assistance to alight, or that she knew of the rules of the carrier requiring trainmen to assist passengers in alighting and relied on their observance, the rules were inadmissible.[39] Where the issue involved is whether or not the carrier's servants were negligent in failing to assist a passenger in alighting, only relevant and material matters should be admitted. Thus, where it appeared that the car was not an open one with several seats, proof that it would be impossible, when running an open car with several seats, to help all the female passengers off when they were all attempting to alight at once, was properly excluded, as not bearing on the question of negligence.[40]

§ 3223. Time to Board or Alight—Sudden Starting.—Where the issue is whether the carrier's vehicle stopped a sufficient length of time for the passenger to board or alight, any fact which is relevant and material, upon the question of whether or not the carrier exercised the degree of care required of him by law,[41] should be admitted. Thus, the passenger should be permitted to

33. Misleading invitation.—Kansas, etc., R. Co. *v.* Belknap, 80 Ark. 587, 98 S. W. 366.

34. To show stopping of train and calling station.—Merrill *v.* Eastern R. Co., 139 Mass. 252, 29 N. E. 666.

35. Crowded condition of car.—Metropolitan R Co. *v.* Jones, 1 App. D. C. 269.

36. Crowded condition of other portions of trains.—Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

37. Crowded condition must be material.—Seale *v.* Boston Elev. R. Co., 214 Mass. 59, 100 N. E. 1020.

38. Negligence preventing passenger entering car.—Dawson *v.* Boston, etc., R. Co., 156 Mass. 127, 30 N. E. 466.

39. Admissibility of carrier's rules.—Chicago, etc., R. Co. *v.* Lampman, 104 Pac. 533, 18 Wyo. 106, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

40. Evidence relating to different kinds of cars.—San Antonio Tract. Co. *v.* Flory, 45 Tex. Civ. App. 233, 100 S. W. 200.

41. To show degree of care.—Where defendant claimed that plaintiff endeavored to alight at the "near" side of the street before the stopping place had been reached as the car slowed down before crossing intersecting tracks, evidence of defendant's rules regulating the crossing of other car lines at street intersections was admissible as some evidence of reasonable care on defendant's part in the

testify that the doors to the coaches were closed and that he had to walk through several coaches before he could alight.[42] And it is said that facts showing the surrounding circumstances are admissible, but not as a basis for recovery.[43] But irrevelant and immaterial facts should be excluded.[44] Thus, it is said that whether a witness knows from experience the usual length of time a passenger train stops at a station is incompetent.[45] The carrier's custom in such instances is immaterial.[46] Where it is shown that the car came to a full stop at the

operation of its cars. Grady *v.* St. Louis Trans. Co., 169 Fed. 400, 94 C. C. A. 622.

Evidence of particular acts of the defendant at the time at which it was alleged that the plaintiff sustained injuries by reason of defendant's failure to allow him sufficient time to alight from a train is admissible, when such evidence tends to illustrate the manner in which the plaintiff claimed he was injured, although a statement of these facts is not set out in detail in the petition. Central, etc., R. Co. *v.* McKinney, 116 Ga. 13, 42 S. E. 229.

Time to procure ticket.—Where a passenger who had not procured a ticket sues for injuries sustained in attempting to board a moving train, he may state, in an action for his injuries, that, if the agent had been in the office when he applied for a ticket, he would have had time to catch the train before it moved, as bearing on the question whether he was denied an opportunity of getting a ticket. Judgment 57 S. W. 291, reversed in Mills *v.* Missouri, etc., R. Co., 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

42. Doors of coach closed.—Where plaintiff alleged that his wife, a passenger, on the arrival defendant railroad's train at the station, arose and proceeded promptly to endeavor to alight, but before she could do so the train proceeded, that the train did not stop a reasonably sufficient length of time to allow her to alight therefrom, etc., and she had to walk through a number of coaches before she could reach a point where she could alight, the wife was properly admitted to testify that the platforms of several coaches from which she attempted to alight were closed. Freeman *v.* Puckett, 56 Tex. Civ. App. 126, 120 S. W. 514.

43. Surrounding circumstances.—In an action by a passenger against a railroad company for injuries sustained because of the sudden backing of the train just as she was alighting, testimony is admissible to show that there were no trainmen at the depot platform assisting passengers in alighting; not as a basis for recovery, but as showing the surrounding circumstances. Sherwood *v.* Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101.

Showing train behind time.—One of the questions in issue being as to how long a train stopped at a given station, plaintiff contending that the stop was not sufficiently long to allow him time to alight safely from the train, and defendant insisting to the contrary, evidence that the train was behind time was admissible as tending to show the existence of a reason for making only a short stop, and therefore as supporting plaintiff's contention. Killian *v.* Georgia R., etc., Co., 25 S. E. 384, 97 Ga. 727.

44. Irrelevant and immaterial matter.—Where, in an action for injuries sustained in alighting from a train, it appeared that plaintiff was a car length from the platform where another witness alighted, evidence as to the manner in which witness alighted, and that the porter of the train helped and lifted her off while the train was in motion, was inadmissible. Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

Where, in an action against a street railway company, the negligence alleged was in starting the car with a jerk as plaintiff was getting on, and then suddenly stopping, it was error to permit the conductor to be asked on cross-examination how fast they ran when approaching the crossing. Birmingham R., etc., Co. *v.* Ellard, 33 So. 276, 135 Ala. 433.

In an action for injuries to a passenger by the starting of a car while she was alighting, evidence by the motorman that he opened the gate involuntarily, without intending to invite any one as a passenger, the car being disabled, was properly excluded. Ahern *v.* Minneapolis St. R. Co., 113 N. W. 1019, 102 Minn. 435.

Length of car.—A question, in an action for injuries to a street car passenger while alighting, whether the witness knew of the length of the eleven-seated cars and had measured their length, was properly excluded, where it did not appear that the car upon which plaintiff was riding had been measured by the witness, nor that the eleven-seated cars in use at the time of trial were of the same length as that on which plaintiff was riding, especially where plaintiff could have obtained the length of that particular car. Marsh *v.* Rhode Island Co., 86 Atl. 724, 35 R. I. 270.

45. Witness' knowledge as to usual length of stops.—Nichols *v.* Dubuque, etc., R. Co., 68 Iowa 732, 28 N. W. 44.

46. Custom immaterial.—In an action against a railway company for the death of a passenger, killed while alighting from a train at his destination, plaintiff could not show how long the train customarily stopped, since, if it stopped sufficiently long to enable plaintiff in his known con-

time and place of the injury to receive passengers, evidence of a custom of defendant not to stop on other occasions has no bearing on the issue of whether or not the car started suddenly at the particular time under inquiry, and is inadmissible.[47] But it is said that evidence of the usual and customary period of the cars stopping at the place in question is relevant, for the purpose of showing what the defendants had considered a reasonable time to be allowed the passengers to leave at that station; and, if the time allowed for that purpose was shorter than the usual and customary time, it would tend somewhat to show that a reasonable time was not allowed. The evidence, though probably not very important, is proper.[48] Where an alighting passenger is injured by a sudden jerk or by the starting of the vehicle, the fact that it had been jerked violently at other stations is incompetent.[49]

Notice of Intention to Alight.—As it is necessary for the carrier to have notice, express or implied, of the passenger's intention and endeavor to alight, evidence relevant to the question should be admitted. Of course, relevant and material evidence is admissible to show express notice to the carrier.[50] The plaintiff may show a custom for passengers to get off at the point where the plaintiff endeavored to alight at the time of the injury. Or he may show that the carrier's vehicles customarily stopped at that point.[51] In some cases the

dition to alight, any custom was immaterial. Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210.

In an action for injuries, sustained in attempting to board a street car, evidence by the conductor, as to the "usual time" that cars stopped to discharge and receive passengers, was properly excluded. Peterson *v.* Metropolitan St. R. Co., 111 S. W. 37, 211 Mo. 498.

47. Custom as to stopping.—Greer *v.* Union St. R. Co., 79 N. E. 267, 193 Mass. 246.

48. Custom or usage as to time of stop.—Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

Where the plaintiffs, on the trial of an action for a personal injury, claimed that the injury alleged resulted from the cars not stopping at the station in question a reasonable time for the passengers to leave, which was controverted by the defendants, and the plaintiffs offered evidence to show the usual and customary period of the cars stopping at that place, it was held that such evidence was admissible. Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

49. Jerks at other stations.—In an action against a railroad to recover for death of plaintiff's intestate, alleged to have been caused by a sudden jerk of the train after stopping at a station to permit passengers to change cars, throwing plaintiff, who had started to go out, from the car, evidence that the train was jerked violently at other stations was inadmissible, since it had no tendency to show that the train was suddenly started at the time of the accident. Clark *v.* Smith, 47 Atl. 391, 72 Vt. 138.

Sudden starting at other times.—In an action against a railroad company for injuries sustained by a passenger by the starting of the train while alighting therefrom, evidence that on another occasion the train started while another passenger was attempting to alight is irrelevant, and it can not be assumed that its admission was harmless. Gulf, etc., R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96.

50. Express notice.—In an action for injuries to a passenger of a street car while she was attempting to alight, evidence that she asked the conductor to let her off at the place where she started to alight, and that he promised to do so, was admissible. Judgment 109 Ill. App. 637, affirmed in Chicago City R. Co. *v.* Bundy, 71 N. E. 28, 210 Ill. 39.

51. Custom of stopping—Practice among passengers.—Where the plaintiff alleges that her car stopped at a place where it was customary to stop to let off passengers and that as she was attempting to alight the car suddenly started, whereby she was injured, it is proper to permit a witness to testify that cars usually stopped there to let off passengers. Birmingham R., etc., Co. *v.* Taylor, 152 Ala. 105, 14 So. 580.

In an action against a street railroad for negligently causing the death of a passenger, evidence that the place where the injury occurred was one which had, by the custom of the railroad, become a stopping place for receiving and discharging passengers, was competent. Birmingham R., etc., Co. *v.* Enslen, 39 So. 74, 144 Ala. 343.

In an action by a passenger for injuries received in alighting from a street car, testimony that on the street where the injury occurred there was a place where street cars stopped at the crossing was admissible. Savannah Elect. Co. *v.* McElvey, 55 S. E. 192, 126 Ga. 491.

It is competent, in connection with a charge of negligence, to establish a custom of the defendant traction company to

passengers injured must have had knowledge of the custom or practice.[52] Under appropriate circumstances, the passenger's habit or custom in alighting at a particular place may be shown.[53] And where, in an action for injuries to a street car passenger while attempting to board a car at a point other than that marked for the stopping of cars, whether the car in fact stopped to permit plaintiff to get aboard is disputed, evidence that defendant's cars stop at points on the line other than the place indicated by the sign is admissible.[54] But evidence concerning the propriety and necessity of stopping defendant's cars at regular stopping places indicated by signs is inadmissible.[55] And any other fact which can have no material tendency to show whether the place of inquiry was a stopping place should be excluded.[56]

Rules of Carrier.—Where the plaintiff was injured by the sudden starting of the car while he was attempting to board or alight, evidence of a rule of the company having no relation to the question involved,[57] or it not appearing that the person injured was aware of the regulation,[58] should be excluded. But

stop its cars at a particular crossing at the near side of the street rather than at the far side, which is the general rule. Chicago City R. Co. *v.* Lowitz, 119 Ill. App. 360, judgment affirmed in 75 N. E. 755, 218 Ill. 24.

In an action for injuries sustained by a passenger on a street car by being thrown to the ground by the sudden starting of a car as he was alighting therefrom, testimony of a common practice among passengers to get off cars at that place was competent. Chicago City R. Co. *v.* Lowitz, 75 N. E. 755, 218 Ill. 24, affirming judgment 119 Ill. App. 360.

In an action for injuries, sustained by being thrown from a street car which, it was alleged, was started before plaintiff had alighted, evidence that defendant was accustomed to stop at that particular place to receive and discharge passengers is admissible. Redin *v.* Alton, etc., Tract. Co., 173 Ill. App. 491.

In an action for injuries to a street car passenger by failure to give her sufficient time to alight, in which plaintiff claimed that it was usual for passengers to alight at the point at which she got off, evidence was admissible to show that it was usual for passengers to board and alight from cars at a point just across a railroad track from the point where plaintiff alighted as well as at that place, as tending to show knowledge by defendant's employees of the custom to get off where plaintiff did. Central Kentucky Tract. Co. *v.* Chapman (Ky.), 124 S. W. 830.

52. Passenger must have knowledge.—In an action against a railroad to recover for the death of plaintiff's husband while alighting from the train of defendant, an offer to show that the railroad company was accustomed to stop its train at the place of the accident, which was not a station for general railroad purposes, and that when trains so stopped passengers frequently got off and on, is inadmissible, where there is no offer to show that deceased had knowledge of such custom. Margo *v.* Pennsylvania R. Co., 62 Atl. 1079, 213 Pa. 463.

53. Habit or custom.—In an action against a street railway company for injuries, where the plaintiff testified that his place of business was in the middle of the block below the crossing where he attempted to get off, and that the motorman saw him arise from his seat, and go to the door to get off at the crossing, it was competent to show by the motorman that the plaintiff was in the habit of riding to the middle of the block before getting off, and had several times requested the motorman to slow down, and let him off there. McDonald *v.* Montgomery St. Railway, 110 Ala. 161, 20 So. 317.

54. To show custom of stopping at other places.—Lexington R. Co. *v.* Herring, 96 S. W. 558, 29 Ky. L. Rep. 794, rehearing denied in 97 S. W. 1127, 30 Ky. L. Rep. 269.

55. Necessity, etc., of stopping at regular places.—Lexington R. Co. *v.* Herring, 96 S. W. 558, 29 Ky. L. Rep. 794, rehearing denied in 97 S. W. 1127, 30 Ky. L. Rep. 269.

56. Fact held immaterial and irrelevant.—In an action for the death of a person attempting to board a street car, evidence that the place where he attempted to board the car was one where people were passing and repassing generally was not relevant to the issue whether it was one of the stopping places of the company's cars. Smith *v.* Birmingham R., etc., Co., 41 So. 307, 147 Ala. 702.

57. Rule irrelevant to issue.—Deutschmann *v.* Third Ave. R. Co., 79 N. Y. S. 1043, 78 App. Div. 413.

58. Plaintiff not aware of rule.—In an action against a street car company for personal injuries from the starting of a car as plaintiff was getting off, in which defendant claimed that plaintiff attempted to get off the car before it reached its regular stopping place at a corner, evidence of a regulation of defendant company requiring motormen to stop at a certain schoolhouse located near the corner, at

where a passenger is injured while alighting from a car during a stop at a railroad crossing, rules of defendant requiring cars to be stopped at a certain distance from railroad crossing, giving the motorman charge of the car while the conductor goes ahead to the crossing, and forbidding the motorman to start the car without seeing that no person is getting on or off, are admissible on the issue of defendant's negligence in starting the car.[59]

To Show Length of Time of Stop.—Where, in an action for injuries sustained in alighting from a train, it is alleged that defendant failed to allow plaintiff a reasonable time in which to alight from the train after reaching the station, evidence tending to show, the length of time the train stopped[60] or to show the existence of a reason or motive for making a short stop,[61] is competent. Testimony of another passenger as to what he had time to do immediately upon his getting off the train and before regaining the same, which was then moving off, is competent on the issue as to how long the train stopped.[62] And evidence by other passengers, who did not see the accident, that they were also passengers and attempted to alight at the same point, but that the car started before they could alight is admissible.[63] But matter which is immaterial to the question, such as the details of conversation between third persons, is incompetent.[64]

§ 3224. Carriage beyond Destination.—In an action against a railroad for carrying a passenger past his destination, whereby he was required to alight some distance from the station and was injured or made sick, evidence as to the conditions surrounding the place where he alighted,[65] as to the condition of the weather, as to mental and physical pain, and as to resulting sickness or injury,[66] is admissible. In an action against a carrier for failure to stop at a flag station for plaintiff to alight, evidence at to the condition of the ground between the place where plaintiff alighted and her home to which she was compelled to walk was admissible to show probable result of having to get off where she did and walk to her home.[67] But irrelevant facts which have no bearing on

which plaintiff desired to get off, was not admissible to show a reason for stopping before reaching the corner, it not appearing that plaintiff was aware of the regulation or of any custom to stop at that place. United R., etc., Co. *v.* Hertel, 55 Atl. 428, 97 Md. 382.

59. Rules as to stopping or starting.—Chicago City R. Co. *v.* Lowitz, 75 N. E. 755, 218 Ill. 24, affirming judgment 119 Ill. App. 360.

60. Evidence as to length of stop.—Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

In an action for injuries received while alighting from defendant's train, negligence of defendant's employees was alleged, in that they did not stop the train long enough for the passengers to alight safely. Held, that evidence as to the length of time the train stopped, and the average length of time for stops at such stations, was competent. Chesapeake, etc., R. Co. *v.* Reeves, 11 Ky. L. Rep. 14, 11 S. W. 464.

In an action against a carrier for personal injuries from its negligence in not stopping its train long enough for plaintiff to get on board, evidence of the length of the stop was admissible. Indianapolis, etc., R. Co. *v.* Wall (Ind. App.), 101 N. E. 680.

61. Showing train to be late to show motive.—Killian *v.* Georgia, etc., R. Co., 97 Ga. 727, 25 S. E. 384.

62. Testimony of other passengers.—Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

63. Evidence by other passengers.—Franklin *v.* Visalia Elect. R. Co., 131 Pac. 776, 21 Cal. App. 270.

64. Details of conversation.—In an action for injuries sustained in alighting from a train, evidence, on the issue as to how long a train stopped, of the details of a conversation held by witness with another passenger, who alighted and returned to the train, was inadmissible. Central, etc., R. Co. *v.* McNab, 150 Ala. 332, 43 So. 222.

65. Condition of place of alighting.—Freeman *v.* Pluckett, 56 Tex. Civ. App. 126, 120 S. W. 514.

66. Mental or physical pain and sickness.—It was proper to admit the testimony of the passenger to the effect that the weather was cold and damp, that the roads were rough, that she suffered mental and physical pain, and that sickness resulted therefrom. St. Louis, etc., R. Co. *v.* Foster, 46 Tex. Civ. App. 194, 103 S. W. 194.

67. Failure to stop at proper place.—Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

the issue should be excluded.[68] Thus, in an action for injuries to a passenger in returning to her destination after having been carrier past it, evidence of the custom as to what was done with passengers carried beyond their destination was not admissible, especially where there was no evidence that the passenger was informed of the custom or that the carrier offered to conform therewith.[69]

§ 3225. Accommodation and Duties in Transit.—Failure to Heat, Light, etc., Car.—Where the cause of action consists in that a passenger coach was not properly heated or lighted or furnished with sufficient drinking water, and that the coach was permitted to become in a dirty condition, resulting in physical and mental suffering by a passenger and his taking cold, evidence of complaints as to the condition of the car made by the passengers to each other, but not to the carrier's employees, is incompetent.[70] Where a railroad postal clerk sues a railroad company for damages for illness caused by defendant's failure to heat its mail car, plaintiff can show that the car was wet and damp as tending to show that it would be uncomfortable.[71] He may testify as to his duties as postal clerk in the car and how long he was compelled to remain therein.[72] And in such a case the plaintiff may show that he complained to defendant of the unheated condition of the car to show actual notice.[73] But the defendant will not be permitted to show that plaintiff was a "chronic kicker,"[74] or that he brought another suit against it to recover for illness occurring thereafter.[75] Nor is evidence as to the temperature of the express car in the same train relevant, where it appears that the express and mail cars were heated differently in some respects, though each contained steam pipes from the engine, and the evidence shows that the mail car was cold while the express car was comfortable.[76]

Permitting Passenger to Occupy Dangerous Place.—In an action against a street railway company to recover damages for injuries to a passenger, testimony is admissible on the question of negligence to show that it was the custom of defendant to permit passengers to ride on the running board of its cars, without evidence that this custom was known to the passenger injured.[77]

Failure to Warn of Danger.—In an action for injuries to passenger on a freight train while attempting to alight to respond to a call of nature, the absence of a water closet in the caboose may be considered, in passing on the question whether the employees in charge of the train were bound to know that the passenger would be likely to leave the car at stops, and would be negligent if they failed to warn him of the dangerous position of the car at stops.[78] And the act of the brakeman in going out of the car for a like purpose immediately before the passenger attempted to alight is properly considered on the question

68. Irrelevant evidence.—In an action against a railroad for failure to discharge plaintiff at her destination, evidence that defendant's conductor did not know of any other train following him was admissible as a basis for an argument that the conductor should have run his train back to plaintiff's station and let her off there. Louisville, etc., R. Co. *v.* Gaddie, 102 S. W. 817, 31 Ky. L. Rep. 502.

69. Custom immaterial.—Birmingham R., etc., Co. *v.* Seaborn, 168 Ala. 658, 53 So. 241.

70. Failure to heat, light, etc., car.—Louisville, etc., R. Co. *v.* Scalf, 110 S. W. 862, 33 Ky. L. Rep. 721.

71. Failure to heat mail car.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

72. As to duties and length of work time.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

73. Evidence to show notice.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

74. Evidence inadmissible.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

75. Bringing of another suit.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

76. Condition of other cars.—Southern R. Co. *v.* Harrington, 166 Ala. 630, 52 So. 57.

77. Permitting passenger to occupy dangerous place.—Stone *v.* Lewiston, etc., Railway, 99 Me. 243, 59 Atl. 56.

78. Passenger attempting to alight while in route.—International, etc., R. Co. Cruseturner, 44 Tex. Civ. App. 181, 98 S. W. 423.

of the care by the passenger leaving the car at the time he did, and on the question as to whether it was the duty of the carrier to anticipate that he might leave the car and to warn him of the danger in so doing.[79]

Separation of Races.—In an action for death of a negro passenger killed by a white passenger in a negro compartment, based on the carrier's neglect in permitting the white passenger to be there in violation of a statute, plaintiff can not show that the conductor failed or refused to remove two other white men, who were in the compartment when he passed through, that he took no steps to prevent whites from entering, or how passengers in adjoining white compartment conducted themselves.[80]

Special Circumstances—Extraordinary Conditions—Evidence as to Notice.—In an action for injuries caused by being thrown from the platform of a car forming part of an excursion train, where it is shown that plaintiff was forced to stand on the platform, owing to the crowded condition of the interior of the car, evidence that defendant had advertised the excursion and expected large crowds is admissible.[81] But evidence of the general understanding in a neighborhood as to the crowd expected to go on a railway excursion, and to the effect that printed invitations had been issued and posters seen in public places, is not admissible, in an action against the company for injuries received by reason of want of sufficient accommodation for excursionists, to charge it with notice of the extent of the accommodation required.[82]

Transferring or Changing Cars.—Where a passenger is injured in making a required transfer or change of cars and using a route alleged to be adopted and pointed out by the carrier, and at whose invitation passengers use it, any evidence that materially tends to show such invitation, such as the furnishing of electricity and equipment for lights, etc., is admissible.[83] And in an action for injury to a passenger while changing cars, the accommodations for passengers, the crowded condition of the cars, and the possibility of getting on another coach, may be shown in evidence to determine whether a reasonable time was given passengers, under the circumstances, to change cars.[84]

Injury While Ejecting Third Person.—In an action for personal injuries to a passenger from a carrier's manner of removing an intoxicated person, the admission of evidence as to the conduct of such person on another car after his removal is within the discretion of the trial court, as bearing upon his intoxication when removed.[85]

Failure to Care for Intoxicated Passenger.—Where the issue is that defendant, knowing plaintiff was intoxicated, did not properly care for him as a passenger, evidence that plaintiff purchased beer, shortly before the accident, at a restaurant in defendant's passenger station, kept by one under lease from defendant, is admissible to show plaintiff's intoxicated condition, but not to impose additional duties on defendant in the care of plaintiff, nor to show that

79. Similar act of brakeman may be considered.—International, etc., R. Co. *v.* Cruseturner, 44 Tex. Civ. App. 181, 98 S. W. 423.

80. Separation of races.—Louisville, etc., R. Co. *v.* Renfro, 142 Ky. 590, 135 S. W. 266, 33 L. R. A., N. S., 133. Constituting Ky. St., §§ 795, 799 (Russells' St., §§ 5343, 5347).

81. Advertising excursion.—Williams *v.* International, etc., R. Co., 67 S. W. 1085, 28 Tex. Civ. App. 503.

82. Evidence as to notice.—Chicago, etc., R. Co. *v.* Fisher, 31 Ill. App. 36.

83 Transfer or change of cars.—In an action for injury to plaintiff, who had left a car to pass an obstruction and take a car on the other side, and who fell over an impediment in the path, evidence that electricity for lighting the path was furnished by the company, and that on the last trip the lights were shut off by the conductor, was admissible. Powers *v.* Old Colony St. R. Co., 87 N. E. 192, 201 Mass. 66.

84. Condition at place of transfer.—Oliver *v.* Columbia, etc., R. Co., 43 S. E. 307, 65 S. C. 1.

85. Intoxication of passenger ejected.—Thayer *v.* Old Colony St. R. Co., 101 N. E. 368, 214 Mass. 234, 44 L. R. A., N. S., 1125.

defendant was guilty of maintaining a nuisance which contributed to plaintiff's intoxicated condition.[86]

Allowing Passenger to Alight at Dangerous Place.—In an action for the death of a street car passenger permitted to alight at a dangerous place while intoxicated, evidence that, when decedent boarded the car, he was bloody about the face and muddy is admissible to show his condition, and to attract the attention of the trainmen to his condition.[87] And proof of the conduct of decedent while a passenger on the car, including his attempt to alight therefrom, is admissible to show his condition and the trainmen's knowledge thereof, but evidence of the condition of the streets where he attempted to alight, but was prevented by the trainmen, is inadmissible.[88]

§§ 3226-3229. Management of Conveyance—§ 3226. In General.—In an action for injury resulting from the negligent management of the vehicle, the evidence must, as in other cases, be relevant and material.[89] Thus evidence that defendant discharged the driver after the accident is inadmissible, having no tendency to prove negligence on the day of the accident.[90] The mere speed of a train, or the fact that it was behind time when the accident to a passenger occurred, is not evidence of the negligence of the employees having it in charge.[91] And in an action for damages caused by defendant's negligence in leaving open the gangway gate after the boat left its dock, a custom of others to be equally negligent is no defense.[92]

Constructions in Aisles, etc.—Where a street car passenger is injured by falling over another passenger's bag placed in the aisle, evidence that it was not customary to have racks for baggage or parcels in street cars, and that it was the custom to allow passengers to put hand baggage and dress-suit cases on the floor, is admissible as bearing on the question whether defendant exercised due care in the premises.[93]

Crowded Vehicle, etc.—Where the issue involved is whether or not a vehicle was negligently operated, the question of negligence being dependent upon the particular circumstances under which the train was operated, evidence re-

86. **Failure to care for intoxicated passenger.**—Cutler *v.* Concord, etc., Railroad, 46 Atl. 1051, 69 N. H. 641.

87. **Allowing passenger to alight at unsafe place.**—Sullivan *v.* Seattle Elect. Co., 97 Pac. 1109, 51 Wash. 71.

88. **Passengers condition—Condition of alighting place.**—Sullivan *v.* Seattle Elect. Co., 97 Pac. 1109, 51 Wash. 71.

89. **Evidence immaterial.**—In an action for the death of a passenger killed on a freight train while returning from the engineer, to whom he had given his tickets, to a passenger coach, evidence that the engineer would have stopped the train if he had been requested to do so is immaterial. Means *v.* Carolina Cent. R. Co., 32 S. E. 960, 124 N. C. 574, 45 L. R. A. 164.

Evidence incompetent to issue of negligence or malice.—The petition alleged that defendant railroad company "did unlawfully, willfully, maliciously, negligently, and carelessly * * * run a number of heavy laden cars against" a detached caboose, in which plaintiff was standing, by reason of which he was injured. Plaintiff, who was shipping stock on the train to which the caboose belonged, was allowed to show that there was a quarrel between other stockmen and some of the trainmen in the caboose, between the shipping point and the place where plaintiff was injured. Held reversible error. Louisville, etc., R. Co. *v.* Bell, 38 S. W. 3, 100 Ky. 203, 18 Ky. L. Rep. 735.

Operation of other elevators.—Evidence as to the operation of other elevators is properly excluded in an action for injuries sustained while a passenger on an elevator. Judgment 70 Ill. App. 166, affirmed in Hartford Deposit Co. *v.* Sollitt, 50 N. E. 178, 172 Ill. 222, 64 Am. St. Rep. 35.

90. **Subsequent discharge of employee.**—Schmitt *v.* Dry Dock, etc., R. Co., 3 N. Y. St. Rep. 257, 2 City Ct. R. 359.

91. **Immaterial matter — Speed, etc.**—Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241.

92. **Custom no defense to negligence.**—Cleveland *v.* New Jersey Steamboat Co. (N. Y.), 5 Hun 523.

93. **Obstructions in aisles, etc.**—Pitcher *v.* Old Colony St. R. Co., 196 Mass. 69, 81 N. E. 876.

lating to the operation of trains in general is incompetent.[94] In such cases evidence which tends to show the condition of the vehicle or the conditions under which it was operated is admissible.[95]

Mixed or Accommodation Trains.—Where the issue is whether or not a passenger was injured on an accommodation train, by reason of the improper loading of logs on flat cars attached to the passenger car in which he was riding, testimony as to the rate of speed at which the train was running is competent, though of little value.[96] And evidence as to the absence of a bell cord is admissible on the question whether it was negligent to load the cars as they were loaded, in view of the probable speed of the train and the absence of a bell cord.[97]

Overturning of Road Vehicle.—In a suit for personal injuries resulting from the overturning of a road vehicle, evidence to be admissible must be relevant and material.[98] Evidence that the lamp on a stagecoach, which upset at night, was not lighted at the time of the accident, is admissible to show negligence on the part of the driver.[99] But where a stage proprietor is sued for damages caused by the upsetting of a stage coach, he can not prove the practice on his own line, but may prove a general custom, as to the number of passengers conveyed.[1]

Excessive or Dangerous Speed.—Where the plaintiff's injury is attributed to the operation of the vehicle at a dangerous and excessive rate of speed, evidence of facts or conditions, both prior and subsequent to the injury, which relevantly and materially tend to establish the issue involved should be admitted. Thus, evidence that while the vehicle was running at a pretty rapid rate of speed the car lurched, and all the people bumped about, and plaintiff was jostled or crowded off and injured, tends to establish the running of the car at an excessive rate of speed.[2] And the condition of the cars after the accident may be shown.[3] Where negligence is charged against a railroad company in the run-

94. Crowded vehicle, etc.—Where a railroad train was so crowded that certain passengers could not conveniently obtain seats or standing room inside the cars, and when the train rounded a curve at the rate of twenty-five or thirty miles an hour a passenger was thrown from a platform and injured, in an action for the injuries it was proper to sustain an objection to a question to a witness as an expert as to whether trains could be operated over the tracks where the accident happened, with safety, at such speed, the question being immaterial under the facts. Chicago, etc., R. Co. *v.* Newell, 72 N. E. 416, 212 Ill. 332, dismissed in 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

95. Condition of vehicle.—It was not error to permit a witness to testify as to the crowded condition of the train at a point several blocks distant, it appearing that the train had not stopped between that place and the place of the accident. Chicago, etc., R. Co. *v.* Newell, 72 N. E. 416, 212 Ill. 332, dismissed in 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

Where another passenger of a street car was thrown against plaintiff as the car, which was crowded was running at a high rate of speed, and plaintiff was thrown from the car and injured, evidence as to the apparent condition of the passenger who struck plaintiff, whether drunk or sober, at the time of the accident, was admissible. Birmingham R., etc., Co. *v.* Hunnicutt, 3 Ala. App. 448, 57 So. 262.

96. Improperly loaded car—Evidence as to speed.—Keating *v.* Detroit, etc., R. Co., 62 N. W. 575, 104 Mich. 418.

97 Absence of bell cord.—Keating *v.* Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575.

98. Materiality and relevancy.—In an action by a passenger against common carriers for injuries received by the overturning of the coach, testimony offered by defendants that after the accident they instructed their drivers to carry plaintiff free of charge is irrelevant; the directions to the drivers being given in the absence of plaintiff. Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125.

99. Where conveyance upset.—Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

1. Custom as to passengers conveyed.—Maury *v.* Talmadge, Fed. Cas. No. 9, 315, 2 McLean 157.

2. Dangerous speed.—Alton, etc., Tract. Co. *v.* Oller, 119 Ill. App. 181, judgment affirmed in Alton, etc., Tract. Co. *v.* Oliver, 75 N. E. 419, 217 Ill. 15, 4 L. R. A., N. S., 399.

3. Condition of car after accident.—Elgin, etc., Tract. Co. *v.* Wilson, 75 N. E. 436, 217 Ill. 47, affirming judgment 120 Ill. App. 371.

ning of a train at a high and dangerous rate of speed, witnesses who saw the train at a point one and a half miles from the place where the accident occurred may, where it is shown by others that the rate of speed continued the same, state the rate at the point where they observed the train.[4] It is held that evidence that defendant's train was behind time is admissible to show that it was being operated at an unusual and immoderate rate of speed.[5] A violation by employees in charge of a car of the rule limiting the speed of cars while running over curves in the track is a circumstance to be considered in passing on their negligence.[6] And it is held that where there is evidence to show that the vehicle was being operated faster than an ordinance permits, the ordinance becomes relevant and material.[7]

Immaterial Evidence.—Testimony as to the cost of rolling stock is irrelevant to the question of negligence in running passenger trains at a high rate of speed.[8] And evidence that the engineer had been warned, at a station where the train stopped before the accident, as to the reckless running of the train over the rough road, is improper, the rate of speed before reaching the neighborhood of the accident not being in issue.[9]

Evidence Based on Some Standard.—Evidence relating to the speed at which a train was running when a car was derailed, injuring a passenger, should be based upon some standard of rapidity, and show, at least approximately, the actual rate of speed, and that it was unsafe.[10]

Opening and Closing Doors.—When the issue involved is whether or not the passenger's injury was the result of the carrier's negligence in operating or closing the doors of the vehicle or other similar acts during the transportation of the passenger, any matter which is relevant and material in determining whether or not the injury resulted from negligence or accident, whether the carrier had notice of the conditions existing, as well as whether the passenger contributed to the injury, is competent.[11] Thus, where a passenger is injured while standing on the platform by having his hand caught in the door of the car, it being closed by a brakeman, proof of the crowded condition of the train and of the platforms is not objectionable for immateriality, since it is explanatory of the reason why plaintiff was riding on the platform, and why he was compelled to occupy the particular place on the platform he did.[12] And evidence of other passengers on the platform, that they saw plaintiff standing and supporting himself in the manner described by him, is admissible to corroborate plaintiff's testimony.[13]

Jerks, Jolts, Sudden Starting, Sudden Stopping, etc.—Where the pas-

4. **Speed at place other than accident.**—Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

5. **Train behind time.**—St. Louis, etc., R. Co. *v.* Savage, 163 Ala. 55, 50 So. 113.

6. **Violation of rules as to speed.**—Partelow *v.* Newton, etc., St. R. Co., 196 Mass. 24, 81 N. E. 894.

7. **Admissibility of ordinance.**—In an action against a street railroad for injuries to a passenger evidence that the car was going "very fast" and "mighty fast" was sufficient to render it error to exclude an ordinance limiting the rate of speed of a street car to seven miles an hour. Moore *v.* Northern Texas Tract. Co., 41 Tex. Civ. App. 583, 95 S. W. 652.

8. **Immaterial evidence.**—Grand Rapids etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

9. **Speed at other places immaterial.**—San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277, 11 S. W. 327.

10. **Evidence based on some standard.**—Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

11. **Duties in transit.**—Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

The part of the carrier's rule that "passengers should be induced to leave the car by the side doors" was competent, as tending to show the necessity of care in opening a door by which passengers were expected to go out, in doing which the hand of a passenger, thrown against it by a lurch of the car, was caught, between the side of the door and the jamb. Larson *v.* Boston Elev. R. Co., 212 Mass. 262, 98 N. E. 1048.

12. **Passenger on platform.**—Trumbull *v.* Donahue, 18 Colo. App. 460, 72 Pac. 684.

13. **Corroborative testimony.**—Trumbull *v.* Donahue, 72 Pac. 684, 18 Colo. App. 460.

senger's injury is alleged to have been caused by the sudden starting, jerking or jolting of the vehicle, any testimony which tends to establish or negative the carrier's negligence in that respect is competent to go to the jury.[14] Thus, it is held that testimony of previous conditions which are shown to have existed up to the time of the injury is competent, where it has a material bearing on the real issue of the case.[15] And as bearing on the question of the negligence charged, that defendant so ran its car as by a sudden lurch thereof to throw plaintiff suddenly and violently out of the car, evidence of the condition of the track and rails where the accident occurred is admissible.[16] But in an action against a street railroad company, for injuries to a passenger caused by another passenger, who was about to enter the car, being thrown upon her while the car was rounding a curve, the fact that the passenger who was so thrown upon plaintiff was talking to the conductor just before the accident was immaterial.[17]

Description of Accident.—In an action against a street railway company for injury to a passenger by the sudden starting of the car, plaintiff's testimony that the car started so suddenly and with such extraordinary movement that it seemed as if it were going to stand upright is properly received to show the force which caused her injury. In such cases the witness may describe the accident, unless it is done in such a way as to mislead the injury.[18]

Explanatory of Passengers Actions.—Where it is alleged that plaintiff was standing in the aisle when the train suddenly stopped at her station, causing her to be thrown to the floor, evidence that the brakeman when he announced

14. Testimony of passengers.—In an action against a railroad company for injuries caused plaintiff by the sudden jolt or jar of a train in stopping, evidence by other passengers that there was no such jolt or jar as would throw a person about in a seat is admissible. Chicago, etc., R. Co. *v.* Rowell, 151 Ky. 313, 151 S. W. 950.

In an action against a street car company for injury caused by a sudden stopping of the car, testimony as to how the stopping affected others, in the car is admissible. Judgment 66 Ill. App. 244, affirmed in West Chicago St. R. Co. *v.* Kennelly, 48 N. E. 996, 170 Ill. 508.

To show stop, start and jerk.—Where plaintiff claimed that his injuries were caused by the sudden jerk of a cable car which had just passed over a crossing of other tracks, after stopping to let passengers alight, evidence of the condition of the tracks at the crossing and the machinery were proper, though negligence in that respect was not alleged, since such evidence was merely to show whether there was a stop, a start, and a jerk, especially where no defects were shown. Setzler *v.* Metropolitan St. R. Co. (Mo.), 127 S. W. 1.

Testimony negativing law of physics.—In an action for injuries to a street railway passenger, alleged to have been thrown from the front platform, while the car was ascending an incline at a curve, by a sudden jerk, evidence that the construction of the car permitted its body to play on the trucks, and that in passing over the curve the wheels would jam and grind, first the left hand rail, then the right, alternately, and that this alternate motion, because of the play between the trucks and the car body, would be reproduced on a larger scale in the latter, so that, though the car was passing on a curve to the right, it would be possible for plaintiff to be thrown off in that direction if the side play of the body should happen to be in that direction when he got the effect of the sudden jerk ahead, that is, the result of the two forces might have thrown him off as claimed—is competent to negative the law of physics that any sudden acceleration of speed on a curve tends to throw a person on the car, in unstable equilibrium, not outward, but inward. Cutts *v.* Boston Elev. R. Co., 89 N. E. 21, 202 Mass. 450.

15. Testimony of previous conditions.—In an action for injuries from the negligent starting of a street car, testimony of a former driver of the same car that there were four different teams used, one of which was apt to start with a jerk, while the others were tractable, and that, though he had left the service of defendant, he knew that the same teams were employed on the car up to the time of the accident, though he could not say which team was attached to the car on that day, is admissible, though the real issue in the case was the conduct of defendant's servant in the management and control of the motive power. Dougherty *v.* Missouri R. Co., 8 S. W. 900, 11 S. W. 251, 97 Mo. 647.

16. Condition of track, rails, etc.—Fitch *v.* Mason City, etc., Tract. Co., 89 N. W. 33, 116 Iowa 716.

17. Immaterial facts.—Merrill *v.* Metropolitan St. R. Co., 77 N. Y. S. 122, 73 App. Div. 401.

18. Description of accident.—Nolan *v.* Newton St. R. Co., 206 Mass. 384, 92 N. E. 505.

the station directed plaintiff to follow him, whereby she was induced to leave her seat, is admissible.[19] And it is competent for the plaintiff to explain, as a reason for placing his hand on the arm of a seat at the time he was injured, that he did it as a precaution to keep himself from falling.[20]

To Show Passenger's Condition.—In an action against a carrier for injuries sustained by being thrown on the floor of a car by a sudden stopping, a conversation which plaintiff had with the conductor on entering the car is competent to show that the company's servant knew that plaintiff was a cripple.[21] But where a passenger is thrown from the train while standing on the lower step, evidence that the engineer promised the passenger to slow up to allow him to jump from the train is admissible, in the absence of proof that the engineer had authority to slow up trains for that purpose.[22]

Rebuttal Evidence.—Where the carrier seeks to prove that a certain class of cars is equipped with a device to prevent sudden starts, jerks, jolts, etc., witness may testify, in rebuttal, to their experiences while riding on other cars of that class belonging to the carrier.[23]

§ 3227. Under Allegation of Derailment.—In an action for personal injuries, under a general allegation of derailment, any relevant and material evidence, such as evidence of the spreading of the track,[24] of similar trouble at the same place,[25] the condition of the vehicle at the time of the accident,[26] or the condition of the track at the time of the accident, or before and after, if the conditions are shown to have been the same,[27] is admissible. And the same

19. Explanatory of passengers actions.—Louisville, etc., R. Co. *v.* Bowlds, 64 S. W. 957, 23 Ky. L. Rep. 1202.

20. To show precaution taken.—Ft. Worth, etc., R. Co. *v.* White (Tex. Civ. App.), 51 S. W. 855.

21. To show passenger's condition.—Louisville, etc., R. Co. *v.* Bowlds, 64 S. W. 957, 23 Ky. L. Rep. 1202.

22. Promise of engineer to show up.—Clark *v.* Atchison, etc., R. Co., 128 Pac. 1032, 164 Cal. 363.

23. Rebuttal.—In an action against a street car company for injuries based on the alleged negligence of the conductor in giving the go ahead signal, causing the motorman to increase the speed of the car, and causing plaintiff to be thrown to the pavement, where defendant sought to prove that their large cars, including the one in question, had a device upon them that effectually precluded jerking, evidence of witnesses as to their experience while riding on other cars of defendant was proper in rebuttal. Orth *v.* Saginaw Valley Tract. Co., 162 Mich. 353, 127 N. W. 330.

24. Spreading of tracks.—Gulf, etc., R. Co. *v.* Smith, 74 Tex. 276, 11 S. W. 1104.

25. In an action for injuries sustained by the negligence of a street car company in allowing a car to dart down a grade after being uncoupled, evidence of the experience of defendant's servants in stopping cars at the same point on that day was admissible. Joliet St. R. Co. *v.* Call, 42 Ill. App. 41.

26. Condition of vehicle.—Where a passenger was killed when a train was derailed, evidence of repairs to the engine wheels after the accident was admissible to show their condition at the time of the wreck, and that the flanges were worn and unsafe, although not admissible to raise an inference of negligence. St. Louis, etc., R. Co. *v.* Evans, 99 Ark. 39, 137 S. W. 568.

27. Condition of track.—Where it appeared in a railroad passenger's action for injuries by derailment that the cars ran some distance on the ties after jumping, leaving marks plainly discernible some days after the accident, evidence was admissible to describe the general condition of the track several days after the accident, it not appearing that the conditions as they existed when the wreck occurred had changed except that the track had been repaired. Ohio, etc., R. Co. *v.* Beuris, 143 S. W. 16, 146 Ky. 612.

In an action for injuries to a passenger by the derailment of the train, evidence that, just after the accident, the ties were broken and cut up, was admissible to show the condition of the ties before the accident, as to their looking rotten, as bearing on the issue of negligence. Parker *v.* Boston, etc., Railroad, 79 Atl. 865, 84 Vt. 329.

Foreman's testimony as to track.—In an action for injuries to a passenger by the derailment of cars, the testimony of a section foreman in charge of the portion of the road where the accident occurred that he had been, for several days before the accident, engaged in repairing the road at that point, and that the speed limit of trains over that portion of the road was fifteen miles an hour, was admissible to show that the officers and agents of the carrier had notice of the

rule applies where the cause of the derailment is alleged, except so far as the proof is limited to the issue raised by the special allegation. So where the complaint alleges negligence in running the train at a high speed over a defective roadbed, evidence that some of the train crew were under the influence of liquor is competent.[28] Where the declaration alleges the negligent running of the train, the condition of the track is properly considered in determining whether the mode of running the train was negligent, and evidence of the condition of the ties just after the accident is admissible.[29] Where the derailment is claimed to have been caused by the negligently defective condition of the road, evidence as to the general faulty construction of the track at the place of derailment is admissible, especially in connection with evidence as to the high speed of the train at that point, for the purpose of showing negligence in running the train at a high speed over such track.[30] And where it is alleged that the derailment of the car was caused by the breaking of a wheel by reason of the excessive speed of the train over a rough and uneven track, evidence of the condition of the track for such a distance as the excessive speed was kept up is admissible.[31] Where the petition charged as one of the elements of defendant's negligence, excessive and dangerous speed across a switch and in and upon a side track, it is proper to allow testimony as to the speed of the train at the time of its derailment and wreck.[32] But evidence which involves facts and purposes foreign to the issue should be excluded.[33] In an action against a street railway for injuries received by a passenger from a derailment of defendant's car, evidence that other cars ran off the track at the place of the derailment is inadmissible, without proof that the track was in the same condition as at the time when the accident in question occurred.[34] And defendant's testimony, showing how the equipment of its electric road compared with the equipment of other roads, is properly excluded when offered to show that defendant's cars could run over the track at a certain speed with safety.[35]

Statements of Motorman, etc.—Where it is alleged that the derailment was caused by excessive speed in going down a hill, statements made by the motorman to plaintiff prior to the accident as to the condition of the track, the want of sand, the overloaded condition of the car, and the excessive speed, are admissible as part of the res gestæ, and to charge the company with notice of facts requiring more than ordinary care.[36]

Pieces of Ties, etc., and Rebuttal Evidence.—Pieces of wood, etc., purporting to be parts of the timbers, ties, etc., forming a part of the track at the point where the derailment occurred, are properly received in evidence where there is evidence tending to establish such fact.[37] But testimony of the con-

unsafe condition of the road, and that it was unsafe to operate trains over it at a greater speed. Johnson *v.* Union Pac. R. Co., 100 Pac. 390, 35 Utah 285.

28. Condition of crew.—Shelton *v.* Southern Railway, 86 S. C. 98, 67 S. E. 899.

29. Allegation of negligent running of train.—Parker *v.* Boston, etc., Railroad, 79 Atl. 865, 84 Vt. 329.

30. Defective condition of road.—Ohio, etc., R. Co. *v.* Beuris, 146 Ky. 612, 143 S. W. 16.

31. Under special allegation.—Jacksonville, etc., R. Co. *v.* Southworth, 32 Ill. App. 307, affirmed in 135 Ill. 250, 25 N. E. 1093.

32. Testimony as to speed.—Texas, etc., R. Co. *v.* Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155.

33. Matter foreign to issue.—In an action for injuries to a passenger in a wreck, plaintiff claimed that the train was running at a dangerous speed, and defendant asked the engineer if he could have stopped at a public crossing. Held, that the evidence called for involved facts and purposes foreign to the issue. St. Louis, etc., R. Co. *v.* Savage, 163 Ala. 55, 50 So. 113.

34. Similar accidents to same place.—Overcash *v.* Charlotte Elect. R., etc., Co., 57 S. E. 377, 144 N. C. 572.

35. Comparison with other roads.—Bosqui *v.* Sutro R. Co., 63 Pac. 682, 131 Cal. 390.

36. Declaration of motorman as to conditions.—Witsell *v.* West Asheville, etc., R. Co., 27 S. E. 125, 120 N. C. 557.

37. Pieces of ties, etc.—Colorado Mid. R. Co. *v.* McGarry, 41 Colo. 398, 92 Pac. 915.

ductor of the train, in rebuttal, that shortly after the derailment he had seen several persons with pieces of wood, in their hands which were not parts of the cross ties under the rails where the accident occurred, and that he so stated to them, is inadmissible, where none of the persons to whom the conductor refers is a witness at the trial.[38]

§ 3228. Under Allegation of Collision.—Collision of Vehicles of Same Carrier.—Where the passenger's injuries are alleged to have resulted from a collision between vehicles belonging to the same carrier, brought about by specific negligent acts alleged, the evidence must be relevant and material to the issues thus made, and evidence which purposes showing negligence other than that alleged is incompetent.[39] But evidence which tends to prove the charge made is competent, although it may tend to establish negligence not charged in the declaration.[40] The admission of evidence as to grades and curves of the track, and as to cuts through which it runs, it being confined to the immediate vicinity of the accident, for the purpose of describing the situation, and not as tending to prove negligence not charged in the complaint, is not error.[41] And evidence which materially tends to controvert the testimony of the adverse party should be admitted, although it does not of itself constitute a defense to the allegation of negligence.[42]

Custom.—Where the situation is unlike that of electric railways generally, evidence in regard to the custom of a motorman to leave his post and go back and warn the rear car is properly excluded.[43]

Habits and Competency of Employees.—In an action by a passenger against a railroad company for personal injuries resulting from a collision with a coal train, evidence of the habits and competency of the conductor of the coal train is admissible.[44]

Allegation of Defect in Vehicle.—Where the collision is claimed to have resulted from the use of defective devices and facilities, or the failure to furnishing better equipment then in use, any testimony which materially tends to show that the care required was not used is admissible.[45] In an action for dam-

38. Testimony in rebuttal held inadmissible.—Colorado Mid. R. Co. *v.* McGarry, 92 Pac. 915, 41 Colo. 398.

39. Must be relevant and material.—Harris *v.* Puget Sound, etc., Railway, 52 Wash. 289, 100 Pac. 838.

40. Tendency to support charge not made immaterial.—In an action against a cable railway company by a passenger for injuries by the collision of a grip car with another car, temporarily stopped upon the same track, where the declaration alleges negligence of defendant in operating its road and the cars propelled thereon, evidence that the colliding grip car was a remodeled horse car, and was not provided with a sand box, is admissible, as bearing on the charge made, although it also tends to support a charge of negligence, not made in the declaration. North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899, affirming 41 Ill. App. 311.

41. Evidence descriptive of situation.—Harris *v.* Puget Sound, etc., Railway, 52 Wash. 289, 100 Pac. 838.

42. Evidence not constituting defense.—In an action by a passenger against a railroad corporation for personal injuries received while in a train on the defendant's road, it appeared that the injury was caused by the train running into another train at a station. The plaintiff testified that the train was running at an unusual rate of speed, and that for several miles before it reached the station it was racing with a train on a parallel road. The defendant, in order to show that the train was running at the usual speed, asked a witness whether the train was running at the usual speed as it approached the station. The judge refused to admit this evidence, unless the defendant also undertook to show that such usual speed was a safe and proper rate of speed, such as was usual upon well conducted railroads; and the defendant excepted. Held, that this evidence should have been admitted, as it tended to contradict to testimony of the plaintiff. Worthen *v.* Grand Trunk R. Co., 125 Mass. 99.

43. Custom.—Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

44. Habits and competency of employees.—Pennsylvania R. Co. *v.* Books, 57 Pa. 339, 98 Am. Dec. 229.

45. Defective equipment, etc.—In an action for injuries to a passenger in a collision between cable trains caused by the loss of control of one of them on an incline, evidence was admissible as tending to show failure to exercise the de-

ages resulting from a collision of street cars, where the plaintiff alleges a defect in one of the cars, whether it is a matter of general knowledge and rumor that the car has been on the road ever since it was built is not only hearsay, but irrelevant, as the company is bound to furnish and maintain safe cars and appliances, whether old or new.[46]

Parts of Train Broken in Two.—Where a passenger is injured by a collision between two parts of a train which has broken in two, questions asked of the engineer and fireman as to whether there was anything different or unusual in the manner they operated the train at the time are immaterial.[47] But in such a case the issue being whether the rear brakeman was in his proper place just prior to plaintiff's injury, the brakeman having testified that he was on the platform of the caboose which was his proper place, evidence of an expert railroad conductor that the proper place for the rear brakeman on such a train under similar circumstances was on top of the train is admissible in rebuttal.[48]

Cars on Side Tracks.—Where it appears that cars with which the train collided had run upon the main track from an incline grade passing track used for the storage of cars, it is permissible to show that derailing switches are commonly used on such tracks, that they are ordinarily left so that cars can not get past, that passing tracks are seldom used for storing cars save in event of accidents, that when a side track is on an incline the brakes should be set, that in the absence of a derailing switch the cars are often blocked with pieces of wood, and that the local agent is supposed to look out for the matters.[49]

Collision at Intersection of Tracks.—Where the issue involved is the negligence of the defendant carrier alleged to have resulted in a collision of vehicles on intersecting tracks, or to have proximately contributed thereto, testimony which is relevant and material as supporting the alleged probability of the collision and the defendant's appreciation that passengers would be injured thereby is competent and should be admitted.[50] Thus, evidence is admissible which tends to establish the degree of care required, and to determine the precautions required of the carrier under that degree of care.[51] A contract

gree of care required as to rail brakes effectively used in stopping cars on a similar incline on which defendant operated its cars, but which it failed to have on the car in question, or in use on the line where the accident occurred. Price *v.* Metropolitan St. R. Co., 119 S. W. 932, 220 Mo. 435.

46. Defect in vehicle alleged.—Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

47. Parts of train broken in two—Materiality of evidence.—Reeves *v.* Chicago, etc., R. Co., 24 S. Dak. 84, 123 N. W. 498.

48. Admissible in rebuttal.—Reeves *v.* Chicago, etc., R. Co., 24 S. Dak. 84, 123 N. W. 498.

49. Cars on side tracks.—Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622.

50. Collision on intersecting tracks—Relevant and material matter.—Under a complaint ascribing plaintiff's injuries to the wanton negligence of defendant's employees in charge of a street car on which plaintiff was a passenger, and alleging that such negligence consisted in their causing a car to cross a railroad crossing without stopping, knowing that a train was approaching and that there would probably be a collision, etc., evidence that the street car was at the time crowded with passengers, and "that there were many people on the car," was admissible as supporting the alleged probability and defendant's appreciation that passengers would be injured by the collision. Birmingham R., etc., Co. *v.* Rutledge, 39 So. 338, 142 Ala. 195.

Knowledge of custom of other carrier.—In an action by a street car passenger, injured in a collision of the car with a railroad train, in which the negligence of the street car company was alleged to be the motorman's failure to properly look out for trains, testimony that the motorman knew of the custom of the railroad to run its trains over the street car crossing at an excessive rate of speed was competent. Parker *v.* Des Moines City R. Co., 133 N. W. 373, 153 Iowa 254, Ann. Cas. 1913E, 174.

51. Precautions required.—In an action against a railroad company for personal injuries caused a passenger on a street car by collision at a street crossing, it is proper to show that no flagman was stationed at the crossing, not to estab-

between the companies as to the stopping of trains on approaching the crossing is admissible on the question of whose negligence was the proximate cause of the accident.[52] Evidence as to the speed of defendant's car when near the crossing is admissible.[53] Testimony tending to show which vehicle had the right of way is material and competent.[54] Thus, evidence of a rule by which the cars of one street railway company have a right of way at a street intersection over the cars of another company is admissible.[55] But an offer to prove the posting of a bulletin in the barn of one of the companies giving cars of the other company the right of way at such crossing is not competent in the absence of an offer to prove that the bulletin was in effect at the time of the accident.[56] Evidence as to any matter which is immaterial to the issue involved and can throw no additional lights upon the conduct of the parties involved should be excluded.[57] As a general rule, evidence as to what had taken place on other oc-

lish negligence in not keeping a flagman, but to enable the jury to determine what precautions due care required of the trainmen when backing a train upon the crossing. Chicago, etc., R. Co. *v.* Hardie, 85 Ill. App. 122.

Failure to shut off power.—Though, in an action for injuries to a street car passenger in a collision between a railroad engine and a car which had become stalled on a crossing, there was no allegation of negligence, in that the power had been intermittent, evidence that the motorman knew such fact was admissible to show that it was likely to again come on suddenly after the car was stalled, and to show negligence in failing to shut off the power when he left the car. Barnes *v.* Danville St. R., etc., Co., 235 Ill. 566, 85 N. E. 921.

52. Contract between carriers.—Washington, etc., R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531.

53. Evidence as to speed.—Wilson *v.* Broadway, etc., R. Co., 8 Misc. Rep. 450, 28 N. Y. S. 781, 60 N. Y. St. Rep. 60.

54 Evidence as to right of way.—In an action to recover for injuries by a collision of two street cars at a crossing, the fact that one of the cars was first on the crossing is not conclusive proof that such car had the right of way, but, in the absence of evidence as to the relative position and speed of the two cars as they approached the crossing, it constituted evidence from which the jury might have inferred that the car first on the crossing was entitled to precedence; and that the car first on the crossing was nearly over when struck is admissible to throw light on the relative position of the cars. Judgment 44 N. Y. S. 742, 16 App. Div. 152, reversed in Loudoun *v.* Eighth Ave. R. Co., 56 N. E. 988, 162 N. Y. 380.

Custom.—In an action against two street railroad companies for injuries to a passenger on the car of one, received in a collision at a crossing, evidence of a custom between street railroad companies of giving the older company the right of way at crossings was admissible to show which defendant was guilty of the greater negligence. Howland *v.* Oakland Consol. St. R. Co., 42 Pac. 983, 110 Cal. 513.

55. Evidence of rule.—Schmidt *v.* Chicago City R. Co., 239 Ill. 494, 88 N. E. 275.

56. Posting of bulletin.—Schmidt *v.* Chicago City R. Co., 88 N. E. 275, 239 Ill. 494, affirming judgment 144 Ill. App. 512.

57. Municipal ordinance immaterial.—Where, in an action for injuries to a passenger on a street car by a collision with a railroad train at a crossing, the conductor, who went ahead and signaled the car to cross, testified that he saw the train when two blocks away, and did not realize there was any danger until it was within one hundred feet of the crossing, and fixed the location of the train at each of the periods he observed it, without basing his judgment in any way on its apparent speed, or any speed that he previously had knowledge of, a city ordinance regulating the rate of speed of trains at that point was immaterial. Chicago City R. Co. *v.* Shaw, 77 N. E. 139, 220 Ill. 532.

Where, in an action for injuries to a passenger on a street car in collision with a railroad train at a crossing, the motorman in charge of the car testified that he discovered the danger of a collision in time to have stopped the car, which he failed to do because his appliances were defective, he was not entitled to presume that the approaching train was running within the rate of speed prescribed by a city speed ordinance, and hence such ordinance was inadmissible in defendant's favor. Bragg *v.* Metropolitan St. R. Co., 91 S. W. 527, 192 Mo. 331.

Railroad commissioner's order customarily ignored.—In an action against two intersecting railroads for injuries to a passenger from a collision, where the testimony shows conclusively that neither road regarded an order of the railroad commissioner fixing the speed at which the interlocker might be crossed, that the order was ignored by general custom, and that the engineer of the road seeking the introduction of the order knew of the cus-

casions it not competent, it being immaterial to the issue.[58] But it has been held in an action for injuries resulting from defendant's failure to stop its train at the intersection of another railroad, as was its duty to do, that evidence is admissible that on prior occasions defendant had failed to stop its trains at this place.[59]

Collision with Road Vehicles.—Where the action is to recover for injuries to a passenger in a car struck at a street crossing by a fire engine, an ordinance giving fire engines a right of way on street railway tracks is irrelevant.[60] But where the injury is alleged to have been caused by a collision with a hook and ladder wagon, evidence as to how far a gong on the wagon could be heard is admissible, where defendant claims that the collision was caused by the gripman's failure to hear any gong, and there is evidence that the gong was sounded.[61]

Inapplicable without Foundation Laid.—Where the injury resulted from a collision between an electric car and a vehicle which turned off a road onto the track, evidence whether the track was wet or dry on the night in question, and testimony as to how far witness could see on such a night, and within what distance a car could be stopped at the place where the accident occurred, is inapplicable, in the absence of any evidence that the vehicle was on the track until the instant of the collision.[62]

Conditions, etc., Attending Collision.—Where the question of the force and effect of the collision becomes material, any evidence which materially tends to indicate the violence of the impact, such as the effect upon the passengers in the vehicle or the vehicle itself, is competent.[63] But in an action for the death

tom, refused to admit the order is not error. Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185.

In an action against two intersecting railroads for injuries to a passenger from a collision, the testimony showed conclusively that neither road regarded an order of the railroad commissioner fixing the speed at which the interlocker might be crossed, that the order was ignored by general custom, and that the engineer of the road seeking the introduction of the order knew of the custom. Held, that the order was immaterial and inadmissible where the liability of the railroad depended on whether by the exercise of proper care the approach of the other train and the imminence of the collision could have been known in time to prevent the accident. Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185.

58. Evidence as to prior occasions.—In an action for injuries received while a passenger on defendant's street car, plaintiff having introduced evidence that the car was striving to pass a crossing before another car, a question as to whether he had seen races of that kind was properly disallowed. Whitbeck *v.* Atlantic Ave. R. Co., 4 N. Y. S. 100.

59. Prior failure to stop vehicle at same crossing.—Washington, etc., R. Co. *v.* Trimyer, 67 S. E. 531, 110 Va. 856.

60. Ordinance irrelevant.—Fane *v.* Philadelphia Rapid Trans. Co., 77 Atl. 806, 228 Pa. 471.

61. Evidence as to gong sound.—Olsen *v.* Citizens' R. Co., 54 S. W. 470, 152 Mo. 426.

62. Testimony inapplicable without foundation laid.—Fagan *v.* Rhode Island Co., 60 Atl. 672, 27 R. I. 51.

63. Conditions, etc., attending collision.—Where evidence in an action for injury to a passenger from collision tended to show that the force of the collision threw the passengers forward at the front end of the car, testimony of a passenger that, as he got up, he "noticed the boys,—the blood running from their heads,"—is admissible, as helping to indicate the violence of the impact producing plaintiff's injury. Larkin *v.* Chicago, etc., R. Co., 92 N. W. 891, 118 Iowa 652.

In an action by a passenger for injuries, evidence of the condition of the cars immediately after the collision, and the efforts required to separate them, is admissible as tending to show the force of the collision and bearing on the rate of speed. Elgin, etc., Tract. Co. *v.* Wilson, 120 Ill. App. 371, judgment affirmed in 75 N. E. 436, 217 Ill. 47.

In an action by a street car passenger for injuries in a collision, evidence as to whether other passengers were injured was competent, as tending to establish the force of the impact, which bore on the question of the motorman's negligence. Mullin *v.* Boston Elev. R. Co., 70 N. E. 1021, 185 Mass. 522.

In an action for injuries to a passenger caused by a collision of defendant's street railway cars, the speed at which the cars collided and the injury to them was material to show the force of the collision, and the force of the collision was material to show the probabilities as to

of a passenger by collision between two street cars, evidence as to the effect of the collision on the other passengers has been held immaterial.[64]

§ 3229. Effort to Escape Danger.—Where the question is whether the plaintiff was making a bona fide attempt to escape danger or was guilty of contributory negligence, the conduct of the passenger injured and the conduct of others on the vehicle at the time, including the officers of the train, is material and competent evidence.[65] And testimony of all the facts and circumstances at the time of the accident is admissible even for the purpose of establishing one or more independent grounds of negligence.[66] Such evidence is considered a part of the res gestæ.[67] Thus, it is permissible to show that the conductor became frightened and left the car before the passenger who was injured.[68]

§ 3229½. Competency of Employees or Care in Selecting Them.—In an action against the carrier for personal injuries caused by the negligence of one of its employees, evidence as to the degree of care previously exercised by defendant in the selection of employees is competent.[69] Where death or injury is caused to a passenger by the horses attached to a horse car "running away" it is proper to prove facts tending to show that the driver was incompetent.[70] Where the complaint alleges that the accident resulted from the persons in charge of the train being intoxicated, evidence that the engineer was seen a number of times in a saloon near a station is admissible, in connection with evidence that he

whether plaintiff was injured, and the nature and extent of the injury. Johnstone *v.* Seattle, etc., R. Co., 87 Pac. 1125, 45 Wash. 154.

64. In action for death.—Abel *v.* Northampton Tract. Co., 212 Pa. 329, 61 Atl. 915.

65. Effort to escape danger.—In an action for injuries received by plaintiff while standing on a platform of a car, he testified that he went there because he feared an accident on account of the high rate of speed. The conductor testified that he left the smoking car several minutes before the accident occurred, plaintiff going out with him; that the train was not then running as fast as it had been; and that he gave certain orders, and then returned to the smoking car, leaving plaintiff on the platform. Held, that it was reversible error to exclude a question put to one of the passengers whether the conductor did return to the smoking car after he and plaintiff left it, and before the accident. Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130.

Immaterial evidence.—Where, in an action for injuries to a passenger in jumping from a street car as the result of an explosion of the controller, there was no allegation that the conductor's direction to the passengers to "Jump for your lives" constituted actionable negligence, evidence that the conductor had no authority to give such direction was immaterial. Waniorek *v.* United Railroads, 118 Pac. 947, 17 Cal. App. 121.

66. Facts and circumstances surrounding accident.—In an action against a street railroad for the death of a passenger, who jumped from the car in an excess of fright on seeing apparent electrical disturbances at the front end of the car, where the evidence was not conclusive as to whether it was the electrical display, or that connected with the high rate of speed and rocking motion of the car, which induced deceased to jump, evidence of the rocking motion of the car and of irregularities in the track was admissible, not only on the issue of the railroad's negligence in causing the electrical disturbance, but as showing an independent ground of negligence. Blumenthal *v.* Union Elect. Co., 105 N. W. 588, 129 Iowa 322.

67. Res gestæ.—In an action against a carrier for personal injuries received by a passenger in jumping from the car to avoid a collision, evidence of the action of the other passengers in also jumping is evidence as a part of the res gestæ to show that the passenger injured was acting with ordinary prudence. Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 162.

68. Conduct of employees at time.—In an action against a street railroad for the death of a passenger, who jumped from the car on seeing an apparent electrical disturbance in the forward end of the car, evidence that the conductor of the car became frightened, and jumped before deceased did, was competent to show negligence in operating the car with an incompetent conductor in charge of it. Blumenthal *v.* Union Elect. Co., 105 N. W. 588, 129 Iowa 322.

69. Competency of employee.—Augusta, etc., R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706.

70. Competency of driver.—Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32, 55 Am. Rep. 292.

drank intoxicating liquors at another station a short time before.[71] But it is held that evidence of inexperience of the operator of a passenger elevator is improperly admitted, as raising a collateral issue, in an action for death of a passenger caused, as alleged, by negligent operation of the elevator.[72] The fact that defendant employed a boy to run an elevator in violation of the law is competent evidence of defendant's negligence as to all consequences of failure of duty on the part of such boy.[73]

§ 3230. Failure to Protect from Third Persons.—Relevancy and Materiality.—Where a passenger sues for injuries resulting from being pushed off the vehicle by other alighting passengers, evidence to be admissible must be relevant to the issue made.[74] Where a passenger sues for injuries sustained by being pushed off the vehicle by other passengers in alighting, the language used by the conductor in telling her that she was blocking the passage way and asking her to move aside being proper in form and substance, evidence that his tone of voice was harsh and loud, so as to agitate and confuse her, is not admissible.[75]

To Show Notice of Danger.—Where a passenger's injury is alleged to have resulted from a violent outbreak of strikers on a train, evidence of policemen as to escorting the strike breakers from defendant's morning trains to the factory is competent on the question of defendant's notice of the risk of danger.[76] And in an action for injuries from disorderly conduct of fellow passengers on the return trip of an excursion train, evidence relative to the disorderly conduct of the same passengers on the going trip is competent.[77] But evidence as to prior happenings which are too indefinite and remote to bring home to the carrier a knowledge of facts indicating danger to its passengers should be excluded.[78]

Corroborative Evidence.—Evidence by plaintiff that he went into the "reserved car" for protection from his assailant, who was after him, is properly admitted in corroboration of a witness, who notified the conductor of the threats

71. **Intoxication of employee.**—Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860.

72. **Evidence of inexperience.**—Oberndorfer *v.* Pabst, 76 N. W. 338, 100 Wis. 505.

73. **Employing boy in violation of law.**—Jones *v.* Co-Operative Ass'n, 109 Me. 448, 84 Atl. 985.

74. **Failure to protect from third person.**—In the trial of an action for damages by a passenger for being compelled to ride in a car occupied by disorderly passengers, evidence that the conductor in charge of the train had, prior to the time that the plaintiff became a passenger, made efforts to suppress the disorder, was irrelevant, when the question to be determined was whether such conductor was diligent in the suppression of disorder which arose after the plaintiff became a passenger. Southern R. Co. *v.* O'Bryan, 112 Ga. 127, 37 S. E. 161.

75. **Passenger pushed from car—Language of conductor.**—McCumber *v.* Boston Elev. R. Co., 207 Mass. 559, 93 N. E. 698, 32 L. R. A., N. S., 475.

Thus it has been said that perturbation of mind which inevitably depends upon individual peculiarities of experience, sensitiveness and nervousness, and fluctuates in the same person with varying conditions of health and happiness, and which is claimed to arise solely from inflection of voice in the course of necessary speech, is too unstable a foundation upon which to rest a standard of legal liability in a case of this kind. McCumber *v.* Boston Elev. R. Co., 207 Mass. 559, 93 N. E. 698, 32 L. R. A., N. S., 475. See Beal *v.* Lowell, etc., St. R. Co., 157 Mass. 444, 33 N. E. 653.

76. **To show notice of danger.**—Nute *v.* Boston, etc., Railroad, 214 Mass. 184, 100 N. E. 1099.

77. **Disorderly conduct on prior trip.**—Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241.

78. **Indefinite and remote evidence.**—In an action against a street railway by a passenger for injuries received through being struck by a missile thrown by a bystander near a street corner, where the car was by ordinance required to stop, plaintiff's evidence, offered to show prior assaults on the car for failure to stop at such corner, was not so framed as to exclude sporadic assaults occurring during a period of years, or as to show a frequent occurrence thereof, indicating future repetition. Held properly rejected as too indefinite and not bringing home to the company facts indicating danger to its passengers. Woas *v.* St. Louis Trans. Co., 96 S. W. 1017, 198 Mo. 664, 7 L. R. A., N. S., 231, 8 Am. & Eng. Ann. Cas. 584.

of plaintiff's assailant, and that plaintiff had taken refuge in the car, and who asked the conductor to keep the door closed, which he refused to do.[79]

Reputation of Servant for Courage.—In an action against a carrier for personal injuries by one passenger to another, on account of the alleged negligence of defendant in failing to put the passenger doing the injury off the train, it is error to strike out part of defendant's answer, alleging the known reputation of the conductor for courage and efficiency, and excluding evidence in regard thereto; especially where the efficient character of the conductor is made in the instructions one of the elements whereon the jury were told to find for defendant.[80]

§ 3231. Assaults, Insults, etc., by Servants.—Where the cause of action is a wrongful and unlawful assault and battery upon the passenger or an insult to such passenger, only such matters as are relevant and material are to be admitted.[81] Thus, in an action for an unlawful invasion of a person's right of personal security while getting off a train when it appeared that plaintiff was on a train which did not stop at his station, and that he chose to leave the train as soon as he was informed of his mistake by the conductor, rather than be carried by his destination, evidence that the ticket agent told him that the train stopped at his station was inadmissible, as it was immaterial whether or not plaintiff was negligent in taking the train.[82]

Circumstances Attending Wrong or Trespass.—The circumstances attending the alleged commission of a trespass or a wrong, although not set forth in the pleading, may be given in evidence with a view to affecting the damages, save where they themselves constitute a separate and distinct cause of action.[83]

79. Corroborative evidence.—Bedsole *v.* Atlantic, etc., R. Co., 151 N. C. 152, 65 S. E. 925.

80. Failure to protect—Courage and efficiency of employee.—Louisville, etc., R. Co. *v.* McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465.

81. Must be material.—In an action against a street railway company for the angry and insulting way in which its conductor replaced a sign on the seat in front of plaintiff after her companion had replaced it where it had been before another passenger jestingly removed it, it was not error to exclude a question asked plaintiff whether the affair would have happened if her companion had not moved the sign. San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

In an action for indignities suffered by a passenger at the hands of the conductor, evidence of occurrences between the conductor and other passengers, not overheard by the passenger, was inadmissible. Chesapeake, etc., R. Co. *v.* Austin, 126 S. W. 144, 137 Ky. 611.

In an action for injury to an alighting street car passenger, it was not error to exclude evidence that when the accident occurred plaintiff told the conductor that he had better learn how to let ladies off the car; the only issue being whether he shoved her. Bullitt *v.* Louisville R. Co., 134 S. W. 1153, 142 Ky. 670.

In an action against a carrier for an assault committed by its conductor in the course of an altercation with plaintiff with reference to an alleged defective pass, it was error for the court to refuse to charge that the jury should not consider the fact that defendant negligently wrote the date on the pass, so that it appeared to expire May 1st, instead of May 10th, as the assault could not be considered as the ordinary and reasonable, or even remotely probable, effect of such negligence. St. Louis, etc., R. Co. *v.* Harrison, 89 S. W. 53, 76 Ark. 430.

82. Mistake of agent immaterial.—Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221, 20 N. E. 775.

83. Circumstances attending wrong or trespass.—In an action against a railroad for damages in carrying plaintiff beyond her station, and for misconduct towards her on the part of the conductor of the train, evidence of misconduct towards her on the part of a brakeman is admissible, although the misconduct of the conductor only is complained of in the petition, when the brakeman's misconduct occurred in the presence of the conductor, and at the time of the acts of the conductor complained of. Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 9 Ky. L. Rep. 7, 3 S. W. 530.

In an action for alleged insulting conduct by a street car conductor toward plaintiff, evidence that the conductor was standing in the presence of negroes on the platform at the time it was claimed the insulting remarks were made by him was admissible though not pleaded. San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

Any part of the proceeding is admissible to characterize the conduct of the carrier's employee at the time or to show the conditions surrounding the case.[84] A passenger suing for the abusive and insulting language of an employee of the carrier may show the manner and tone of voice accompanying the language.[85] And it is competent for the passenger to show his physical condition at the time, where he is suing to recover for insult and humiliation.[86] Where insults are offered by a street car conductor toward a passenger, it is proper to permit proof of the presence of others on the car at the time.[87]

Other Cause of Injury.—Although the carrier might show the passenger's injuries were caused by his own drunkenness at the time, yet an isolated instance of intoxication on his part, some three months before the assault, is not admissible to show that his alleged injuries were due to alcoholism, and not to the assault.[88]

Prior Conduct and Relations of Parties.—In an action against a railroad company for an assault by its conductor on a passenger, a question whether

84. Conduct of parties—Surrounding circumstances.—Where, in an action by a passenger for an assault by the conductor, the evidence showed that the assault followed a wrangle concerning the failure of the passenger and his companions to leave the car at their destination, it was proper to show the facts whether their failure to leave the car was due to their carelessness or to the conductor's failure to announce the station as shedding light on the contentions of the parties and to mitigate the damages, though neither reason for failing to get off would be conclusive on the right to recover. Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142.

In an action against a railroad for damages alleged to have been sustained by plaintiff from ill treatment by defendant's inspector, evidence that when the inspector ordered plaintiff off the train he was gruff and insulting, and said to a gentleman passenger interfering by reason thereof: "It is none of your business. I will not give you my name. I don't have to. I don't care if I do lose my job. I was going to quit anyhow," was admissible as tending to characterize the conduct of the inspector, and to show that the language used to plaintiff was in the hearing of the other passengers. Southern Pac. Co. *v.* Bailey (Tex. Civ. App.), 91 S. W. 820.

Starting car before all parties alight.—In an action against a street railway company for misconduct of its conductor towards plaintiff and her companions, it could be shown that the car was started before one of the companions alighted. San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

Evidence explanatory of servant's conduct.—In an action for alleged injuries to a passenger by his being thrown from a train by a brakeman, evidence that the train carried a large crowd who were intoxicated, boisterous and disorderly was properly admitted to explain the conduct of the trainmen. Berg *v.* Chicago, etc., R. Co., 131 N. W. 902, 146 Wis. 419.

Conduct subsequent to insult.—In an action against a street railway company for damages for breach of duty by the defendant, as a common carrier, in carrying a passenger, the evidence showed that the driver of the car insulted and abused the passenger, and threatened to put him off the car; that such threats and insults were kept up until the car reached a station, where another driver was placed in charge of the car, the first driver still remaining in the car, and continuing the conduct complained of. Held, that evidence as to the insults and acts of the driver after he had been relieved by the second driver was properly admitted. Malecek *v.* Tower Grove, etc., R. Co., 57 Mo. 17.

85. Manner and tone of voice.—Alabama, etc., R. Co. *v.* Pouncey, 7 Ala. App. 548, 61 So. 601.

86. Physical condition.—In an action against a carrier for humiliation to a passenger resulting in sickness, etc., caused by a conductor's angry, etc., manner, evidence respecting passenger's physical condition is admissible. Trinity, etc., R. Co. *v.* Bradshaw (Tex. Civ. App.), 107 S. W. 618.

87. Presence of others.—San Antonio Tract. Co. *v.* Lambkin (Tex. Civ. App.), 99 S. W. 574.

88. Other cause of injury.—Fielder *v.* St. Louis, etc., R. Co. 51 Tex. Civ. App. 244, 112 S. W. 699.

In an action by a passenger for assault by the company's employees, defendant claiming that plaintiff's injuries were due to alcoholism, the admission, over objection, of evidence that witness, the sheriff, saw plaintiff drunk on the street several months before the alleged assault, and threatened to remove him from his position as deputy if he continued to drink, together with the statements that plaintiff had then been drinking for several days and causing trouble, was prejudicial error. Fielder *v.* St. Louis, etc., R. Co., 51 Tex. Civ. App. 244, 112 S. W. 699.

plaintiff on some previous day used abusive and profane language to the conductor on the train, and had threatened him, is improper, it not being stated when or on what occasion this occurred.[89] And it is improper to admit evidence that the plaintiff had threatened the employee some months previous that, if he did not pay a certain bill, the plaintiff would make him lose his job.[90]

Acts of Employees at Other Times.—In an action against a railroad company for injuries inflicted on a passenger by a conductor, plaintiff may not show that the conductor had been guilty of similar conduct on other occasions with reference to other persons.[91] Where the carrier is sued for an assault by a special police officer in its employee, evidence of another assault by the same officer on a third person at another time is inadmissible.[92] And where no effort is made by plaintiff to impeach the servant as a witness, evidence offered by the defendant as to the conductor's general character, and his conduct towards lady passengers in particular, is properly excluded.[93]

Subsequent Conduct of Servant.—Where a passenger seeks to recover for an insult given by the conductor of a street car, evidence as to the conduct of the conductor subsequent to the transaction alleged in the petition and disconnected therewith is admissible.[94]

Arrest and Punishment of Servant.—Where a passenger's suit is based on an assault by a servant of the carrier, it is improper to admit, over the objection of the plaintiff, evidence that the servant had been arrested and fined for the assault.[95] And where the servant had at the same time killed plaintiff's brother, the record of the indictment, conviction, and sentence of the servant for the murder is inadmissible.[96]

To Show Capacity and Authority.—Evidence is admissible in such cases to show that the person committing the assault was an employee of the carrier,[97] or, on the other hand, to show that he was an officer of the law at the time of the assault.[98] In an action for personal injuries by a passenger alleged to have been assaulted by the agent of defendant, the admission of evidence that the servant had prosecuted parties for being intoxicated on trains and also for jumping on and off was proper as tending to prove that he was in the employ and service of the defendant.[99] Where the plaintiff sues for an assault while waiting to take passage on a car, by a special officer appointed at the request of the carrier to maintain order at the station platform, evidence of the directions

89. **Prior conduct, etc.**—Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

90. **Former threats by plaintiff.**—Hanson *v.* Urbana, etc., St. R. Co., 75 Ill. App. 474.

91. **Acts and omission of servants on other occasions.**—Hayes *v.* St. Louis R. Co., 15 Mo. App. 584.

92. **Assaults on other persons.**—Layne *v.* Chesapeake, etc., R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414.

93. **No offer to impeach servant.**—Berger *v.* Chicago, etc., R. Co., 97 Mo. App. 127, 71 S. W. 102.

94. **Subsequent and disconnected conduct.**—Georgia R., etc., Co. *v.* Baker, 58 S. E. 88, 1 Ga. App. 832.

95. **Arrest and punishment.**—Hanson *v.* Urbana, etc., St. R. Co., 75 Ill. App. 474.

96. **Record of conviction of servant.**—Layne *v.* Chesapeake, etc., R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414.

97. **To show capacity as employee.**—In an action for assault by persons in the employ of defendant's street railway company, evidence that the persons committing the assault were appointed special deputies by the sheriff at the request of the company was material only in so far as it tended to show their employment by the company. Rand *v.* Butte Elect. R. Co., 107 Pac. 87, 40 Mont. 398.

98. **Officer of the law.**—The question for the jury being in what capacity B. was acting when he assaulted a passenger, whether as a servant of defendant or as a peace officer, under what he regarded as a valid appointment and qualification, testimony to show that B. was a public officer, the validity of the appointment being entirely collateral, should not have been stricken out. Philadelphia, etc., R. Co. *v.* Green, 71 Atl. 986, 110 Md. 32.

99. **Prior actions to show employment.**—Southern R. Co. *v.* Crone, 51 Ind. App. 300, 99 N. E. 762.

of the carrier's superintendent to the special officer, and his precise duties, is admissible.[1]

Evidence of Approval of Employee's Act.—Where plaintiff's evidence tends to prove that the assault was wanton and malicious, but that the carrier approved of the employee's act and conduct, any evidence which tends materially to rebut the effect of the plaintiff's evidence in this respect is competent.[2]

Report to Carrier by Passenger.—In a suit against a carrier for misconduct of its conductor towards plaintiff and others, evidence is admissible on plaintiff's part to show that he reported the misconduct to the company as soon as he arrived home, as tending to show he was aggrieved.[3]

Report to Carrier by Servant.—In an action by a passenger against a railway company for injuries inflicted on the former by defendant's conductor, where plaintiff has shown a ratification by defendant of the agent's acts, defendant may show what report its agent made to it of the affair.[4]

Plaintiff's Conduct Provoking Assault or Insult.—Abusive or insulting language by the carrier's servant towards a passenger can not be justified; the passenger being entitled at least to nominal damages. Evidence that the abuse or insult was brought about by the misconduct of the passenger is competent only in mitigation of damages.[5] So if the conduct of the passenger is set up in defense, evidence which tends to explain this conduct is competent. Thus, where a carrier is sued for an assault by a brakeman upon a passenger who attempted to board a train after it started, and exhibition of whose ticket was demanded by the brakeman on the car steps, evidence that the passenger was crippled and thus prevented from boarding sooner is proper.[6]

§§ 3232-3233. As to Injury—§ 3232. Evidence as to Existence of Injury.—Connecting Injuries and Negligence or Breach of Duty.—In order to connect the plaintiff's injuries with the defendant's negligence or breach of duty, any material relevant fact may be admitted in evidence.[7] But facts

1. **Evidence as to authority.**—Brewster *v.* Interborough Rapid Trans. Co., 123 N. Y. S. 992, 68 Misc. Rep. 348.

2. **Evidence to rebut presumption of approval.**—In an action by a passenger against a street car company for being wrongfully ejected from a car, where plaintiff's evidence tended to show that the ejection was wanton and malicious; but that the defendant company approved of the acts of its conductor by retaining him in its service, it was error to exclude evidence offered by defendant that such conductor was prosecuted criminally for his assault on plaintiff and was acquitted, since such evidence tended to rebut the presumption that defendant by retaining the conductor in its service ratified his wrongful acts. Peterson *v.* Middlesex, etc., Tract. Co., 59 Atl. 456, 71 N. J. L. 296.

3. **Report to carrier by passenger.**—San Antonio Tract. Co. *v.* Davis (Tex. Civ. App.), 101 S. W. 554.

4. **Report to carrier by servant.**—Hayes *v.* St. Louis R. Co., 15 Mo. App. 584.

5. **Plaintiff's conduct.**—Birmingham R., etc., Co. *v.* Coleman (Ala.), 61 So. 890.

Plaintiff's conduct provoking the assault is admissible in mitigation of exemplary damages. Galveston, etc., R. Co. *v.* La Prelle, 65 S. W. 488, 27 Tex. Civ. App. 496.

6. **Explanatory of conduct.**—Cathey *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 130.

7. **Connecting injuries and negligence or breach of duty.**—Where a passenger is carried beyond his destination, in an action for damages therefor, the fact that plaintiff was sick when she left the train, though unknown to the conductor, and the rough condition of the track back to the station over which plaintiff walked, are admissible in evidence to show the relation between subsequent aggravation of her sickness and defendant's wrongful act. East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

In an action against a carrier of passengers, to recover damages for the failure of the defendant to carry the plaintiff from New York to San Francisco, via Lake Nicaragua, according to his agreement, for neglect of duty in furnishing suitable accommodations, etc., for detention and delays on the route, and for sickness caused by unnecessary exposure to an unhealthy climate, etc., it was held that it was entirely proper for the judge to receive evidence as to how much the plaintiff was exposed to the sun and rains while crossing the Isthmus, and to show

which can have no bearing on the issue should be excluded.[8]

Evidence as to Injury to Other Passengers.—In an action for injuries to a passenger testimony of other passengers that they received injuries at the same time, and owing to the negligence complained of, is admissible.[9]

§ 3233. Nature and Extent of Injury.—What took place in the car at the time of the accident is competent, as illustrating the severity of the injury.[10] And where a passenger sues for injuries received while leaving defendant's station, a question as to whether plaintiff appeared to be hurt immediately after the accident in suit, should be allowed to be answered if put to a witness to whom the plaintiff had made complaint of injury immediately following the accident.[11] But where the petition or complaint specifically sets out the injury claimed to have been sustained, evidence of other injuries not a part thereof or a result therefrom is inadmissible.[12] However, where the complaint alleges that, as a result of the injury on the head, plaintiff suffered mental derangement, an expert witness may testify that plaintiff's disposition was changed, since a derangment of the mind would necessarily have some effect on the disposition of the person.[13]

that the climate there was bad and unhealthy, so that the jury could determine whether the plaintiff's sickness was caused by the defendant's negligence or breach of duty. Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

In an action for injury to a passenger wrongfully required to leave a train while it was in motion, testimony of the brakeman that he saw plaintiff leave the train, and did not tell him to stop, was admissible to show that negligence, in requiring plaintiff to leave the train, was the proximate cause of his injury. Kansas, etc., R. Co. *v.* Florence (Tex. Civ. App.), 138 S. W. 430.

8. Fact inadmissible.—In an action for death of a passenger caused by the explosion of a burning oil tank, testimony of a witness, who was also injured, as to where he was standing at the time, but which in no way tends, to show where deceased was, is inadmissible. Rudiger *v.* Chicago, etc., R. Co., 77 N. W. 169, 101 Wis. 292.

9. Evidence as to injury to other persons.—Ft. Worth, etc., R. Co. *v.* Stingle, 2 Texas App. Civ. Cas., § 704.

Where witness was a passenger in the same car in which deceased was riding at the time she received the injuries from which she died, evidence that witness was suddenly thrown from the car at the same time deceased was also thrown off was admissible. Baldwin *v.* People's R. Co. (Del.), 7 Pen. 81, 76 Atl. 1088, judgment affirmed in 72 Atl. 979.

In an action by a passenger for inujries sustained in a collision, in which defendant denied that plaintiff was injured, evidence as to the number of persons killed in the collision was admissible to show its severity. Estes *v.* Missouri Pac. R. Co., 85 S. W. 627, 110 Mo. App. 725.

A train was wrecked, but the rear coach, in which plaintiff was a passenger, was not derailed or overturned. Plaintiff claimed his injuries had been caused by the shock. Defendant pleaded a general denial. Held, that evidence was admissible that persons riding in the other coaches were injured, and that the engineer was killed. Missouri, etc., R. Co. *v.* Wright, 47 S. W. 56, 19 Tex. Civ. App. 47.

In an action against a railroad company for injuries to plaintiff, a passenger, caused by a car jumping the track, where the issue is whether plaintiff was injured at all, and the physicians disagree, evidence that the conductor of the train, who was in a seat near plaintiff at the time of the accident, was not injured, is admissible. Levy *v.* Campbell (Tex.), 20 S. W. 196, reversing 19 S. W. 438.

10. Illustrating severity of injury.—Louisville, etc., R. Co. *v.* Carothers, 65 S. W. 833, 66 S. W. 385, 23 Ky. L. Rep. 1673.

11. Apparent condition of plaintiff.—Williamson *v.* Grand Trunk Western R. Co., 159 Ill. App. 443.

12. Evidence of other injuries inadmissible.—Under an allegation in a petition in an action against a railroad for damages for personal injuries that plaintiff's back was sprained, evidence of injuries to his bladder and kidneys is inadmissible. Ft. Worth, etc., R. Co. *v.* Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366.

Allegations in plaintiff's petition to the effect that his damages resulted from the negligent crushing of his foot by defendant's cars will not warrant the admission of evidence to show that an attending physician in the employ of the defendant company improperly administered an enema which caused a permanent stricture of the bowels. Galveston, etc., R. Co. *v.* Scott, 18 Tex. Civ. App. 321, 44 S. W. 589.

13. Change of disposition.—Neuer *v.* Metropolitan St. R. Co., 127 S. W. 669, 143 Mo. App. 402.

Statement Prepared by Physician.—A written statement prepared by a physician who attended the plaintiff, setting forth the nature of the injuries received and their effect upon his bodily and mental condition and containing a statement as to witness' opinion as to the probable length of time within which he might recover from the injuries, is not admissible in evidence as an instrument of evidence although at the trial the physician testified that it was written by him and that it correctly stated the plaintiff's condition at the time referred to therein.[14]

Physical Examination.—The court can not, on application of the defendant, and in advance of the trial, order the plaintiff to submit to a surgical examination as to the extent of his injuries.[15]

§§ 3234-3237. As to Damages—§ 3234. Damages for Breach of Contract.—In an action for damages for breach of contract of carriage, any evidence which is relevant and material to the question of amount, measure and elements of damages properly pleaded is admissible.[16] Thus, where the damages depend upon the discomfort or injury suffered, evidence which tends to show that the plaintiff suffered no discomforts or injury is admissible.[17] But where the question is as to the amount and measure of damages, evidence as to matters for which the plaintiff is not entitled to recover should be excluded.[18]

14. Written statement of physician.—Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 30 L. Ed. 299, 7 S. Ct. 118.

15. Compelling plaintiff to submit to surgical examination before trial.—Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 35 L. Ed. 734, 11 S. Ct. 1000.

16. Damages for breach of contract.—In an action by a passenger against a railroad company to recover damages for the latter's breach of a contract to carry him to a certain station, in that it took him to a station a few miles distant therefrom, the exclusion of the testimony of a livery stable man, engaged in transporting passengers between these stations, as to the regular charge for such transportation, where the object is to show that the passenger could have obtained transportation back to the station for a less sum than that charged for such service in the complaint, constitutes error. Miller *v.* King, 53 N. Y. S. 123, 32 App. Div. 389.

In an action against a railroad company for carrying a passenger by her destination, evidence that no conveyance could be obtained; that she walked five miles in the night over dusty roads, taking her three hours; that, in crossing a creek, she got her clothing and feet wet; that she was chased by dogs, and otherwise frightened; and that, in consequence of all this and the heat, she was made sick, is admissible. Cincinnati, etc., R. Co. *v.* Eaton, 94 Ind. 474, 48 Am. Rep. 179.

17. Evidence as to discomfort, etc.—In an action for damages by a negro against a railroad company for being required to ride in a car not provided with a water closet, evidence that plaintiff suffered no discomfort or injury on account of the car not being provided with a water closet is admissible. Henderson *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 42 S. W. 1030.

18. Matter irrelevant and inadmissible.—Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236.

In an action by a passenger for damages from being directed to a train which did not stop at her destination, instead of the proper one, which followed a few minutes later, testimony that her son had been directed to meet her on arrival of the train which did not stop, and that he did so, and, not finding her, returned home so that she was compelled to walk, was improperly admitted on the question of damages, since, if she had been directed to the proper train, her son would still not have met her. Louisville, etc., R. Co. *v.* Summers (Ky.), 118 S. W. 926.

In an action for carrying passenger beyond destination it appeared that plaintiff, of her own volition, returned to her destination on a freight train, while, by waiting an hour, she could have returned on a passenger train. Held, that evidence as to the unpleasant conditions on the freight train, and plaintiff's annoyance caused thereby, was not admissible. St. Louis, etc., R. Co. *v.* Power, 53 S. W. 572, 67 Ark. 142.

Matter of which neither party had notice.—Upon the trial of an action brought by a woman against a railroad company for damages alleged to have been sustained by her in consequence of having been carried beyond her destination and landed at night at or near a given town, where she, with no companion except her little child, was compelled to walk some distance in order to secure shelter and protection until the following morning, evidence that it was not the custom for ladies to walk about at that time of night without an escort in that town, or that it would be rather imprudent for a lady to walk a given distance in that place "in the dark" with no companion except a

Mitigation or Aggravation of Injury.—On the issue whether plaintiff exercised proper care in hiring a conveyance and driving to his destination after the carrier had failed to stop its train to permit him to board it, evidence that plaintiff was in the habit of driving was admissible.[19]

Willful Failure or Refusal.—Where the complaint alleges intentional wrong, the plaintiff has the right to introduce testimony having only a remote causal connection between the alleged wrongful act and the injury resulting therefrom, in order that the jury may have all the facts and circumstances before them in estimating damages.[20] Where the question at issue is whether the employee of the carrier willfully or inadvertently breached the contract of carriage, evidence which tends to show his temper or disposition toward the passenger at the time is admissible.[21] But in an action by a passenger for damages resulting from having taken the wrong car in pursuance to a direction of the railroad's flagman, the fact that plaintiff was a witness in another case involving misconduct on the part of the flagman was not competent as tending to show that he willfully directed her to the wrong car.[22]

Evidence to Rebut Willfulness.—In an action against a railroad company for its willful failure to transport a passenger over a leased line, evidence that its lease had expired, and that it was not in its power, was competent on the question of willfulness.[23] But in an action against a railroad company for willful and malicious refusal to stop its train, a statement by the engineer of the train that he had never disregarded a signal to stop is incompetent, as he was not a party to the suit, and there were no allegations in the complaint charging him with willful misconduct.[24]

§ 3235. In Actions for Ejectment.—In an action for damages for wrongful ejection, any evidence is admissible which is relevant and material to the question of the amount of measure and elements of damages recoverable under the pleadings.[25] Thus, where passengers who called for tickets to a place over

little child, was inadmissible; it not appearing that either the plaintiff or defendant had any knowledge of these facts. Dorsey *v.* Central, etc., R. Co., 38 S. E. 958, 113 Ga. 564.

19. Mitigation or aggravation.—International, etc., R. Co. *v.* Addison (Tex. Civ. App.), 93 S. W. 1081, reversed on another point in 97 S. W. 1037, 100 Tex. 241, 8 L. R. A., N. S., 880.

20. Pickens *v.* South Carolina, etc., R. Co., 54 S. C. 498, 32 S. E. 567.

Under a complaint alleging willful failure to carry plaintiff to her destination, and damages resulting from a storm after leaving defendant's depot, evidence that plaintiff was annoyed by negroes at and about the depot, and by defendant's failure to have a fire therein, was competent to show what caused her to leave, though she did not claim to have been injured by a failure to provide suitable accommodations therein. Pickens *v.* South Carolina, etc., R. Co., 32 S. E. 567, 54 S. C. 498.

21. Evidence as to temper or disposition.—On an issue as to whether the act of defendant's conductor in running by a certain station at which plaintiff wished to alight was willful or inadvertent, evidence was admissible that when plaintiff asked to be put off at a gate, which was not a stopping place, the conductor replied, "No, sir! I won't stop for you there, or anywhere else." Vicksburg, etc., R. Co. *v.* Scanlan, 63 Miss. 413.

22. Evidence to show willfulness.—Robertson *v.* Louisville, etc., R. Co., 37 So. 831, 142 Ala. 216.

23. Expiration of lease.—Pickens *v.* South Carolina, etc., R. Co., 32 S. E. 567, 54 S. C. 498.

24. Statements by employee.—Reeves *v.* Southern R. Co., 46 S. E. 543, 68 S. C. 89.

25. In action for ejectment—Recoverable under pleading.—In an action by a passenger against a carrier for wrongful ejection, an allegation that the agents of defendant, "by force and violence and threats, put plaintiff in fear," is equivalent to an allegation that the agents of defendant were insolvent or insulting, and authorizes the recovery of damages for insult or insolence. Cincinnati, etc., R. Co. *v.* Barkley, 13 Ky. L. Rep. 331.

But a subsequent count which alleges that plaintiff, after being expelled from defendant's car, "walked to B., her home, there being no other way or means of reaching there," and that she was injured by being compelled to leave defendant's car, by defendant's refusal to convey her, and by her walk to B., sufficiently alleges that the walk to B. was caused by defendant's act, and under such count plain-

one route, were given tickets there over a second route, boarded a train over the first route, and were put off at the next station, evidence of the conditions at such station and of the injuries from a carriage ride back to the initial station, is admissible as tending to show the necessity of such ride and damages therefrom.[26] And evidence of a passenger's arrest, on account of orders of the conductor, though subsequently discharged, is admissible.[27] In an action for the wrongful ejection of a street-car passenger, it is proper to allow plaintiff to testify that the place at which she was ejected had no police protection, though the absence of such protection is not alleged in the declaration.[28] But such issues must be properly before the jury under the pleading, or evidence relating thereto should be excluded.[29]

Evidence of Worldly Circumstances.—In an action to recover for the wrongful expulsion of a passenger, evidence of the worldly circumstances of the parties is only admissible where the entire injury is to the peace, happiness and feelings of the plaintiff and not where recovery is sought for loss of time and expenses incurred by reason of his expulsion.[30]

§ 3236. In Action for Personal Injury.—In an action for personal injury to a passenger, any evidence which relevantly and materially tends to show the extent, nature and elements of damage for which the passenger can recover is admissible.[31] Thus, where the suit is brought for ill-treatment, such as

tiff may recover, not only for her expulsion, but also for damages caused by her walk to B., if she herself exercised due care. Spicer *v.* Lynn, etc., R. Co., 149 Mass. 207, 21 N. E. 363.

26. Conditions at point of ejection—Ride back, etc.—Levan *v.* Atlantic, etc., R. Co., 68 S. E. 770, 86 S. C. 514.

27. Evidence of arrest, etc.—In an action to recover damages from a street car company for the act of the conductor of a car in unlawfully ejecting a passenger, evidence offered by the plaintiff that, upon the conductor's orders, he was arrested by a policeman and taken to court, but afterwards discharged, was excluded. Held error, as the evidence bore on the extent of plaintiff's damages. Jenkins *v.* Brooklyn Heights R. Co., 51 N. Y. S. 216, 29 App. Div. 8, 5 N. Y. Ann. Cas. 315.

28. Absence of police protection.—Atlanta Consol. St. R. Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100.

29. Issue must be raised.—An allegation in a complaint that plaintiff was expelled from defendant's train, that he experienced great fatigue and distress in finding his way back, and that by reason thereof and the ejection from the train he suffered great pain of mind and body, will not admit proof of the sickness of plaintiff's child, to which he was going, and plaintiff's consequent mental suffering, but such fact must be distinctly pleaded. Gulf, etc., R. Co. *v.* Hurley, 74 Tex. 593, 12 S. W. 226.

In an action by a passenger against a railroad company for being wrongfully ejected from a train on a dark, cold night, at a place where there was no station or house, where the complaint did not allege any mental suffering it was error to allow plaintiff to prove the delicate condition of his wife, who was awaiting his arrival at his destination, and his consequent distress of mind on her account. Indianapolis, etc., R. Co. *v.* Milligan, 50 Ind. 392.

A count in a declaration which alleges that plaintiff, a passenger in defendant's railway car, was wrongfully expelled therefrom, and that "in consequence of her wrongful expulsion, * * * defendant's neglect of duty in not carrying her to B., * * * and of her walk to B. in order to reach her home," she was injured, may be treated as if the last allegation were omitted, as plaintiff's walk to B. is not alleged to have been caused by defendant's act, and under such count plaintiff may recover for damages resulting from her wrongful expulsion, but not for damages occasioned by the walk. Spicer *v.* Lynn, etc., R. Co., 149 Mass. 207, 21 N. E. 363.

30. Evidence of worldly circumstances.—Central, etc., R. Co. *v.* Almand, 116 Ga. 780, 43 S. E. 67, citing Higgins *v.* Cherokee Railroad, 73 Ga. 149; Georgia R. Co. *v.* Homer, 73 Ga. 251; Central R. Co. *v.* Senn, 73 Ga. 705; Coleman *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Atlanta Consol. St. R. Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100; Southern R. Co. *v.* Hardin, 101 Ga. 263, 28 S. E. 847; Southern R. Co. *v.* Bryant, 105 Ga. 316, 31 S. E. 182.

31. Conduct of servants.—A passenger in a steamboat, in an action against the owners for damages, having proved the injury to himself through the negligence of the master and crew, offered further evidence to show that, while sitting upon the wharf immediately after the injury, he applied to the master for some of his men to assist him into a carriage, who re-

threatened ejection, evidence which tends to establish the existence and amount of any element of damage, such as plaintiff's anxiety, for which the plaintiff can legitimately recover, is competent.[32] But evidence as to matters for which the plaintiff can not recover should be excluded. Matter immaterial to the issue involved under the pleading is incompetent.[33]

Evidence as to Poverty or Need of Plaintiff.—A passenger being entitled only to compensatory damages, evidence as to his poverty, or the number and ages of his children, is irrelevant.[34]

§ 3237. Punitive Damages.—Where the question is whether or not plaintiff is entitled to punitive damages, the rules as to relevancy and materiality apply, and any testimony is admissible which materially tends to establish or protect the rights of either party as to the issue involved.[35] The conduct or conversation of the carrier's employees which tends to aggravate the injury complained of seems to be relevant and material.[36] But testimony, though material to the question of actual damages, may be immaterial as to the question of punitive damages.[37]

Ejection at Dangerous Place.—In an action against a carrier for wrongful ejection, evidence that plaintiff was put off at a point where there was a switch engine approaching him and a freight train also moving on the side tracks was properly admitted, as it tended to show that he was ejected at a dangerous place which was an aggravating circumstance to be considered in determining the right to exemplary damages.[38]

fused, saying that he had enough for his men to do on board. Held, that such evidence was admissible, because such conduct of the master was part of the transaction in question, and because it was proper for the purpose of showing the damage sustained. Hall *v.* Connecticut River Steamboat Co., 13 Conn. 319.

32. In suit for ill treatment.—Where, in action against a railroad for damages to plaintiff through ill treatment at the hands of defendant's train employees in threatening to eject her from the train because of an alleged irregularity in her ticket, the petition did not allege plaintiff's pecuniary condition, but plaintiff testified that at the time of the threatened ejection, she told defendant's inspector that she could not leave the train at that point as she had not sufficient money to enable her to reach home from there, such evidence could be considered by the jury in passing on the question of the extent of plaintiff's anxiety. Southern Pac. Co. *v.* Bailey (Tex. Civ. App.), 91 S. W. 820.

33. Immaterial matter.—In an action for carrying passenger beyond destination, evidence of the sad plight of her boy, whom she was anxious to reach, is not admissible. St. Louis, etc., R. Co. *v.* Power, 53 S. W. 572, 67 Ark. 142.

Where defendant carrier did not deny its liability for injuries to plaintiff, a passenger, the issue being the amount of damages, a photograph of the wreck was not material evidence. Taylor *v.* Spokane, etc., R. Co., 67 Wash. 96, 120 Pac. 889.

34. Poverty or necessity of plaintiff.—Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141.

35. Testimony to reduce damages.—In an action by a passenger for injuries arising from the explosion of a steamboat boiler, caused by negligence of the engineer, the defendant may, for the purpose of reducing the amount of punitive damages only, show that the engineer, though not licensed as such under United States statutes, was, nevertheless, skillful and competent. Fay *v.* Davidson, 13 Minn. 523, Gil. 491.

36. Conduct, etc., aggravating injury.—In an action against a carrier for taking a passenger past his destination, evidence of conversations between plaintiff and the conductor and motorman of the car, tending to show aggravation of the wrong and bearing on the issue of plaintiff's right to recover punitive damages, was admissible. North Alabama Tract. Co. *v.* Daniel, 3 Ala. App. 428, 57 So. 120.

37. Matter immaterial to question of punitive damages.—On the question of a passenger's right to punitive damages for being carried beyond her destination, the physical condition of the passenger, the purpose of her journey and that she intended to go to a hospital, the condition of the weather, and the fact that her ill health was aggravated by getting wet, are immaterial, though they may be material on the question of actual damage, or as matters of aggravation, if the right to punitive damages is established. Yazoo, etc., R. Co. *v.* Hardie, 100 Miss. 132, 55 So. 42, 34 L. R. A., N. S., 740, Ann. Cas. 1914A, 323, suggestion of error denied in 55 So. 967, 34 L. R. A., N. S., 742.

38. Action for ejection—Ejection at dangerous place.—Louisville, etc., R. Co. *v.* Forrest, 65 S. E. 808, 6 Ga. App. 766.

Refusing Entrance upon Subsequent Tender of Fare.—Where the plaintiff sues for ejection from a street car for refusal to accede to a wrongful demand for fare, evidence that, immediately after the ejection, plaintiff tendered a second fare and attempted to re-enter the conveyance, is admissible as a circumstance of aggravation authorizing punitive damages.[39]

Previous Trouble between Plaintiff and Carrier's Employees.—In a suit against a street railroad for the ejection of plaintiff who boarded a car not in service for carriage of passengers, evidence that plaintiff had previously had trouble with the men in charge of such cars, and claimed he had a right to ride on them, is admissible on the issue of punitive damages.[40]

§§ 3238-3287. Weight and Sufficiency of Evidence—§ 3238. In General.—In order to recover for personal injuries alleged to have been occasioned by negligence of a carrier, plaintiff must show by a preponderance of the evidence that defendant's negligence in fact caused such injuries and that there was no negligence on his part which contributed to causing the same.[41] In an

39. Subsequent tender of fare.—Georgia R., etc., Co. *v.* Davis, 65 S. E. 785, 6 Ga. App. 645.

40 Previous difficulties.—Hermann *v.* St. Joseph R., etc., Co. (Mo. App.), 129 S. W. 414.

41. Weight and sufficiency of evidence.—Keck *v.* Calumet, etc., R. Co., 156 Ill. App. 402.

Evidence held sufficient.—St. Louis, etc., R. Co. *v.* Evans, 99 Ark. 69, 137 S. W. 568; St. Louis, etc., R. Co. *v.* Taylor, 84 S. W. 1035, 74 Ark. 31.

Colorado.—Denver, etc., R. Co. *v.* Gunning, 80 Pac. 727, 33 Colo. 280.

Florida.—Pensacola Elect. Co. *v.* Alexander, 50 So. 673, 58 Fla. 337.

Georgia.—East Tennessee, etc., R. Co. *v.* Hughes, 22 S. E. 397, 97 Ga. 330; Georgia R., etc., Co. *v.* Tice, 52 S. E. 916, 124 Ga. 459; Southern R. Co. *v.* Dean, 57 S. E. 702, 128 Ga. 366; Georgia R., etc., Co. *v.* Cole, 57 S. E. 1026, 1 Ga. App. 33; Tallulah Falls R. Co. *v.* Harris, 58 S. E. 838, 129 Ga. 305.

Indiana.—Evansville Elect. R. Co. *v.* Lerch, 40 Ind. App. 147, 81 N. E. 225.

Kentucky.—Illinois Cent. R. Co. *v.* Dallas, 150 S. W. 536, 150 Ky. 442; Chesapeake, etc., R. Co. *v.* Morgan, 129 Ky. 731, 112 S. W. 859; Illinois Cent. R. Co. *v.* Colly, 86 S. W. 536, 27 Ky. L. Rep. 730; Louisville R. Co. *v.* Worley, 101 S. W. 926, 31 Ky. L. Rep. 96.

Louisiana.—Oxendine *v.* Louisiana R., etc., Co., 43 So. 1003, 119 La. 191.

Maine.—Pomroy *v.* Bangor, etc., R. Co., 67 Atl. 561, 102 Me. 497.

Michigan.—Gerlach *v.* Detroit United Railway, 171 Mich. 474, 137 N. W. 256.

Minnesota.—McGuire *v.* Great Northern R. Co., 118 N. W. 556, 106 Minn. 192; Crandall *v.* Minneapolis, etc., R. Co., 105 N. W. 185, 96 Minn. 434, 2 L. R. A., N. S., 645, 113 Am. St. Rep. 653; Symonds *v.* Minneapolis, etc., R. Co., 92 N. W. 409, 87 Minn. 408; Ahern *v.* Minneapolis St. R. Co., 113 N. W. 1019, 102 Minn. 435.

Nebraska.—Chicago, etc., R. Co. *v.* Winfrey, 93 N. W. 526, 67 Neb. 13. Judgment, 97 N. W. 308, 70 Neb. 287, affirmed in Chicago, etc., R. Co. *v.* Troyer, 103 N. W. 680, 70 Neb. 293.

New York.—Graham *v.* New York City R. Co., 104 N. Y. S. 869, 54 Misc. Rep. 566; Tauger *v.* New York City R. Co. (App. Term), 104 N. Y. S. 681.

North Carolina.—Reeves *v.* Seaboard, etc., R. Co., 62 S. E. 1078, 149 N. C. 244.

Oklahoma.—Atchison, etc., R. Co. *v.* Calhoun, 89 Pac. 207, 18 Okla. 75.

Oregon.—Devroe *v.* Portland R., etc., Co., 131 Pac. 304, 64 Ore. 547.

Pennsylvania. — Powelson *v.* United Tract. Co., 66 Atl. 78, 216 Pa. 583; Harper *v.* Pittsburg, etc., R. Co., 68 Atl. 831, 219 Pa. 368.

South Carolina. — Gyles *v.* Southern Railway, 60 S. E. 433, 79 S. C. 176.

Tennessee.—Cincinnati, etc., R. Co. *v.* Harris, 91 S. W. 211, 115 Tenn. 501, 5 L. R. A., N. S., 779; Memphis St. R. Co. *v.* Shaw, 75 S. W. 713, 110 Tenn. 467.

Texas.—Texas, etc., R. Co. *v.* Bump, 43 Tex. Civ. App. 297, 95 S. W. 29; Ft. Worth, etc., R. Co. *v.* Walker, 48 Tex. Civ. App. 86, 106 S. W. 400.

Utah.—Madsen *v.* Utah, etc., R. Co., 105 Pac. 799, 36 Utah 528.

Evidence held insufficient. — *Maine.* — Sayles *v.* Maine Cent. R. Co., 85 Atl. 2, 109 Me. 570.

Massachusetts.—Welch *v.* Boston Elev. R. Co., 72 N. E. 500, 187 Mass. 118.

Minnesota.—Mageau *v.* Great Northern R. Co., 119 N. W. 200, 106 Minn. 375; S. C., 113 N. W. 1016, 102 Minn. 399.

Oregon.—Goss *v.* Northern Pac. R. Co., 87 Pac. 149, 48 Ore. 439.

South Carolina.—McLean *v.* Atlantic, etc., R. Co., 61 S. E. 900, 1071, 81 S. C. 100, 18 L. R. A., N. S., 763.

South Dakota.—Wright *v.* Sioux Falls Tract. System, 28 S. Dak. 379, 133 N. W. 696.

Virginia. — Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

Washington. — Valentine *v.* Northern

action for the death of a passenger, it is necessary, not only to show that the accident occurred, but to show that the injury occurred through the fault of the defendant, and it is insufficient to show that defendant might have been guilty of negligence, especially where the evidence suggests with equal force that the injury might have resulted without his fault.[42]

Preponderance of Evidence.—In an action by a passenger for injuries, he must make out his case by a preponderance of the evidence.[43] A passenger, suing for injuries, must show by preponderance of the evidence that the negligence causing the accident was the negligence described in the declaration.[44]

Proof to Satisfaction of Jury.—A requested instruction which required that the jury should be "satisfied" that the apprehended results would flow from the injury, was properly refused. It exacted too high a degree of proof for a civil case.[45]

Reasonable Certainty.—Plaintiff, in an action against a carrier for personal injuries, is bound to make it reasonably certain that the injury was caused by the negligence of defendant or his agents or servants.[46] An instruction that the jury must find, with a "reasonable degree of certainty," that decedent's death was the proximate result of the injury received while a passenger on defendant's railroad, was properly refused, as it required a higher degree of evidence than is furnished by a preponderance of evidence.[47]

Questions for Jury.—Where the plaintiff testifies that the injury for which he sues occurred as defendant's train was approaching a station, a verdict in his favor will not be set aside on account of the strength of defendant's evidence that the injury occurred as they were preparing to leave and not as they approached the station, as the weight of the evidence and credibility of the witnesses are for the jury.[48] In an action for personal injury by a passenger, the verdict on conflicting evidence will not be disturbed.[49]

Circumstantial Evidence.—The liability of a street car company for the death of a passenger struck by a car may be shown by circumstantial evidence.[50] Though the death of a passenger was unwitnessed, where the circumstances are

Pac. R. Co., 126 Pac. 99, 70 Wash. 95.

Wisconsin.—Peat *v.* Chicago, etc., R. Co., 107 N. W. 355, 128 Wis. 86.

42. Brown *v.* Union Pac. R. Co., 106 Pac. 1001, 81 Kan. 701, 29 L. R. A., N. S., 808.

43. Preponderance of evidence.—Benson *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 202, 75 Atl. 793; Domenico *v.* El Paso Elect. R. Co. (Tex. Civ. App.), 90 S. W. 60. See, also, Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56, affirmed in 93 Tex. 735, no op.

In an action by a passenger for injuries, he must make out his case by a preponderance of the evidence. Domenico *v.* El Paso Elect. R. Co. (Tex. Civ. App.), 90 S. W. 60.

To warrant a verdict for defendant in an action for injuries to a passenger, the jury must find defendant's liability established by a preponderance of the evidence. Mieuli *v.* New York, etc., R. Co., 120 N. Y. S. 1078, 136 App. Div. 373.

In order to recover damages from a railroad company for injuries causing the death of a passenger, the right need not be established beyond all doubt, a preponderance of evidence being sufficient. Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, 3 So. 902.

44. Reiss *v.* Wilmington City R. Co. (Del.), 67 Atl. 153.

45. Proof to satisfaction of jury.—Fordyce *v.* Chancy, 2 Tex. Civ. App. 24, 21 S. W. 181.

46 Reasonable certainty.—Otts *v.* Shreveport Tract. Co., 58 So. 879, 130 La. 1052.

In an action by a passenger against a railroad company for personal injuries caused by the breaking of machinery on defendant's locomotive, an instruction that the jury must feel "reasonably certain" that the engine, or the part in question, had not been properly cared for; that, in civil cases, the jury did not arrive at conclusions beyond a reasonable doubt; but they should feel "reasonably certain," is unobjectionable. Beery *v.* Chicago, etc., R. Co., 73 Wis. 197, 40 N. W. 687.

47. St. Louis, etc., R. Co. *v.* Burke, 81 S. W. 774, 36 Tex. Civ. App. 222.

48. Question for jury.—Lusby *v.* Atchison, etc., R. Co., 41 Fed. 181.

49. Louisville, etc., R. Co. *v.* Smith (Ky.), 2 Duv. 556.

50. Circumstantial evidence.—Richter *v.* United R. Co. (Mo. App.), 129 S. W. 1055.

such as to satisfy reasonable minds that the accident resulted from the negligence of the carrier, liability attaches.[51]

Occurrence of Accident.—In an action of injuries to a passenger, the presumption of negligence which arose, under the circumstances, from the occurrence of the accident, was sufficient to sustain a verdict for plaintiff, in the absence of specific proof rebutting the presumption.[52] Proof that a passenger on a street car was injured in a collision between the car in which she was riding and the car of another company at a street intersection established a prima facie case of negligence against both companies.[53]

Testimony of Plaintiff.—The plaintiff was the only witness as to the way in which the accident occurred. His testimony contradicted material allegations of his complaint, and was not clear or satisfactory as to how the accident happened. His account of what he was doing immediately preceding, and what happened immediately after, the accident was not satisfactory, and his confusion of mind at the time was not satisfactorily explained. He was contradicted by several disinterested witnesses as to the circumstances of the accident, and immediately after the accident admitted it to be his fault. A verdict in the plaintiff's favor should be set aside, as against the weight of evidence.[54]

Proximate Cause of Injury.—The burden of proof is upon a passenger, seeking to recover against a street railroad for personal injuries, to show by a preponderance of evidence that defendant's negligence caused the injuries.[55] In an action against a street railway for negligence causing the death of a passenger, it was plaintiff's theory that the passenger's fingers were bruised in the device for the opening the door, and that from such injuries he fainted, and fell from the car, and was killed. There was evidence that he had taken six or eight glasses of ale that evening, and there was no evidence to show that he did faint. The jury would not have been warranted in finding that his fall was caused by an injury to his finger, it being as reasonable to suppose that he might have fallen from sleepiness, apoplexy, or from the effects of the ale.[56] The plaintiff, eleven years of age, a passenger on the defendant's train, was thrown, by the backing of an engine against the train, so violently across one of the seats that he shortly after had pains in his left side and breast, and for months suffered intensely therefrom. It was claimed that the injury was permanent, and rendered the plaintiff incapable of severe exertion, and decreased his capacity for labor from one-half to two-thirds; that he had previously been bright and strong, but since he had been dull and weak. The defendant's evidence showed that the engine was backed against the train by an employee without authority; that the plaintiff's father said, shortly after the accident, that the plaintiff had merely got a good shaking. A physician testified that, a month before the accident, he had treated plaintiff; found that he then had a difficulty in breathing, and swelling in the left side; that the plaintiff looked very delicate; that shortly after the accident plaintiff was worse, but in witness' opinion this was but a continuation of the old trouble, as there was then no evidence of physical injury except from the disease. Other physicians testified that plaintiff's trouble was prob-

51. Tucker *v.* Pittsburg, etc., R. Co., 75 Atl. 991, 227 Pa. 66.

52. **Occurrence of accident.**—Cincinnati, etc., R. Co. *v.* Bravard, 76 N. E. 899, 38 Ind. App. 422; Craft *v.* Boston Elev. R. Co., 97 N. E. 610, 211 Mass. 374, 39 L. R. A., N. S., 878.

53. Schmidt *v.* Chicago City R. Co., 88 N. E. 275, 239 Ill. 494, affirming judgment 144 Ill. App. 512.

A showing of injury to a passenger in the operation of a train makes out a prima facie case of negligence by the carrier, especially in case of an injury caused by a derailment. Arkansas Cent. R. Co. *v.* Janson, 90 Ark. 494, 119 S. W. 648.

54. **Testimony of plaintiff.**—Fash *v.* East River Ferry Co., 8 N. Y. St. Rep. 363.

55. **Proximate cause of injury.**—Butler *v.* Wilmington City R. Co., 2 Boyce's (25 Del.) 262, 78 Atl. 871.

56. Williams *v.* Citizens' Elect. St. R. Co., 68 N. E. 840, 184 Mass. 437.

ably from disease, and not from the accident. A verdict for plaintiff was warranted.[57]

Gross Negligence of Carrier.—In an action for personal injuries caused by a railroad accident, in the absence of evidence of gross negligence, punitive damages for such negligence can not be recovered, since the presumption that the accident and resulting injury were caused by the carrier's negligence does not embrace gross negligence.[58] Where, in an action against a railroad for injuries to a passenger in alighting from a car, the record failed to show gross negligence or any element of wrongdoing on defendant's part to warrant punitive damages, any recovery should have been limited to compensatory damages.[59]

Violation of Rules and Regulations.—Abrogation of a rule of a carrier may be shown by proof of its habitual violation with knowledge of the carrier, and such knowledge may be constructive as well as actual.[60]

Payment of Fare.—Where, in an action for death of an alleged passenger on a freight train, plaintiff's only witness as to payment of fare to the conductor is not corroborated, though she states another person, who is in attendance on court, was present, and such other person is not examined, and witness' testimony is discredited, a finding that deceased was not a passenger must be sustained.[61]

Passenger on Freight Train.—Evidence that plaintiff rode in a "caboose car" attached to a freight train does not show that he was a passenger, as such a car is defined as one "used on freight or construction trains for workmen or train crew."[62] A conductor of a freight train collusively agreed to carry the plaintiff without payment of fare. The plaintiff testified that he did not know the rules of the road, and thought that he had a right to ride on the train, and added that he would have preferred to go on a passenger train if he could have gone for the same money. The plaintiff was nineteen years of age, and the conductor permitted him to ride on the payment of a nominal sum for the conductor's use. The evidence was held to authorize the court to assume as a matter of law that the plaintiff knew that the conductor had no authority to allow him to ride on the train as a passenger.[63]

As to Negligence in Transporting Explosives.—Where defendant's street car, on which plaintiff was a passenger, was proceeding at such speed that it might have been quickly stopped and in a short distance, and was completely wrecked—as to the forward part—by an explosion conceded to have been caused by dynamite, and there was no evidence whatever that defendant or its servants had special information of such unusual danger, or could have obtained it by the exercise of that high degree of care exacted of carriers, the happening of the explosion was not evidence of negligence.[64]

Injury to Illiterate and Ignorant Person.—In an action against a city for injuries sustained while a passenger on one of a line of ferryboats operated by

57. Richmond, etc., R. Co. *v.* Childress, 86 Ga. 85, 12 S. E. 301.

58. Gross negligence of carrier.—Southern R. Co. *v.* Lee, 101 S. W. 307, 30 Ky. L. Rep. 1360, 10 L. R. A., N. S., 837.

59. Louisville, etc., R. Co. *v.* Mount, 101 S. W. 1182, 31 Ky. L. Rep. 210.

60. Violation of rules and regulations.—Coburn *v.* Moline, etc., R. Co., 149 Ill. App. 132, judgment affirmed in 243 Ill. 448, 90 N. E. 741.

61. Payment of fare.—Crawleigh *v.* Galveston, etc., R. Co., 67 S. W. 140, 28 Tex. Civ. App. 260.

62. Passenger on freight train.—Bergan *v.* Central Vermont R. Co., 82 Conn. 574, 74 Atl. 937.

63. Grahn *v.* International, etc., R. Co., 100 Tex. 27, 93 S. W. 104, 5 L. R. A., N. S., 1025, 123 Am. St. Rep. 767.

No inference would arise that a brakeman on a freight train had authority to agree to carry passengers merely because his employer knew that such acts were done, as they might be done while the company was endeavoring to enforce rules forbidding such acts. Judgment 78 S. W. 249, reversed in Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110.

64. As to negligence in transporting explosives.—Bigwood *v.* Boston, etc., R. Co., 95 N. E. 751, 209 Mass. 345, 35 L. R. A., N. S., 113.

the defendants, in which it is admitted for the purpose of the case that the liability of the defendant is that of a carrier of passengers, it is no defense that the plaintiff and her mother, the only witnesses, illiterate and ignorant women, do not know the name of the ferryboat on which the accident happened, and it is for the jury to say whether the inability of the witnesses to give the name of the boat proceeds from their ignorance or is evidence that the whole claim is a fraud.[65]

Passenger Injured by Missile from Outside of Car.—A passenger on a train, while sitting at a window, was injured by a missile, the nature of which was unknown. There was no evidence to connect the accident with a defect in any of the appliances or with negligence of the company. The passenger could not recover from the carrier for the injury.[66] In an action against a railroad company for personal injury, the evidence showed that plaintiff, while a passenger on the train, in rapid motion, was struck over the eye by a hard substance, thought by surgeons to be coal, and was severely injured. Another train was at the time passing, and the engine was opposite plaintiff. There was no evidence to show where the missile came from. The operatives of plaintiff's train testified that they knew nothing of it, and did nothing to cause it, and those of the passing train testified that nothing was thrown or escaped from their train. There was evidence that the appliances and machinery of the trains were in good order. Instructions that there was no evidence for the consideration of the jury, and that they should find for defendant, were properly refused.[67]

§§ 3239-3248. As to Negligent Acts of Employees—§ 3239. In General.—The term "gross negligence," relating to the negligence of employees, means negligence materially greater than the lack of ordinary care; but a finding of gross negligence should be sustained, where the injury likely to result from failure to do that which should be done will be fatal or very serious, so that a finding of gross negligence by a railroad company's servants is justified where an express train is run past a station without slowing up, while a local train is stopping to discharge passengers.[68]

§ 3240. Ejecting Passenger.— Proximate Cause of Injury.—Where, in an action for the death of a trespasser who had been stealing a ride on a passenger train, it appeared that deceased was instantaneously killed, and his body was found some distance from the place of his ejection and on the oppo-

65. **Injury to illiterate and ignorant person.**—Rosen *v.* Boston, 187 Mass. 245, 72 N. E. 992, 68 L. R. A. 153.

66. **Passenger injured by missile from outside of car.**—Ginn *v.* Pennsylvania R. Co., 69 Atl. 992, 220 Pa. 552.

In an action against a street car company for personal injuries caused by plaintiffs being struck by a missile thrown by a member of a mob composed of striking employees of defendant company evidence considered, and held insufficient to justify a jury finding that defendant was guilty of negligence. Fewings *v.* Mendenhall, 39 N. W. 127, 88 Minn. 336, 60 L. R. A. 601, 97 Am. St. Rep. 519.

In an action against a railroad company for personal injuries, it appeared that plaintiff was a passenger on defendant's cars; that, while sitting at an open window, his arm was struck and broken by a missile; that he did not see the missile; and that it was not found in the car. It was not shown what caused the injury, or that any one was near the train on the outside who could have inflicted it. Plaintiff contended that the injury was caused by a loose nut, thrown from one of the switches of defendant's roadbed, over which the train was passing at the time; but there was no evidence either to sustain such contention, or to connect the injury with any defect in the cars or machinery, in the movement of the train, or any of the appliances of transportation. Held, that a verdict for defendant was properly directed. Thomas *v.* Philadelphia, etc., R. Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416, distinguishing Pennsylvania R. Co. *v.* MacKinney, 124 Pa. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820.

67. Pennsylvania R. Co. *v.* MacKinney, 124 Pa. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820.

68. **As to negligent acts of employees.**—Renaud *v.* New York, etc., R. Co., 92 N. E. 710, 206 Mass. 557.

site side of the track, his death was not shown to be the proximate result of his ejection.[69]

Authority to Eject Passenger.—A previous course of conduct, not shown to have been known to the company, or its proper representative, does not establish authority to eject.[70]

Unnecessary Force.—On an issue whether a conductor on a street car used more force than was necessary in putting a passenger off the car on his refusal to pay his fare, it appeared that the conductor had to use force to put the plaintiff off; that the plaintiff was resisting; that the plaintiff landed in the street on his head; that the car had not altogether come to a stop when the conductor laid hold of the plaintiff, but had stopped by the time the conductor had the plaintiff off the car. This evidence was held insufficient to warrant a finding that the conductor used more force than was necessary.[71]

Ticket Taken by Conductor.—The plaintiff testified that he got on the defendant's train, which was crowded, and that he gave his ticket to the conductor, who afterwards asked for it again, and denied receiving it. Two boys who were in company with plaintiff told the conductor that he had it, but the latter ordered the plaintiff to leave the train. He got off when the conductor again ordered him to do so, but immediately got back on the train, and was carried to his destination. The two boys corroborated plaintiff's testimony. The conductor testified that the plaintiff never gave him a ticket, and that after leaving the train he got on again, and rode. The evidence is sufficient to sustain a judgment against the company for the wrongful ejection of the plaintiff.[72]

Passenger Refusing to Pay Fare.—Plaintiff, who was traveling with his sister, presented a ticket for one fare, and a sum of money, less than the legal rate, for the other, and was ejected by the conductor for refusal to pay the full fare. At the trial of an action therefor, plaintiff's contention was that the ticket was given to cover his fare, and the cash to cover his sister's fare, and that his sister was responsible for the extra amount demanded. The evidence did not show that the conductor had reason to so understand the matter, and it appeared that plaintiff's sister had offered to pay the additional amount, but plaintiff refused to allow her to do so, and, on being ejected, exclaimed that he would "get $10,000 for this." A verdict for plaintiff was not sustained by the evidence.[73]

Passenger Carried Past Destination.—Where, at the time a passenger reached his destination, he was asleep, and so continued until the train had left the station, when the conductor discovered him and his companion, and, while the train was in motion, ejected them, and a passenger on the train testified that the conductor and porter put plaintiff and his companion off the train, and came back laughing, and stated that the last they saw of them they were turning somersaults along the track, a verdict in favor of plaintiff was supported by the evidence.[74]

Passenger Answering Description on Ticket.—Where a passenger was ejected from a railroad train by reason of a defect in her return ticket in failing to properly describe her personal characteristics, evidence that the conductor who ejected her was the conductor who punched the ticket on the going trip, and that he was acquainted with her, was insufficient to establish that he had

69. Ejecting passenger.—Morgan *v.* Oregon Short Line R. Co., 83 Pac. 576, 30 Utah 82.

70. Authority to eject passenger.—Chicago, etc., R. Co. *v.* Moran, 129 Ill. App. 38.

71. Unnecessary force.—McGarry *v.* Holyoke St. R. Co., 182 Mass. 123, 65 N. E. 45.

72. Ticket taken by conductor.—Alabama, etc., R. Co. *v.* Bell (Mass.), 29 So. 818.

73. Passenger refusing to pay fare.—Houston, etc., R. Co. *v.* Faulkner (Tex. Civ. App.), 56 S. W. 253.

74. Passenger carried past destination.—International, etc., R. Co. *v.* Bohannon (Tex. Civ. App.), 71 S. W. 776.

knowledge that plaintiff was the same person who presented the going part of the ticket, where he and the brakeman on the going train both testified that they did not see plaintiff on such train, but that they remembered seeing plaintiff's daughter thereon.[75]

Passenger Riding on Freight Train.—Where a passenger who boarded a freight train without a required permit was carried back to the place where he embarked, and put off the train without force, and it was not shown that he demanded a return of the money paid for his ticket, or that he was prevented from making the desired journey on that day, no damage was shown.[76] Plaintiff was ordered off a freight train by a brakeman, who had consented that he should ride, having accepted the regular fare. Plaintiff refused to go, when the brakeman knocked him off. In an action for the injuries resulting defendant went to trial under a general denial. Plaintiff testified that he had no knowledge of a rule forbidding trainmen to permit persons to ride on freight trains. He had frequently seen persons riding on such trains. During the pain caused by the injury he stated that he had been knocked off after he had paid his fare. Defendant's evidence was almost wholly directed to show that the brakeman had no authority to eject trespassers. The brakeman did not testify. On appeal defendant contended that plaintiff rode through collusion with the brakeman to defraud the company. The evidence did not support such a defense.[77]

Passenger Taken Back on Train.—An unlawful ejection, or any willful disregard of the plaintiff's rights as a passenger, authorizing punitive damages, is not shown by testimony that, when her train reached the natural and contemplated place for her to change for her destination, but where she thought she would only have to step from the coach on which she was to the coach for her destination, the porter picked up her baggage, and told her she would have to get off there, and, on her protesting that she had been told that she would only have to step into another coach, carried her things off, saying it was the conductor's orders; she having, when it was discovered that her train had gone, been let back on to the train from which she had alighted, with a view to making connection at another point, though she testified that when this was suggested to the conductor by a stranger, the conductor said "in a rather gruff kind of way" that he supposed she could get back on the train.[78]

Expense Incurred by Ejection.—The plaintiff was wrongfully ejected from the defendant's train at night, and stayed at a hotel until the afternoon of the next day. Her son testified that he paid one dollar and seventy-five cents for his mother for her hotel bill. This was sufficient to show that the bill was reasonable, and that it was paid with the plaintiff's money.[79]

Testimony of Plaintiff.—In an action against a railroad company by a trespasser on a train for injuries, the plaintiff's evidence that he was kicked from the train by one of the defendant's brakeman is insufficient to establish

75. Passenger answering description on ticket.—Western Maryland R. Co. *v.* Schaun, 55 Atl. 701, 97 Md. 563.

76. Passenger riding on freight train.—Ellis *v.* Houston, etc., R. Co., 70 S. W. 114, 30 Tex. Civ. App. 172.

77. Texas, etc., R. Co. *v.* Black, 57 S. W. 330, 23 Tex. Civ. App. 119.

In an action for personal injuries the court instructed that if a carrier of passengers was using for its purposes the kind of freight train which plaintiff borded, and if plaintiff paid his fare to a brakeman, and was authorized by him to board the train, though the brakeman had no express authority, and if the conductor had no knowledge of plaintiff's presence, but the carrier's brakeman had been exercising such authority for so long that the carrier should have known it, then "plaintiff had the right to presume that such duties." Held erroneous, for authorizing such presumption, especially in view of evidence tending to show that plaintiff was informed that the brakeman was acting without authority. Judgment 78 S. W. 249, reversed in Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110.

78. Passenger taken back on train.—Taber *v.* Seaboard, etc., Railway, 62 S. E. 311, 81 S. C. 317.

79. Expense incurred by ejection.—St. Louis, etc., R. Co. *v.* McAnellia (Tex. Civ. App.), 110 S. W. 936.

that fact as against the positive evidence of every person connected with the operation of the train at the time of the injury, the most of which was undisputed.[80]

Instances of Sufficiency of Evidence.—For other circumstances of sufficiency of evidence, see cases in footnote.[81]

80. Testimony of plaintiff.—Murphy *v.* New York, etc., R. Co., 92 N. Y. S. 192, 101 App. Div. 610.

In an action against a carrier for personal injuries, plaintiff testified that he paid the conductor the fare, and asked to be put off at a certain station, and that the conductor said he would stop there; that the train stopped 200 yards before reaching the station, but plaintiff did not get off there, supposing it would stop when it reached the platform; that on the train's passing the platform plaintiff went to the conductor, and said he wanted to get off; that the conductor said: "God damn you, why didn't you get off when the train stopped? * * * Get off here;" that the train was running fifteen miles an hour, and he asked the conductor to stop it, but that the conductor said, "God damn you, get off here," and pushed him off. In the fall plaintiff was injured. Another witness corroborated plaintiff. Defendant's conductor, brakeman, and a passenger contradicted plaintiff, and testified that he jumped off of his own accord. Held that, in view of the conflict in the evidence, and the trial judge's approval of the verdict for plaintiff, it should not be disturbed. East Tennessee, etc., R. Co. *v.* Hyde, 89 Ga. 721, 15 S. E. 621.

81. Evidence held sufficient.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Dallas, 93 Ark. 209, 124 S. W. 247; Little Rock R., etc., Co. *v.* Dobbins, 95 S. W. 788, 78 Ark. 553.

Georgia.—Southern R. Co. *v.* Merritt, 47 S. E. 908, 120 Ga. 409.

Idaho.—Lindsay *v.* Oregon Short Line R. Co., 13 Idaho 477, 90 Pac. 984, 12 L. R. A., N. S., 184.

Kentucky.—Chesapeake, etc., R. Co. *v.* Robinett, 107 S. W. 763, 32 Ky. L. Rep. 1077; South Covington, etc., St. R. Co. *v.* Burns, 150 S. W. 343, 150 Ky. 348.

Utah.—Slatter *v.* Oregon, etc., R. Co., 118 Pac. 831, 39 Utah 596.

In an action against a carrier for the ejection of an intoxicated passenger at such a point that he was thereby drowned, evidence held sufficient to show that he was put off at a reasonably safe place, that he was not guilty of contributory negligence, and that he came to his death by drowning. Bennett *v.* Seattle Elect. Co., 105 Pac. 285, 56 Wash. 407.

In an action to recover for ejection of a passenger from a freight train because he had no ticket, evidence held to warrant a finding that the passenger paid his fare and believed in good faith that a permit issued him was the evidence of his right to transportation, and that he was not at fault in failing to discover the agent's mistake in not giving him a ticket. Olson *v.* Northern Pac. R. Co., 96 Pac. 150, 49 Wash. 626, 18 L. R. A., N. S., 209.

Alabama.—Louisville, etc., R. Co. *v.* Perkins, 39 So. 305, 144 Ala. 325.

Georgia.—Watson *v.* Southern R. Co., 64 S. E. 549, 132 Ga. 552.

Kentucky.—Louisville, etc., R. Co. *v.* Setser (Ky.), 128 S. W. 341.

Mississippi.—Mobile, etc., R. Co. *v.* Jackson, 92 Miss. 517, 46 So. 142.

Washington.—Knapp *v.* Northern Pac. R. Co., 106 Pac. 190, 56 Wash. 662.

Wisconsin.—Hirte *v.* Eastern Wisconsin R., etc., Co., 106 N. W. 1068, 127 Wis. 230.

In an action against a railroad for the wrongful ejection of a passenger, evidence held insufficient to support findings that the conductor received plaintiff's ticket as entitling him to travel, or without notifying him that it was of no value, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the ticket which was taken up should be returned. Elliott *v.* Southern Pac. Co., 79 Pac. 420, 145 Cal. 441, 68 L. R. A. 393.

In an action by one traveling upon a coupon ticket, issued for transportation over several roads, for damages for his ejection by the last carrier on the ground that the time limit contained in the ticket had expired, evidence held not to show that the time limit fixed in the ticket by the issuing carrier was unreasonable. Brian *v.* Oregon Short Line R. Co., 105 Pac. 489, 40 Mont. 109, 25 L. R. A., N. S., 459, 20 Am. & Eng. Ann. Cas. 311.

In an action against a railroad company for injuries resulting from the ejection of a drunken passenger, evidence held not to show that he was in such a condition that he would probably not be able to take care of himself when ejected shortly after noon on a not inclement day in April. Tuttle *v.* Cincinnati, etc., R. Co., 80 S. W. 802, 26 Ky. L. Rep. 152.

Evidence considered, and held to show that a passenger who boarded a train without procuring a ticket did not exercise proper diligence to procure a ticket before the train started, and that he was not entitled to recover damages caused by his ejection from the train after it had left the depot. Indianapolis, etc., R. Co. *v.* Kennedy, 77 Ind. 507.

§ 3241. Assaulting Passenger.—Evidence that a passenger was assaulted by one who was acting as a brakeman is sufficient to support a finding that he was so acting by the authority of those who were authorized by the company to assign brakemen to duty on that train.[82] Where a train reached a terminal station at which train crews are changed, and the coach in which passengers were riding was taken out of the train without notice to passengers and placed on a siding about four hundred feet away while one of the passengers was in the dining room eating breakfast, and when the passenger returned to the train he found a new crew in charge and the car in which he had been riding and which contained his baggage had been set out, and when he went to that car the brakeman who had been with the train up to that point was present with uniform and assuming to be in control of the car, and, when chided for not warning the passengers that the car containing their baggage was to be cut out, made a violent assault on the passenger, the testimony is sufficient to support the verdict of the jury, finding the company liable for the injuries inflicted, on the theory that the brakeman was a servant of the company and in the line of his employment when the assault was made.[83] In an action against a railroad for a rape committed on a passenger by a brakeman, the absence of complaint does not conclusively disprove the charge, but the jury are to consider all of the facts and circumstances surrounding all connected with the transaction, including the age, intelligence, and experience of the plaintiff.[84] Where the defendant's version of an assault made on the plaintiff by a conductor on one of its cars, uncontradicted by any testimony except that of the plaintiff, is to the effect that the plaintiff fell in jumping off the car while in motion, and the conductor stopped the car, and went back to make inquiries, whereupon, after some conversation, the plaintiff, who was suffering from a broken ankle, followed and struck him, and was dealt a blow in return, a verdict for the defendant will not be disturbed on the ground that the story is too incredible to justify it.[85] Where a child riding on the platform of a street car is of such tender years as not to be chargeable with negligence, and there is some evidence, although disputed, that the conductor approached for fare in a manner calculated to frighten him, so that he jumped and was injured, the case is for the jury.[86] The plaintiff recovered a verdict against a railroad company. His case was to the effect that the conductor and several passengers, by talking about robbing him and throwing him off the train, so frightened him that he jumped off and was injured. It was proved that he had been drinking, and there was evidence tending to prove him to have been suffering from delirium tremens, or from a disordered mind, and the conductor's testimony wholly contradicted plaintiff's. A new trial was granted.[87] In an action by a passenger for assault by an em-

82. Assaulting passenger.—Conger *v.* St. Paul, etc., R. Co., 45 Minn. 207, 47 N. W. 788.

In an action for an assault on plaintiff by a conductor, evidence held sufficient to sustain a judgment for plaintiff. Yazoo, etc., R. Co. *v.* Shelby, 95 Miss. 155, 48 So. 403.

In trespass for assault and battery by employees of a carrier upon one about to take passage on its car, evidence held to sustain a verdict for plaintiff. Wilcox *v.* Rhode Island Co., 70 Atl. 913, 29 R. I. 292; Bishop *v.* Bishop (R. I.), 70 Atl. 966; Holley *v.* Jamestown, etc., Ferry Co. (R. I.), 71 Atl. 69.

In an action for an assault on car No. 3,717, proof that plaintiff's attorney had informed defendant that the assault occurred on car No. 3,771, the the information was given voluntarily, after the denial of a motion for a bill of particulars, and at a time when the attorney was under no obligation to give the information, which was given over the telephone, did not show such bad faith of plaintiff as to impeach him, authorizing for defendant. Cohen *v.* Brooklyn, etc., R. Co. (App. Term.), 115 N. Y. S. 1101.

83. Morey *v.* Chicago, etc., R. Co., 119 Pac. 544, 86 Kan. 73.

84. Garvik *v.* Burlington, etc., R. Co., 108 N. W. 327, 131 Iowa 415, 117 Am. St. Rep. 432.

85. James *v.* Metropolitan St. R. Co., 80 N. Y. S. 710, 80 App. Div. 364.

86. Sandford *v.* Hestonville, etc., R. Co., 153 Pa. 300, 25 Atl. 833.

87. Spohn *v.* Missouri Pac. R. Co., 87 Mo. 74.

ployee, where the evidence tended to show that it was malicious and vicious, the question of exemplary damages was properly submitted.[88]

§ 3242. Escorting Passenger Across Track.—In an action for the killing of a passenger at a railroad station, evidence held not to show that at the time of the accident deceased was being escorted across the tracks by an agent of defendant.[89]

§ 3243. Controlling Conduct of Other Passengers.—In an action by a woman passenger against a railroad company to recover damages for personal injuries, caused by another passenger sitting in front of her tossing through an open window an empty bottle, which broke against a car on another track, and fragments of it returned through the open window at which plaintiff was seated, injuring her in the face, the evidence was held not sufficient to sustain a verdict against the railroad company.[90] Car employees were sufficiently shown to have known of the use of profane language by the plaintiff's fellow passengers, where the conductor had passed through the car, taking up tickets, and other employees had swept it out, after plaintiff had become a passenger.[91] In an action by a woman, a passenger on a street car, to recover against the railroad company for injuries received from an intoxicated passenger, where the only negligence alleged was allowing the man to enter the car when he appeared intoxicated, it was error to submit the case to the jury where the evidence showed that there was no appearance of intoxication until he was asked to pay his fare.[92]

§ 3244. Aiding in Making Arrests.—Evidence that on demand of police officers who were endeavoring to arrest plaintiff, a passenger on defendant's train, defendant's conductor instructed the train porter to deliver to such officers the key to a water-closet, wherein plaintiff had locked himself, without the conductor's knowledge, bolting the door on the inside, so that the key was of no avail, and that the train remained a few minutes longer at the station while the arrest was being made, did not show that the conductor aided the arrest.[93]

88. Germann *v.* Great Northern R. Co. (Minn.), 135 N. W. 750.

89. Escorting passenger across track.—Dieckmann *v.* Chicago, etc., R. Co. (Iowa), 105 N. W. 526.

90. Controlling conduct of other passengers.—Barlick *v.* Baltimore, etc., R. Co., 41 Pa. Super. Ct. 87.

In an action for injuries by a passenger inflicted by a fellow passenger, evidence held to justify a finding that the conductor had knowledge or opportunity to know that some injury was threatened, and that by his prompt intervention he might have prevented or mitigated it, authorizing a recovery. Kline *v.* Milwaukee Elect. R., etc., Co., 131 N. W. 427, 146 Wis. 134, Ann. Cas. 1912C, 276.

It appeared that after the train started plaintiff was informed by the conductor that the train did not stop at the place of her destination, and that she would have to get off at the preceding station. One of plaintiff's witnesses testified that a male passenger, who had intruded his attentions on plaintiff, afterwards had a conversation with the negro porter, and gave him half a dollar, when the negro started out at the back of the car, saying: "This train does not stop at all stations." This witness also testified that she saw the male passenger and the conductor talk together twice, but this was shown to have been in plaintiff's presence, who was endeavoring to persuade the conductor to let her off at her destination. When the train showed up at the preceding station, the conductor informed plaintiff that she would have to get off there, and the male passenger then offered to conduct her to an hotel where he boarded. Held, that the evidence was not sufficient to establish plaintiff's claim that while she was a passenger on defendant's train a conspiracy was formed between the male passenger, the conductor, and the porter to place plaintiff in the male passenger's power, to enable him to ravish her. Sira *v.* Wabash R. Co., 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386.

91. Texas, etc., R. Co. *v.* Kingston, 30 Tex. Civ. App. 24, 68 S. W. 518.

92. Brehony *v.* Pottsville Union Tract. Co., 66 Atl. 1006, 218 Pa. 123.

93. Aiding in making arrests.—Bowden *v.* Atlantic, etc., R. Co., 144 N. C. 28, 56 S. E. 558.

§ 3245. Negligently Closing Door.—A passenger, after closing the door to the lavatory, threw her hand up against the side of the lavatory to steady herself, so that her little finger was between the door and the door jamb. At that moment a brakeman came up behind her, opened the door, went in, and closed it. As he opened it, the passenger's finger fell into the crack thus made, and was crushed when the door was closed. The evidence was held to be insufficient to show negligence.[94] The plaintiff, a passenger on a street car, being unable to see out by reason of frost on the windows, and believing that the next street was the place where he desired to alight, signaled the conductor to stop and walked toward the door, which the conductor opened. The car was stopped "unusually sudden," and plaintiff discovered that he had not yet reached his stopping place, so informed the conductor, and placed his hand against the door jamb in plain sight of the conductor, with his thumb in the slot in which the door ran, to support himself against the sudden starting of the car. The conductor became enraged, and slammed the door on plaintiff's thumb. The evidence was held sufficient to warrant a finding that the conductor, by the exercise of ordinary care, could have known that the plaintiff's thumb was in the slot, and was therefore negligent in closing the door as he did.[95] But negligence is not shown, and, if anything, contributory negligence, by evidence that, as a passenger who had been standing on the platform of a car of an elevated train started to enter the car, the guard closed the sliding door, jamming the passenger's fingers between the door and the sill; that the guard looked just before closing the door, and the passenger's hand was not on the sill; and that the passenger did not see that the door was being closed.[96]

§ 3246. Inviting Passenger on Engine.—The plaintiff's testimony that the conductor was in charge of the train, and was giving orders in connection therewith, and had authority over the train, and went with the plaintiff to the engine, does not show authority on the part of the conductor to waive a written contract providing that plaintiff "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock," since, to prove such a waiver, it rested on the plaintiff to affirmatively show that it was within the apparent scope of the conductor's authority to waive the benefit of the contract, and that plaintiff did not know or have reasonable grounds to believe that the conductor was exceeding his authority.[97] In an action for injuries to the plaintiff, a boy fifteen years old, received while attempting to board the defendant's train, moving at the rate of three miles an hour, it appeared that one of the defendant's engineers, while standing by his engine at a station, asked plaintiff to get him some paint. When the plaintiff returned with the paint, the engine was gone, and he went to a flag house near by, where he waited about an hour, explaining to a switchman his errand for the paint. The engineer of a passing train waved his hand at the switchman, who suggested to plaintiff that it was the engineer who sent him for the paint, and that he "imagined" that this engineer was looking for plaintiff, whereupon plaintiff attempted to board the train, and was injured. The evidence was not sufficient to show that the engineer invited the plaintiff to get on his train.[98]

§ 3247. Putting Up Berth.—In an action by a passenger against a railroad company for injury received by the falling of a berth, it appeared that the accident happened on a car on which it was understood that the passengers

94. Negligently closing door.—Martin *v.* Missouri Pac. R. Co., 119 S. W. 444, 137 Mo. App. 694.

95. Carroll *v.* Boston, etc., R. Co., 71 N. E. 89, 186 Mass. 97.

96. O'Rourke *v.* Interborough Rapid Trans. Co., 92 N. Y. S. 317, 46 Misc. Rep. 453.

97. Inviting passenger on engine.—Illinois Cent. R. Co. *v.* Jennings, 82 N. E. 403, 229 Ill. 608.

98. Connaughton *v.* Brooklyn, etc., R. Co., 13 Misc. Rep. 401, 34 N. Y. S. 243, 68 N. Y. St. Rep. 122.

should look after their own berths, and were accordingly charged a low rate of fare. Soon after the accident, plaintiff wrote the company that she was injured by the carelessness of one of its employees. Shortly afterwards, in a letter to the company, she said that it was a newsboy who pushed the berth up. On the trial she testified that she thought it was a brakeman. There was sufficient evidence that the injury resulted by reason of the negligence of an agent of the company to sustain a verdict for the plaintiff.[99]

§ 3248. Injury to Passenger in Custody of Employee.—The fact that the superintendent of a railroad is in the same car with a slave who is being carried as a passenger, and who is run over and injured on account of leaving it, is not sufficient to charge the road, when there is no evidence that the superintendent saw the slave leave the car or permitted him to do so.[1]

§ 3249. As to Negligence in Respect to Condition of Carrier's Premises.—Passenger Invited to Place of Danger.—A prospective passenger, injured by falling into a hole in a corner of depot grounds not for use by passengers, claimed that he was directed by the company's employee to go from the passenger depot to the freight depot to get a ticket. He believed, but would not swear positively, that the defendant's night clerk was the one giving such direction, in attempting to obey which he came to his hurt. The night clerk and train dispatcher, who alone were about the premises at the time, positively denied giving any such direction, and both knew that tickets were not sold at the freight depot. The person accompanying the plaintiff testified that afterwards, on purchasing a ticket from the night clerk, the plaintiff said, "You came near getting me killed," to which no reply was made, but did not identify the clerk as the person giving the direction. The evidence was insufficient to show such an express invitation by an authorized agent of the company as to require a reversal of judgment in its favor.[2]

Defective Platform.—Where a person was injured by falling off a platform which was built by the side of a street railway, and used by it, and at which the company regularly stopped its cars to take on and discharge passengers, a finding that the company had adopted the platform, and invited the public to use it in getting on and off the cars, was justified.[3] Evidence that plaintiff slipped on a platform at the bottom of a flight of stairs, where there was a slight snow over thin ice above a depression of from one-eighth to three-eighths of an inch, does not warrant a finding that the depression was the proximate or a concurrent cause of the accident.[4]

Permitting Banana Peel to Remain on Platform.—The fact that a banana peeling was on a stairway leading to a street-railway station, on which a passenger stepped, causing him to fall, would not support a verdict against the railway company for injuries, in the absence of a showing of negligence in permitting it to remain there.[5] Testimony in an action for injury to a passenger on an elevated railroad, by slipping on a banana peel on the carrier's station platform, describing the peel in the following terms: "It felt dry, gritty, as if there were dirt on it," as if "trampled over a good deal," as "flattened down, and black in color," "every bit of it was black, there wasn't a particle of yellow," and as "black, flattened out, and gritty," authorized an inference that it had not been dropped a moment before by a passenger, and consequently fur-

99. **Putting up berth.**—Northern Pac. R. Co. *v.* Hess, 2 Wash. 383, 26 Pac. 866.

1. **Injury to passenger in custody of employee.**—Mitchell *v.* Western, etc., R. Co., 30 Ga. 22.

2. **As to negligence in respect to condition of the carrier's premises.**—Davis *v.* Houston, etc., R. Co., 68 S. W. 733, 29 Tex. Civ. App. 42.

3. **Defective platform.**—Haselton *v.* Portsmouth, etc., Railway, 53 Atl. 1016, 71 N. H. 589.

4. Rusk *v.* Manhattan R. Co., 61 N. Y. S. 384, 46 App. Div. 100.

5. **Permitting banana peel to remain on platform.**—Benson *v.* Manhattan R. Co., 65 N. Y. S. 271, 31 Misc. Rep. 723.

nished evidence of negligence of the carrier's employee at the station, whose duty included the observing and removing of anything on the platform interfering with the safety of passengers.[6]

Passenger Injured by Crowd at Station.—In an action by a woman against a railroad company to recover damages for personal injuries, a verdict and judgment for the plaintiff will be sustained, where the evidence tended to show that as the plaintiff, an intending passenger, was crossing the corridor from the waiting room to the train shed of a large terminal station, she was surrounded and thrown down by a rush of several hundred students, who were attending the departure of a football team, that the crowd had been in the corridor for nearly half an hour, had been behaving in a boisterous and disorderly manner, and that after the plaintiff had fallen they formed a ring and danced around her, inflicting further injuries as she lay prostrate.[7]

Defective or Slippery Steps to Platform.—At a place where the defendant's railroad had been elevated, and a station built on one side of the tracks, approached by flights of steps, and a wall and steps were being constructed on the other side of the tracks, preparatory to construction of a station there, the plaintiff, a stranger, without making any inquiries as to how to get to the station, started up the unfinished steps at about eight o'clock in the evening, though she saw there was no constructed walk from the street to the steps, but only a little beaten path through the mud, and though close to the steps were piles of broken stone, a derrick, and other evidences that work was going on, and an arc light across the street lighted up the place about the steps. From the top of the steps she fell. Even if the defendant was negligent, there was no evidence to warrant a finding that the plaintiff was in the exercise of due care.[8] Hand rails on uncovered steps to an elevated railway track were about the height of a man's hips, and the rail on top too wide to clasp with the hand. Plaintiff's intestate, ascending the steps, had nearly reached the upper platform, when he stopped and leaned against the rail, and went over sideways, falling across it. He did not have hold of the hand rail, and had walked up the stairs the same as anybody else. It had been raining, and the steps were slippery. The evidence was held to present no evidence of negligence necessary to be submitted to the jury.[9]

Uncovered Water Hole.—A passenger of another railroad company required to pass over the depot platform of defendant railroad company was injured by stepping into an uncovered water hole in the platform. The defendant was in the exclusive control of the platform and water holes used for watering its trains, an extra number of which had been watered during the day before the accident. The weather was cold, and the employees were busy and had frequent occasion to uncover the holes and no other person had any authority to open them. The employees opening the holes were instructed not to leave them uncovered. Though negligence will not be presumed, an inference within a statute, declaring that an "inference" is one kind of indirect evidence, and a deduction which the jury makes from the facts proved and must be found on a fact legally proved and on such a deduction from that fact as is warranted by a consideration of the usual propensities, that the employees omitted to recover the hole was justified, authorizing a recovery against the latter company.[10]

Injured by Falling over Mail Bag.—In an action for injuries to a passenger caused by stumbling over a mail bag lying on the station platform, between

6. Anjou *v.* Boston Elev. R. Co., 94 N. E. 386, 208 Mass. 273, 21 Am. & Eng. Ann. Cas. 1143.

7. Passenger injured by crowd at station.—Kennedy *v.* Pennsylvania R. Co., 32 Pa. Super. Ct. 623.

8. Defective or slippery steps to platform.—Reimer *v.* New York, etc., R. Co., 59 N. E. 671, 178 Mass. 54.

9. McMahon *v.* New York Elev. R. Co., 50 N. Y. Super. Ct. 507.

10. Uncovered water hole.—Jenkins *v.* Northern Pac. R. Co., 119 Pac. 794, 44 Mont. 295.

the waiting room and the passenger car, several witnesses for plaintiff testified that they had seen mail bags thrown on the platform many times during the preceding two years. The defendants' station agent testified that sometimes mail was thrown out of the mail car, but that he never knew it to be thrown at the place where plaintiff was injured. The conductor of the train, a trainman, and the person who carried the mail between the post office and the train testified that they never knew of mail bags being thrown off on that side of the station. The evidence was held sufficient to sustain a finding that the defendant knew of the practice of throwing mail bags from the train on the platform.[11]

Failure to Provide Light.—A carrier's failure to provide sufficient lights at a passenger station tends to show actionable negligence.[12] Where a depot platform was elevated five feet above the track, a verdict is warranted finding the company negligent in failing to light the platform at night, so that passengers could safely pass from the platform to the cars.[13]

Station Not Heated.—The possibility that a passenger could have caught a cold from other causes than the condition of defendant's waiting room did not prevent the jury from finding that the cold resulted proximately from such cause, if there was evidence to sustain such finding, and there was no evidence that the cold in fact resulted from any other cause.[14]

Derrick Near Track.—The plaintiff, while a passenger on one of the defendant's trains, received a blow from a heavy block, attached to a derrick, which was thrown through the window of the car. The derrick, consisting of a mast, and a long boom and block, had been in use near the tracks for several days, and when the boom was lowered and swung towards the tracks it extended over them. It had been thus swung before the train approached, and there was evidence that when it was over the tracks it could have been seen by those in charge of the train long enough before reaching it to stop the train; that the train was running at a high rate of speed; and that the watchman who had been stationed there to warn approaching trains was absent. A verdict for the plaintiff was neither contrary to nor against the weight of evidence.[15]

§ 3250. As to Negligence in Respect to Condition of Means of Transportation.—Defective Track.—Evidence that there was a low joint at the place of the injury, and that there was a sudden jar of the train, sufficiently showed that there was a defect in the track to support a verdict for the plaintiff.[16]

Defective Switch.—Where a passenger was injured in a wreck caused by the failure of a switch tender to throw a switch so that the train would go onto the main line, causing the train to pass onto a side track and run into a train standing thereon, the facts showed ordinary negligence, and not a wanton or malicious injury.[17]

Defective Door.—Where a passenger on boarding a car placed his right hand on the door jamb, when it was injured by the conductor closing the door of the car upon it, the fact that the car was so constructed that in all positions

11. **Injured by falling over mail bag.**—Ayres *v.* Delaware, etc., R. Co., 4 App. Div. 511, 40 N. Y. S. 11, 74 N. Y. St. Rep. 619.

12. **Failure to provide light.**—Williford *v.* Southern Railway, 67 S. E. 302, 85 S. C. 301.

13. Texas, etc., R. Co. *v.* McKenzie (Tex.), 2 Posey 307.

14. **Station not heated.**—Crawford *v.* Maine Cent. Railroad, 78 Atl. 1078, 76 N. H. 29.

15. **Derrick near track.**—Baker *v.* New York, etc., R. Co., 50 N. Y. S. 999, 28 App. Div. 316.

16. **As to negligence in respect to condition of means of transportation.**—Gulf, etc., R. Co. *v.* Franklin (Tex. Civ. App.), 155 S. W. 553.

A passenger alleged that he was injured by a rail, which was broken before the train reached it. Held, that the fact that another train passed over the road shortly before the injury was insufficient to support the allegation. McPadden *v.* New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705, reversing 47 Barb. 247.

17. **Defective switch.**—Shelton *v.* Canadian Northern R. Co., 189 Fed. 153.

the sliding doors operated from right to left did not render the happening of the accident as claimed a physical impossibility, it not appearing that the plaintiff at the time of the accident was not facing the platform instead of the inside of the car.[18] The plaintiff, while passing through the forward door of a combination car in alighting at his destination, put his hand on the jamb of the door to steady himself in turning round, when the door closed on his fingers. It appeared that in the top of the door there was an arrangement which automatically closed the door and at the bottom a catch designed to hold it open. The door was open when the plaintiff reached it and the train was then at a standstill. A companion of the plaintiff got off immediately before the plaintiff, and this companion, called by the plaintiff, testified that an unknown man and a newsboy got off ahead of him and that the door was opened by the newsboy. The forward part of the combination car here in question was used as a baggage car. The baggage master, called by the plaintiff, testified that he did not open the door in question; that there was no newsboy on the train, and that he was most sure that the door was opened by the plaintiff's companion; that the plaintiff's companion was the first to go out, then the plaintiff, and then an unknown man, who said he didn't pull the door on the plaintiff's fingers. The plaintiff testified that two or three people went out ahead of him, and that he was the last passenger out of the car. On this evidence there was no more reason to suppose that the door swung to because of a defect in the catch than to suppose that it was not properly set on the catch when opened by one of the persons who got off before the plaintiff; and therefore no case of negligence on the part of the defendant was made out.[19] In an action against a street railway for injuries to a passenger, it was the plaintiff's theory that the slot in the door which contained the opening device was defective, and exposed those opening the door to the risk of having their fingers bruised when the door was slid back. It appeared that the passenger had declared that he jammed his finger in the door, and one witness, who saw him open the door, testified that he used his right hand, while it was his left that was injured. There was nothing to warrant a finding that plaintiff was injured by means of the opening device.[20]

Defective Seat.—A passenger was injured by the fall of the seat in front of her, caused by the breaking of the metallic armature by which it was attached to a post on the car. After the accident, a half of the break was bright and the other half rusty. The evidence was held sufficient to warrant a finding that a crack in the armature, existing before the accident, was discoverable on inspection, authorizing a recovery for the injuries received.[21]

Defective Window.—If the evidence shows that a window latch of a railroad car is weak, broken, or defective, and for that reason the window falls and inflicts injury to a passenger, the carrier is prima facie guilty of negligence.[22] In an action for injuries to a passenger caused by the fall of a car window when the train started of its usual motion, it appearing that the window and attachments were in good order, and that the fall must have been due to it not having been properly fastened, and there being no evidence that defendant's employees raised the window, the plaintiff could not recover.[23] In an action by a passen-

18. Defective door.—Stein *v.* Manhattan R. Co., 90 N. Y. S. 437.

19. Casey *v.* New York, etc., R. Co., 207 Mass. 443, 93 N. E. 926.

20. Williams *v.* Citizens' Elect. St. R. Co., 68 N. E. 840, 184 Mass. 437.

21. Defective seat.—Gould *v.* Boston, etc., R. Co., 77 N. E. 712, 191 Mass. 396.

22. Defective window.—Rehearing 82 N. E. 1025, denied in Cleveland, etc., R. Co. *v.* Hadley, 84 N. E. 13, 170 Ind. 204, 16 L. R. A., N. S., 527.

23. Faulkner *v.* Boston, etc., Railroad, 72 N. E. 976, 187 Mass. 254.

Where, in an action for damages for injuries to plaintiff's hand by a car window falling on it, plaintiff's testimony that when he entered the car the window was raised, and that he did not touch it, is disputed by other witnesses, and found untrue by the court, and it is found that plaintiff raised the window himself, and there is no evidence as to the cause of the fall, or that it was caused by any de-

ger for injuries, the evidence showed that the plaintiff changed her seat to one beside an open window just vacated by another passenger, and that about five minutes after the train started the window fell, injuring the plaintiff's arm. There was no evidence who opened the window, and nothing but the fact that it fell tending to show that any part was out of order. An expert witness testified that the window might have become jammed in the casing without engaging the catch, and become loosened by the motion of the car, or that there might have been some defect in the catch. The evidence was insufficient to go to the jury, the burden of proof being on the plaintiff to show negligence by a preponderance of the evidence, and proof of facts that might show negligence or not being insufficient.[24] Where, in an action for injury to a street railway passenger by a window falling on his finger, there was no direct evidence that the window catch was defective, and the presumption of defective condition that might arise from the fact that the window fell was met by evidence that the catch was in first-class condition immediately after the accident and by other evidence by the carpenter in charge of the railway company's workshop that he had examined the car the day before, and that every window was in perfect condition and that two days after the accident the car was found in good condition the burden of establishing negligence by a preponderance of the evidence was not sustained, and there could be no recovery.[25] Where, in an action for injuries to a passenger caused by the fall of a car window when the train started, the evidence authorized an inference that when the window was put up, and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clear over its rest, the testimony of a witness that his window was up as high as it would go, and that the window in question appeared to be equally high, did not overcome the inference.[26]

Defective Transom.—The plaintiff, a mail clerk, when he started on his return trip stopped at another mail car to leave some mail with the agent, who observed that he was then in good health. A few minutes later another witness observed him sitting in his compartment with an expression of pain, and he complained of being hurt. The witness' attention was directed to his left shoe, which showed fresh marks as if something had struck the top of it. The witness then noticed a transom lying on the floor, and saw that a transom was missing from its place. Nothing else in the car was disturbed. When the decedent returned home, he limped, and that night the top of his foot was badly swollen. During the night he had a severe chill and another in the morning. The swelling increased in area, and the decedent subsequently died of traumatic pneumonia. The evidence was sufficient to show that the fall of the transom was the proximate cause of the decedent's injury.[27]

Defective Floor.—The plaintiff, a passenger, while leaving the defendant's car, stepped on a nail, which penetrated his shoe and entered one of his toes, remaining there. No direct proof was given that the nail came out of the floor of the car. The defendant proved that the car had been inspected on hour before the accident, and that a matting covered the floor. Since the evidence was

fect in the window or fastening, a judgment for plaintiff is not justified. Texas Mid. R. Co. *v.* Johnson (Tex. Civ. App.), 65 S. W. 388.

A passenger was injured by the window of a car falling on his fingers, and in an action for the injuries it was shown that the car had left a place of general inspection; that it was a new one, and that the window was supplied with proper catches, but that the window was not raised above the catches; and that it is sometimes difficult to raise windows above catches on new cars. Held, that the evidence was sufficient to sustain a verdict for plaintiff. International, etc., R. Co. *v.* Phillips, 69 S. W. 107, 29 Tex. Civ. App. 336.

24. Boucher *v.* Boston, etc., Railroad, 79 Atl. 993, 76 N. H. 91, 34 L. R. A., N. S., 728.

25. Segelman *v.* Interborough Rapid Trans. R. Co. (App. Term), 112 N. Y. S. 1068.

26. Faulkner *v.* Boston, etc., Railroad, 72 N. E. 976, 187 Mass. 254.

27. Defective transom.—Dunlap *v.* Chicago, etc., R. Co. (Mo. App.), 129 S. W. 262.

as equally consistent with the absence as with the existence of negligence, the plaintiff could not recover.[28]

Defective Coupling.—Where a passenger injured by the breaking of a defective coupling and the parting of the train showed that an inspection of the coupling might have disclosed the defect, the company was required to show that it made an inspection, and a failure to do so warranted a recovery.[29] Where, in making up a passenger train, the coupler connecting the baggage car with the tender gave way, causing injury to a passenger, negligence of the carrier is proven by evidence that the coupler had come apart several times before, that the carrier's servants knew it was liable to come apart, and that, notwithstanding this, they threw off the safety chains simply to expedite business.[30]

Defective Trolley Wire.—The frequent breaking of a trolley wire near a given point justifies a finding that the company was negligent in discharging its duties to the public and the passengers.[31]

Defective Lamp.—The plaintiff, a passenger, was cut about the face by a piece of a porcelain shade which fell from a lamp attached to the top of the car. If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant was for the jury; and that the fact that the shade broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to convict defendant of negligence.[32]

Defective Ventilator.—A trolley car passenger was injured by the falling of a ventilator. Shortly before the accident the ventilator had been opened by the conductor. The passenger was in a seat directly beneath the ventilator. The cause of the fall of the ventilator was not shown, but the evidence showed that it was so constructed that it could not fall from its place if the fixtures and fastenings were in proper condition and properly cared for. The evidence was sufficient to prima facie show actionable negligence, without proof of any specific defect in the ventilator or any particular act of misconduct in its management or inspection constituting the negligence causing the injury.[33]

Defective Stanchion on Ferryboat.—The plaintiff, while a passenger on the defendant's ferryboat, was hurt by the falling of a stanchion, which was knocked down by the stage plank which had been run out to land the passengers, and which, by the falling away of the boat, was brought in contact with the stanchion. There was evidence that the stanchion had been shoved in to temporarily support the upper deck, which was heavily loaded, and that it was not perpendicular, nor fastened to the floor, and there was also evidence that the crew placed the stage plank so that it came in contact with the stanchion. There was, on the other hand, evidence that the stanchion was secure enough to resist any ordinary blow or strain, and that other passengers placed the stage plank so that it struck the stanchion. The burden of proof being on the defendant, a verdict for the plaintiff was justified by the evidence.[34]

28. Defective floor.—Cahn *v.* Manhattan R. Co., 76 N. Y. S. 893, 37 Misc. Rep. 824.

29. Defective coupling.—Galveston, etc., R. Co. *v.* Young, 45 Tex. Civ. App. 430, 100 S. W. 993.

30. Williams *v.* Spokane Falls, etc., R. Co., 80 Pac. 1100, 39 Wash. 77, reversed in 84 Pac. 1129, 42 Wash. 597.

Where the question was whether the negligence of defendant's servants in coupling the car was the proximate cause of an injury to a passenger, an instruction that the jury must answer it "No," unless they were satisfied to a reasonable certainty, from the greater weight of evidence, that it should be answered "Yes," should have been given. Ward *v.* Chicago, etc., R. Co., 78 N. W. 442, 102 Wis. 215.

31. Defective trolley wire.—Mannon *v.* Camden Interstate R. Co., 49 S. E. 450, 56 W. Va. 554.

32. Defective lamp.—White *v.* Boston, etc., R. Co., 144 Mass. 404, 11 N. E. 552.

33. Defective ventilator.—Thorson *v.* Groton, etc., St. R. Co., 81 Atl. 1024, 85 Conn. 11.

34. Defective stanchion on ferryboat.—Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710.

Defective Curtain Hook.—The plaintiff's clothing caught in a curtain hook as she was attempting to get out of the defendant's car, and she was injured. The only proof of negligence on the part of the defendant was that the spring of the hook was broken, thus exposing its point; but it did not appear how long it had been broken, nor that by any diligence the defendant could have known of its condition. The evidence was held not to be sufficient proof of negligence to support a finding for the plaintiff.[35] The only proof of negligence given by the plaintiff was that the spring of the hook was broken, and that the point of the hook was thus exposed. There was no proof showing how or when the spring was broken, nor how long it had been broken; nor was there any proof that by any degree of diligence or care incumbent upon the defendant it could have known of its defective condition. The hooks broke in no other way than by use, and, for aught that appears, this hook may have been broken by some person after the car started upon that trip. The defendant gave evidence showing that all the Coney Island cars were furnished with the same kind of curtains and hooks, and that there was no better way known of fastening the curtains; that its road had been operated for several years, and carried more than a million of passengers every year, and that such an accident had never before occurred; that the springs in the hooks would sometimes break by use; that at the end of every trip the cars were inspected by persons assigned to that duty, and the curtains examined, and, if a broken hook was discovered, it was taken off, and replaced by a perfect one. It is difficult to preceive what more the defendant could have done or was bound to do. A defective, broken hook was not of such a dangerous character as to require the very highest degree of diligence to discover and remove it. It was not more dangerous in this car than it would have been elsewhere, where people were passing. No prudent man would have anticipated such an accident as this, or apprehended such an injury from a broken hook. Upon all the evidence, therefore, the trial judge should have held, as matter of law, that the plaintiff had failed to establish a case entitling her to a recovery.[36]

Peculiar Construction of Step.—Where plaintiff in alighting from a railroad car missed her footing and fell between the car step and the platform and was injured, evidence that other railroads constructed car steps and platforms of a different type, without proof of the existence of a standard type, is insufficient to charge defendant with negligence.[37]

Snow and Ice on Platform and Step.—In an action for injuries to a passenger by slipping on the snow on the platform of defendant's car in attempting to alight, where there was evidence from which it could be inferred that the snow was on the step before the train started, and in such condition that it was likely that some one would slip upon it, a finding that defendant was liable for a failure to remove the condition at the earliest practicable moment was warranted.[38] A carrier may not be held liable for the fall of a passenger from the platform of a car while standing on a trestle, on the ground of negligence in permitting part of the platform to be in a slippery condition; how he came to fall not being shown, and the contributing thereto of the slippery condition, not shown to exist in front of the door, being mere speculation.[39] Testimony of plaintiff that the tread on the car step was covered with a solid sheet of ice, and of a witness to the same effect, is of much greater force than evidence that a person slipped on material on the platform of the car which "looked like old

35. Defective curtain hook.—Kelly *v.* New York, etc., R. Co., 109 N. Y. 44, 15 N. E. 879, reversing 39 Hun 486.

36. Kelly *v.* New York, etc., R. Co., 109 N. Y. 44, 15 N. E. 879.

37. Peculiar construction of step. — Kingsley *v.* Delaware, etc., R. Co., 80 Atl. 327, 81 N. J. L. 536, 35 L. R. A., N. S., 338.

38. Snow and ice on platform and step. —Gilman *v.* Boston, etc., Railroad, 168 Mass. 454, 47 N. E. 193.

39. Louisville, etc., R. Co. *v.* Gregory, 133 S. W. 805, 141 Ky. 747, 35 L. R. A., N. S., 317.

ice."[40] In an action by a passenger against a street car company for personal injuries, where the plaintiff testified that the step of the car was slippery from frost or ice, he could not tell which, and the motorman testified that there might have been some frost on the step, but he did not think there was any ice, giving as his reason that the car stayed in a shed overnight, an allegation that defendant negligently permitted the step to remain covered with ice was not sustained.[41] Plaintiff was injured, while alighting from a street car because of the slippery condition of the steps, which was occasioned by a storm of snow and sleet. Before the car started on its trip during which the accident occurred it waited at least fifteen minutes. The rules of the company required the conductor, in case of a storm, to sprinkle sand on the steps. The conductor stated that there was sand at each end of the car in a pail, and that about half an hour before the accident he had put a quart of sand on the step while the car was waiting. The plaintiff's witnesses stated that there was no sand on the step when the accident happened, and that there was no sand pail on the platform. The evidence was sufficient to warrant the jury in finding that defendant was negligent.[42]

Defective Platform and Running Board.—The mere facts that a railway passenger, in passing from one car into another, fell and was injured, and that the platform of one car was higher than the other by three or four inches, do not render the railroad company liable for the injury, in the absence of any evidence as to what caused the fall, or that the difference between the height of the platforms was unusual or dangerous.[43] A passenger, suing a carrier for injury on the ground of a defective running board on the car, is properly nonsuited; all that appears being that plaintiff caught her heel and tripped and fell, and the occurrence being as consistent with the supposition that she carelessly put down her foot, without noticing where it was going, as that there was a hole in the board.[44]

Providing Proper Horses and Driver.—In an action by a passenger for injuries from the upsetting of a stage on a mountain road, it appeared that one of the horses had been inclined to run away; that the road was muddy; that the horses were going at "a slow jog," when they were frightened by a landslide; that they ran one hundred yards before the driver regained control; that flying mud made it hard for the driver to see, and tended to frighten the horses; and that the horses were going in a trot, when they were so frightened by another slide that the driver lost control, and they ran away, and upset the stage. There was evidence for the jury as to whether defendant failed to provide suitable horses and driver.[45]

Guard Chains Out of Place.—Where, in an action for injuries to a passenger, the only allegation of negligence submitted was the defendant's failure to have the guard chains in place across the edge of the platforms of the cars, between which the plaintiff's foot was caught and crushed, and there was no evidence as to the purpose of the chains nor how they could have prevented the accident had they been in place, such negligence was not shown to be the proximate cause of the injury.[46]

Grip Iron Wedged in Slot of Conduit.—A prima facie case of negligence

40. Murphy *v.* North Jersey St. R. Co., 80 Atl. 331, 81 N. J. L. 706, 35 L. R. A., N. S., 592, reversing judgment 73 Atl. 1119.

41. Richmond R., etc., Co. *v.* West, 40 S. E. 643, 100 Va. 184.

42. Foster *v.* Old Colony St. R. Co., 182 Mass. 378, 65 N. E. 795.

43. Defective platform and running board.—Wigg *v.* Erie R. Co., 174 Fed. 401, 98 C. C. A. 289.

44. Wilbour *v.* Rhode Island Co. (R. I.), 67 Atl. 445.

45. Providing proper horses and driver.—Knight *v.* Pacific Coast Stage Co., 100 Cal. xvii, 34 Pac. 868.

46. Guard chains out of place.—Coady *v.* Brooklyn Heights R. Co., 128 App. Div. 856, 113 N. Y. S. 100.

is established in an action for personal injuries by a passenger where the evidence tends to indicate that from some cause the grip iron of the traction car became wedged in the slot of the conduit in which the grip runs, and that in consequence thereof the injury resulted.[47]

Burning Out of Electric Fuse.—Evidence in an action for the death of a passenger on an open electric car, occasioned by the burning out of the fuse in the fuse box situated above the floor, accompanied by a loud explosion and a flame streaming above the floor, whereupon the passenger jumped to the opposite side of the car to avoid the flame and stepped or fell off, is sufficient to authorize a finding that the death was caused by negligence in not furnishing a safe car.[48] In an action for injuries to a passenger on an electric street car by fire alleged to have been caused by the burning out of a fuse, the expert evidence on both sides showed that the report, flash, and vapor-like puff attendant on the burning out of a fuse in proper condition was instantaneous and harmless. Other evidence established that the fuse on the car in question was located directly under plaintiff's seat, and that the burning thereof was attended with a flame lasting a few seconds, which partly enveloped plaintiff, and burned her face and clothing; while other witnesses testified that they noticed only the smoke, and no flame. A verdict finding that the flame was not the instantaneous and harmless flame which results from the ordinary burning out of a fuse in proper condition, that the fuse was therefore defective, and that the company was guilty of negligence in placing the fuse where it was, was not contrary to the evidence.[49]

Insufficient Heating of Car.—Car employees were sufficiently shown to have known that a passenger was suffering from its cold condition, where the conductor had passed through the car, taking up tickets, and other employees had swept it out, after plaintiff had become a passenger.[50] Where it is impossible to determine whether the cold contracted by a passenger resulted from the insufficient heating of the car or from the fact that after arrival at his destination he marched with a militia company and stood around for several hours in the cold without an overcoat, the carrier is not liable.[51] Where, in an action against a railway company for damages to a passenger, defendant denied generally the allegations that the coach was not properly heated, and that the passenger contracted a cold by reason thereof, and the passenger's only testimony that the coach was not sufficiently heated was contradicted by another passenger and the railway employees, the claim that the coach was not properly heated was denied by allegation and proof, thereby rendering a verdict for the company supported by the evidence.[52]

§ 3251. As to Negligence in Management of Conveyances in General. —Necessity for Proof of Cause of Accident.—Where an accident happens to a passenger on a street railway and the instrumentality which caused the accident was within the railway company's control, and the passenger at the time of the accident was in the exercise of due care, proof of such facts is sufficient to establish a prima facie case of negligence against the railway company without proof of the cause of the accident.[53]

Running at Excessive Speed.—That a car is going at a dangerous speed

47. Grip iron wedged in slot of conduit.—Chicago City R. Co. *v.* Wyckoff, 136 Ill. App. 342, judgment affirmed in 85 N. E. 237, 234 Ill. 613.

48. Burning out of electric fuse.—Lord *v.* Manchester St. Railway (N. H.), 67 Atl. 639.

49. Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285.

50. Insufficient heating of car.—Texas, etc., R. Co. *v.* Kingston, 68 S. W. 518, 30 Tex. Civ. App. 24.

51. Louisville, etc., R. Co. *v.* Scalf, 110 S. W. 862, 33 Ky. L. Rep. 721.

52. Tyler *v.* Texas, etc., R. Co. (Tex. Civ. App.), 79 S. W. 1075.

53. As to negligence in management of conveyances in general.—Greinke *v.* Chicago City R. Co., 85 N. E. 327, 234 Ill. 564, affirming judgment 136 Ill. App. 77.

and strikes an obstruction, injuring a passenger, is evidence of negligence.[54] Where an electric railway company operates its road on the public highway, and runs its cars in the nighttime upon a straight level track, although in the open country, at such a rate of speed that a cow can not be discovered standing upon the track by the light of the headlight in time to stop the car, and a passenger is injured by reason of the car striking the animal, such facts will justify a jury in rendering a verdict in favor of the passenger for the injuries sustained.[55]

Rounding Curve.—Where plaintiff, a passenger on a street car, was thrown from the platform thereof as it was rounding a curve, evidence that the speed of the car was "pretty swift," "about nine miles an hour," and that the movement was not "an ordinary jolt," was insufficient to establish negligence on the part of the carrier.[56] Evidence that while plaintiff was, by permission, standing on the platform of an elevated street car, she placed her hand on the door casing to save herself from being thrown as the car passed a curve, when her hand was injured by the door coming out of the socket and striking it, does not entitle her to recover against the car company for the injury; there being no evidence that the speed of the car was excessive or that the trainmen were negligent.[57]

Jerking and Rocking of Car.—Where irregular movement of a street car which causes injury to a passenger is so excessive and violent, though the car may remain on the track, that common experience warrants a finding that the movement would not have happened but for a defect in tht car on in the roadbed, or carelessness in managing the car, evidence of the accident and of the passenger's due care are prima facie sufficient to establish liability, if no proof of want of negligence is offered by the carrier.[58] A carrier's negligence can not be found from the bare fact that there was an unusual lurch of the car, and that injury to a passenger resulted. The passenger, to recover, must show, by evidence of what the motorman did, or what occurred, that the motorman was negligent.[59]

Injury to Passenger Standing in Car.—In an action for injuries, caused by being thrown to the floor while standing in a train without holding on to anything, the mere expression of opinion by plaintiff and one of his witnesses that the rocking or lurching of the train was unusual and extraordinary was

54. Running at excessive speed.—Willmott *v.* Corrigan Consol. St. R. Co. (Mo.), 16 S. W. 500; S. C., 106 Mo. 535, 17 S. W. 490.

55. Cleveland, etc., Railway *v.* Sites, 21-31 O. C. D. 167, 12 O. C. C., N. S., 73.

56. Rounding curve.—Kiefer *v.* Brooklyn Heights R. Co., 97 N. Y. S. 841, 111 App. Div. 404.

57. Hunt *v.* Boston Elev. R. Co., 87 N. E. 489, 201 Mass. 182.

58. Jerking and rocking of car.—Nolan *v.* Newton St. R. Co., 92 N. E. 505, 206 Mass. 384.

59. Young *v.* Boston, etc., R. Co., 100 N. E. 541, 213 Mass. 267, 50 L. R. A., N. S., 450, Ann. Cas. 1914A, 635.

In order for a passenger to recover for an injury from a jerk, jolt, or lurch, he must show, by evidence of what the motorman did, that he was negligent in the way he stopped or started the car, or by evidence of what took place as a physical fact, or by evidence of what appeared to take place as a physical fact, and it is not enough for witnesses to testify that the jerk was unusual. Work *v.* Boston Elev. R. Co., 93 N. E. 693, 207 Mass. 447.

Arm caused to protrude from window.—On the question whether plaintiff voluntarily put his arm out of the car window, or whether it was cast out by a lurch of the train, and came in contact with a bridge through which the car was passing, it appeared that the rail on plaintiff's side was one-half inch lower than the other, that neither plaintiff nor the other passengers were moved from their seats by the lurch complained of, that plaintiff immediately after the injury said that he got his arm hurt by putting it out of the car window, and that the top of the car did not touch the bridge, as it must have done in case of a violent lurch. Held insufficient to show involuntary projection of plaintiff's arm from the window, and that a verdict in his favor must be set aside. Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91.

insufficient to show defendant's negligence.[60] The plaintiff was injured while riding on a freight train for the purpose of attending to the shipment of a horse, and, in an action therefor, he testified that he was seventy years of age; that while he was walking in the middle of the caboose, without having either hand on anything, an unexpected movement of the car threw him down. This evidence is insufficient to show negligence by the trainmen.[61] But where the movement of a train so unusual and extraordinary, as to break a passenger loose from his hold on the water-closet in the car, and of such a nature that the accident could not have happened without negligence, a prima facie presumption of negligence arises.[62]

Testimony of Plaintiff.—Where the plaintiff and two witnesses testify substantially that the injury was caused by a sudden jerk before the car had been brought to a full stop, and a former motorman experienced in the operation of the same kind of car testifies that such jerk might occur and would occur unless the car was properly equipped and operated, it was held, that the liability of the street car company is sufficiently shown to uphold the verdict.[63] In an action for injuries to a passenger, his sworn statement that he was not thrown by the force of the car, but had a ring on the third finger of his left hand that got caught on the brass car handle, lacerating the finger, was not inconsistent with his claim at the trial that the sudden forward movement of the car caused the laceration of his finger.[64] In an action against a street railway company, on the first trial the plaintiff testified that her injury occurred through the sudden stopping of the car, and that there was a car waiting to which she wanted to transfer, and on the second trial she contradicted herself, and testified that it occurred through the sudden starting of the car, and that no other car was waiting. At both trials the pleadings were amended, as to the cause of her fall, to conform to her testimony. There was no corroborating evidence on her side, while the defendant's version of the accident was confirmed by two disinterested witnesses. A judgment for the plaintiff was contrary to the evidence.[65] That in an action for injuries by being thrown from a jerk of a cable car, plaintiff testifies that the car stopped and was jerked forward, and then stopped within two feet, which would be impossible, does not show that there was no jerk, since it was merely a matter of opinion, which in his condition he could not have known.[66]

Sudden Starting of Car.—The mere fact that a car was started with a sudden jerk will not of itself warrant a finding that an accident to an embarking passenger was due to the negligence of the motorman.[67] Evidence that a motorman, when about to start or increase the motion of a heavily loaded passenger car, turned on the power and released his brake, so as to cause a passenger on the front platform to fall a little to the side, is not evidence of negligence on the part of the motorman.[68] Where the plaintiff had stepped on the platform of a car and was about to enter the same, when the train was started so suddenly that she was compelled to seize hold of the frame of the doorway, and the door, which was open, closed, injuring her finger, it was insufficient to justify a verdict against the defendant, where plaintiff failed to show any unskillfulness or negligence on the part of the defendant's employees, or any defect in the ap-

60. Injury to passenger standing in car.—Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

61. Heyward *v.* Boston, etc., R. Co., 169 Mass. 466, 48 N. E. 773.

62. Norfolk, etc., R. Co. *v.* Rhodes, 109 Va. 176, 63 S. E. 445.

63. Testimony of plaintiff.—Van Vranken *v.* Kansas City Elev. R. Co., 84 Kan. 287, 114 Pac. 202.

64. Tooker *v.* Brooklyn Heights R. Co., 80 N. Y. S. 969, 80 App. Div. 371.

65. Reiss *v.* Joline, 125 N. Y. S. 765, 69 Misc. Rep. 349.

66. Setzler *v.* Metropolitan St. R. Co. (Mo.), 127 S. W. 1.

67. Sudden starting of car.—Martin *v.* Boston Elev. R. Co., 101 N. E. 1089, 214 Mass. 456.

68. Faul *v.* North Jersey St. R. Co., 59 Atl. 148, 70 N. J. L. 795.

pliances used in starting the train.[69]

Same—Passenger Carrying Bundles.—A finding that the starting of a street car, throwing a passenger, who had entered with both hands filled with articles and was standing without holding onto anything to steady herself, was with extraordinary violence, so as to constitute negligence, is not authorized; she alone testifying to that effect, and that only when recalled after the defense was developed, and all the other witnesses either testifying that there was no such violation or that they did not notice any.[70]

Same—Testimony of Plaintiff.—In an action against a street railway for injuries to a passenger resulting from the negligent starting of defendant's car, testimony of plaintiff that the car was started with "a very strong jerk," and of another witness that "the car jerked," was insufficient to show negligence on defendant's part.[71] After the plaintiff stated that the car on which she was riding was started ahead with a motion "like three bounds," and she was thrown against another seat and injured, she was shown a written statement by her to a claim agent, soon after the accident, in which she stated that the car started in the usual way, and was then asked, "The statement you then made do you now say is a fact?" to which she replied in the affirmative. The plaintiff's answer, after having had her attention called to her previous statement, affirmed the truth thereof, thus showing that there was no negligence in starting the car.[72]

Sudden Stopping of Car.—That the plaintiff testified that the street car on which she was riding was stopped more suddenly than any on which she had ever ridden, and that she had ridden on electric cars for a long time, showed that the stop was not one of the kind incident to travel on an electric car.[73]

Sudden Application of Brake.—The testimony of witnesses, in an action against a street railway company for injuries sustained to a passenger by reason of the stopping of the car by a sudden jerk, that the jerk was caused by the sudden application of the brake, who failed to testify that they saw the motorman apply the brake, but inferred the cause from what happened, was insufficient to show the cause of the jerk, or that the application of the brake was negligently done, essential to a recovery.[74] In an action for injuries to a passenger from the sudden stopping of a street car, plaintiff's testimony that she did not remember distinctly, but it seemed to her it was a regular stop, and that she had an indistinct recollection of some one passing in front of her as though they went out of the front door, justified a finding that the car was stopped to let off passengers, and not to avoid a collision.[75]

Running Behind Scheduled Time.—The presumption of negligence of the carrier in failing to make a schedule connection is not conclusively overcome by testimony that the delay was due to being late from another point, to loss of time on account of a trestle being on fire, to delay of nine minutes at a station in loading baggage, and to twenty-one minutes lost owing to bad coal.[76]

Negligent Swinging of Trolley Rope.—As the plaintiff, a passenger on a trolley car, was descending the steps, the end of the trolley rope struck him in the eye, destroying its sight. The conductor had released the rope, and swung it around in front of the steps, intending to catch it with his other hand. Such

69. Gould *v.* New York, etc., R. Co., 111 N. Y. S. 1106, 59 Misc. Rep. 36.

70. Passenger carrying bundles.—Randall *v.* Providence, etc., R. Co. (R. I.), 67 Atl. 419.

71. Testimony of plaintiff.—Hirsch *v.* Union R. Co., 96 N. Y. S. 333, 48 Misc. Rep. 527.

72. Tupper *v.* Boston Elev. R. Co., 90 N. E. 422, 204 Mass. 151.

73. Sudden stopping of car.—Black *v.* Boston Elev. R. Co., 91 N. E. 891, 206 Mass. 80.

74. Sudden application of brake.—Rehearing, 102 N. W. 641, denied in Conroy *v.* Detroit United Railway, 104 N. W. 319, 139 Mich. 173.

75. Black *v.* Boston Elev. R. Co., 206 Mass. 80, 91 N. E. 891.

76. Running behind scheduled time.—Taber *v.* Seaboard, etc., Railway, 62 S. E. 311, 81 S. C. 317.

facts warranted findings that the conductor's act was negligence for which the defendant was responsible, that it was the proximate cause of the injury, and that a person of ordinary care ought to have foreseen that some injury would be likely to result from such act when persons were leaving the car.[77]

Negligent Placing of Torpedo.—Where the only evidence as to the cause of an accident to a passenger was that of the plaintiff, who testified that, before the window at which he was sitting was struck by a missile, he heard two sharp reports, like the explosion of a torpedo, and that an engine on the track adjoining was opposite his window, a nonsuit was properly granted.[78]

Negligent Coupling of Cars.—That a jerk given a train on a coupling of cars was extraordinary and unusual tends to prove negligence in operating the train.[79] That cars of a freight train were coupled so violently that a passenger sitting on a trunk near a side door of the caboose was thrown through the door to the ground, a water keg in the car was overturned, papers were jarred from the conductor's desk, and a lamp was jarred from its position, etc., warrants a finding that the company was negligent, though there is no proof of a specific negligent act on the part of those operating the train.[80]

Permitting Overcrowding of Car.—Evidence that a street railroad company allowed its car to become so filled that the aisle and platforms were packed justified the jury in finding that it was negligent.[81]

Failure to Detach Car from Train.—Where, in an action for injuries to a person riding on a freight train, there was a conflict in the evidence as to whether the caboose could have been detached from the train, after the danger was known to defendant, in time to have avoided the injury, and that no attempt was made to do so, though the trainmen were requested by the plaintiff and others to attempt to detach it, there was substantial evidence to support a verdict in the plaintiff's favor, and hence a finding that the defendant failed to use ordinary care will not be reviewed on appeal.[82]

Passing Object Beside Right of Way.—Evidence that a trolley car passenger standing on a step within the vestibule and forced outward by the crowd on the car and the swinging motion of the car, so as to collide with a trolley pole at the side of the track, is sufficient to justify a finding that the conductor was guilty of negligence in failing to exercise care for the safety of the passenger.[83] The plaintiff, who was a passenger in the defendant's open horse car, sitting in the outside seat, was injured by a kick from a horse going in the same direction as the car. In an action against the railroad company for damages therefor, he testified that the car approached a pair of horses on the track, on one of which a man was riding, and leading the other; that the man commenced to get them out of the way, but the driver of the car ran the car against the legs of the lead horse, so that the front and end of the step at the side of the car struck the horse, which then kicked plaintiff on the knee. His testimony was contradicted by all the other witnesses, seven in number; but, of these, two were the driver and conductor of the car, and the testimony of the others was

77. **Negligent swinging of trolley rope.**—Coolidge *v.* La Crosse City R. Co., 117 N. W. 818, 136 Wis. 356.

78. **Negligent placing of torpedo.**—Ginn *v.* Pennsylvania R. Co., 69 Atl. 992, 220 Pa. 552.

79. **Negligent coupling of cars.**—St. Louis, etc., R. Co. *v.* Billingsley, 96 S. W. 357, 79 Ark. 335; Lancon *v.* Morgan's, etc., Steamship Co., 127 La. 1, 53 So. 365; Mitchell *v.* Chicago, etc., R. Co., 112 S. W. 291, 132 Mo. App. 143.

80. Mitchell *v.* Chicago, etc., R. Co., 112 S. W. 291, 132 Mo. App. 143.

81. **Permitting overcrowding of car.**—Knaisch *v.* Joline, 123 N. Y. S. 412, 138 App. Div. 854.

Injury to a passenger while excusably riding on the platform of a car because of the overcrowding of the train usually constitutes a prima facie case of negligence of the carrier. Norvell *v.* Kanawha, etc., R. Co., 68 S. E. 288, 67 W. Va. 467, 29 L. R. A., N. S., 325.

82. **Failure to detach car from train.**—Merrielees *v.* Wabash R. Co., 63 S. W. 718, 163 Mo. 470.

83. **Passing object beside right of way.**—Tolleman *v.* Sheboygan, etc., R. Co., 148 Wis. 197, 134 N. W. 406.

not positive, and, in some particulars, not consistent. A dismissal of the complaint was improper, as the question of the improbability of the plaintiff's testimony was for the jury.[84]

§§ 3252-3256. As to Negligence Causing Passenger to Fall from Vehicle—§ 3252. In General.—Passenger Passing from One Car to Another.—The fact that intestate, a passenger, was found near the tracks in a position showing that he had been dragged by the cars for some distance was no evidence that in attempting to pass from one car into another he fell between the cars by reason of imperfections in the passageway.[85]

Where Passenger Jumped from Car.—Where the only testimony of the plaintiff, in an action against a carrier, shows that he jumped from the defendant's car while it was in motion, and was thereby injured, the court may withdraw the case from the jury and enter judgment for the defendant on the ground that no negligence has been proved against defendant.[86]

Drawn under by Draft of Moving Train after Fall.—The plaintiff testified that he went from his seat in a car to the platform before the train had stopped, and was thrown from the train by a sudden jerking movement of the cars, and that his foot was caught under the wheels and injured. A deposition by plaintiff in another stage of the action stated that, after he was thrown from the car, he was drawn under the wheels by the draught created by the moving of the train, but several unimpeached witnesses testified that after the accident plaintiff stated that he had stepped off the train when it stopped at the depot, and that in trying to step back he slipped, and that his foot was caught under the wheel. It was shown that the wheel of the car was two feet inside the outer edge of the lower step of the platform, and that the height of such step was two feet, and it appeared that from the slow motion of the train at the time of the accident it would have been impossible for plaintiff to have been drawn under the cars by the draught as alleged. A verdict for the plaintiff was not sustained by the evidence.[87]

§ 3253. Defective Means and Instrumentalities.—Defective Track.—In an action for personal injuries by a passenger against a street-railway company it appeared that plaintiff, while standing on the front platform, let go the rail to get out his fare, and slipped off, getting his foot crushed under the wheel. The car was in good repair, and there was no evidence that the track was out of order, except the testimony of one witness that about the time of the accident the track was laid on lateral sleepers, without cross-ties, which had partially rotted. There was no extraordinary jar or unusual motion of the car at the time of the accident. The evidence did not show the company to be guilty of negligence.[88] In an action against a street-railroad company for personal injuries occasioned by plaintiff's being thrown from a car, the evidence was that the plaintiff at the time was drunk; that he had no recollection of boarding the car, or of any of the facts connected with the accident; and that he first came to a realization of his injuries at the hospital. Shortly before the accident he was standing on the front platform, with his hands on the guard rail, and his body swaying back and forth. The rate of speed was moderate, and, although the up and down motion of the car was such at the time the plaintiff was thrown off as to throw another passenger towards the driver, there was no evidence of any defect in the rails or the roadbed. The court properly directed a verdict for the defendant.[89]

84. Walker *v.* Atlantic Ave. R. Co., 11 N. Y. S. 742, 34 N. Y. St. Rep. 118.

85. **As to negligence causing passenger to fall from vehicle.**—Chicago, etc., R. Co. *v.* Mock, 88 Ill. 87.

86. **Where passenger jumped from car.**—Coursel *v.* Cincinnati, etc., R. Co., 8 O. Dec. 174, 6 Wkly. L. Bull. 190.

87. **Drawn under by draft of moving train after fall.**—San Antonio, etc., R. Co. *v.* Choate (Tex. Civ. App.), 35 S. W. 180.

88. **Defective means and instrumentalities.**—Baltimore, etc., Turnpike Road *v.* Cason, 72 Md. 377, 20 Atl. 113.

89. Holland *v.* West End St. R. Co., 155 Mass. 387, 29 N. E. 622.

Defectve Platform.—The testimony is not entirely clear as to the exact manner in which the injury occurred; but it sufficiently appears from the evidence on behalf of the plaintiff that, just as the train was pulling into a station, moving very slowly, the plaintiff left one coach to go into another. When he reached the platform, which was without vestibule, he stumbled over something and fell. He tried to catch himself, but failed, and was thrown to the ground and his arm broken. The evidence shows that the coach was old, and that the planks in the floor of the platform were loose, and could be kicked up with the foot. Plaintiff did not know just what his foot struck, but stated that it felt like a hole. Held, sufficient to show that the defective condition of the platform was the cause of plaintiff's stumble, whereby he was thrown from the train.[90] In an action against a street-railway company for damages for killing the plaintiff's minor child, an instruction to the effect that, under the pleadings and evidence, the plaintiff could not recover, was properly refused, when it appears from the evidence that the boy stated that he "fell off the front platform" of the defendant's car, and it further appears that the evidence tended to show that there was no gate to keep him from falling off, as required by law, and that the car was going around a curve at a rate of about five miles an hour.[91]

§ 3254. Negligent Management of Conveyance.—Running at Excessive Speed.—There was evidence, though conflicting, that while the car was being driven at a dangerous speed it struck an obstruction on the track, and the jolting caused thereby threw the plaintiff off and injured him. It was held, that the defendant was not entitled to a nonsuit.[92] Where a passenger was thrown from a street car while rounding a curve, and injured, his testimony that the car was going at an unusually rapid rate of speed is sufficient to sustain a verdict, where other passengers were thrown at the same time.[93] In an

90. Defective platform.—Yazoo, etc., R. Co. *v.* Tillman (Miss.), 61 So. 658.

91. Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315.

92. Negligent management of conveyance.—Willmott *v.* Corrigan Consol. St. R. Co. (Mo.), 16 S. W. 500; S. C., 106 Mo. 535, 17 S. W. 490.

93. Rounding curve.—Samuels *v.* California St. Cable R. Co., 56 Pac. 1115, 124 Cal. 294.

That a passenger alleged to have been thrown off a street car in consequence of it having been run on a curve toward the west from the north at an excessive rate of speed was found lying six feet to the east of the track did not demonstrate that according to the laws of physics she could not have been thrown from the car, but must have stepped off, and a verdict for her would not be set aside as against the physical facts. Neumann *v.* St. Louis Trans. Co., 90 S. W. 1165, 115 Mo. App. 259.

Passenger on platform.—Plaintiff's intestate, who was a passenger on defendant's street car, left his seat as the car was about to enter a thirty-three degree curve, and went out on the front platform, from which he fell. One witness stated that the car was running twenty miles per hour, and, when it struck the curve, deceased was lifted from his feet, and thrown over a chain three and a half feet high across the entrance to the platform. Witness was about 1,400 feet distant. The evidence was overwhelming that there was no chain on the car. The motorman stated that his first knowledge of deceased's presence on the platform was when the car was entering the curve, when he saw him lift his hand as if for a signal; that about this time witness threw off the power, and deceased at the same moment opened the gate across the entrance, and stepped down on the car step; that witness warned him, but he did not stop, and stepped down into the street. This witness said the car was running about fifteen miles per hour, and others, who were passengers, placed it at from ten to fifteen miles per hour, and none of them seemed to think the car was going too fast. Held, that the evidence was insufficient to sustain a verdict based upon any negligence of defendant. Bruce *v.* Brooklyn Heights R. Co., 74 N. Y. S. 324, 68 App. Div. 242.

Plaintiff, a passenger on a horse car, during an altercation with the driver on the front platform fell or was thrown therefrom as the car was rounding a curve. He contended that he was thrown off by the excessive speed of the car while rounding the curve, and testified that the car was going at "full speed," and at a "terrific rate," while rounding the curve. Plaintiff's witness, who saw the accident, testified that the car was going three or four miles an hour, which was substantiated by other witnesses, and it was undisputed that the car stopped

action for the death of plaintiff's intestate, who was killed by falling from an open street car, it appeared that, when he fell from the car, it was rounding a sharp curve, but was only going at the rate of four miles per hour, and nothing more than the ordinary jar was experienced by any of the passengers. Under the evidence, the deceased fell out contrary to the known laws of force, and the occurrence was not accounted for. There was no evidence showing improper management of the horses or the car, or a defect in the car or the track. The plaintiff failed to show that the injury was in any way caused by the negligence of the defendant or its servants.[94]

Sudden Starting.—In an action for injuries to plaintiff while a passenger on defendant's electric car, plaintiff claimed that, while he was sitting in a seat facing towards the front of the car, it suddenly gave a jerk, and threw him off. Such evidence was not sufficient to charge defendant with negligence, as the natural result of a sudden start would be, not to throw plaintiff off, unless he was sitting in a careless manner, but to throw him against the back of the seat on which he was sitting.[95]

While Setting Down Passenger.—Plaintiff was a passenger in one of defendants' stages. As she was getting out, the horses started up, and by reason thereof she was thrown down and injured. In an action to recover damages, it was held, that the facts showed, prima facie, either that the horses were unsuitable for the business or that the driver was incompetent or negligent, and, in the absence of proof that the occurrence of something beyond the control of the driver or the proprietors caused the horses to start, was sufficient to sustain a recovery.[96] In an action against a street-car company for personal injuries, where plaintiff testifies that after the car had slackened speed, and while he was waiting for it to stop, it made a sudden start forward, and threw him off, thus causing the injuries, and defendant's witnesses are not entirely harmonious as to the circumstances, though they all testify that plaintiff got off while the car was in motion, a verdict for plaintiff will not be disturbed on appeal.[97]

Passenger Intoxicated.—In an action to recover for injuries sustained from the sudden movement of a horse car, it appeared that plaintiff had been

within five feet of the place where plaintiff fell. Held, that the evidence was insufficient to sustain a verdict for plaintiff on the ground of excessive speed. Vogler *v.* Central Crosstown R. Co., 82 N. Y. S. 485, 83 App. Div. 101.

94. Muller *v.* Second Ave. R. Co., 48 N. Y. Super. Ct. 546.

95. Sudden starting.—Brennan *v.* Brooklyn Heights R. Co., 12 Misc. Rep. 570, 33 N. Y. S. 852, 67 N. Y. St. Rep. 605.

Evidence in an action for injuries to a street railway passenger thrown from the front platform while the car was ascending an incline held to warrant a finding that the motorman, when starting ahead after slowing down, threw on the whole power at once, instead of putting it on slowly. Cutts *v.* Boston Elev. R. Co., 89 N. E. 21, 202 Mass. 450.

Plaintiff and a fellow passenger testified that they were riding in a caboose on a freight train, and that, the train having stalled and come to a stop, plaintiff attempted to pick up an overcoat from the floor, when the car was suddenly struck a very hard blow, causing him to fall and receive the injury, and that when the car stalled it made two or three attempts to move, and then eased back and stopped. Held, that the court properly refused to instruct the jury that there was no evidence of overloading, or negligent management, or that the injury was the result of a mere accident. Wallace *v.* Western, etc., R. Co., 101 N. C. 454, 8 S. E. 166.

96. While setting down passenger.—Roberts *v.* Johnson, 58 N. Y. 613.

97. Ganley *v.* Brooklyn City R. Co., 55 Hun 605, 7 N. Y. S. 854, 28 N. Y. St. Rep. 93, 5 Silvernail 319.

In an action for personal injuries sustained by plaintiff there was evidence that the driver of the car directed plaintiff to take a dangerous position on the platform; that plaintiff, on nearing his destination, asked the driver to stop the car; that the speed of the car was thereupon slackened, and that when plaintiff was preparing to get off the horses started suddenly, throwing plaintiff to the ground. The driver testified that he did not hear plaintiff ask him to stop, and there was evidence that plaintiff attempted to leave the car while it was in motion. There was not sufficient evidence of negligence on the part of the plaintiff, or of due care on the part of defendant, to warrant taking the case from the jury. Nichols *v.* Sixth Ave. R. Co., 38 N. Y. 131, 97 Am. Dec. 780.

drinking, was riding on the front platform, although without objection, and stepped to the lower step to permit persons to pass. The only evidence as to defendant's negligence was that the car in starting gave a sudden movement. A nonsuit should have been granted.[98]

Sudden Starting.—In an action against a street railway company for injuries to a passenger, evidence showing that plaintiff, who was standing near the edge of the rear platform without holding onto anything, was pitched off by a sudden jerk in the car, caused by a sudden stop, without showing that there was any defect in the car or rails, or that the apparently sudden stop was not justifiable, fails to show any negligence on the part of defendant.[99]

Sudden Jerking or Lurching of Car.—A passenger on a street car, who was injured by being thrown to the ground by the lurch of the car in passing from the main track to a switch track, can not recover therefor where there is no evidence that the injury was due to any defect in the car or track, or that the speed was unusual or dangerous, or that the jar was unusual, since such motion of the car is not sufficient to show negligence.[1] Where a passenger on a train which was lurching considerably was last seen alive going out of one sleeping car for the next one, which he did not enter, and was afterwards found dead beside the track, the manner of his death is not mere conjecture, but it is a fair inference that he was thrown by the lurching of the train through the open vestibule door, there being nothing to indicate he intended to commit suicide.[2] Where a plaintiff's testimony that he was thrown from a car platform by a jerk, by reason of which his foot was run over by the train, was corroborated by two witnesses, a verdict for plaintiff will not be disturbed on the ground of insufficiency of the evidence.[3] Where a plaintiff's testimony that he was thrown from a car platform by a jerk, by reason of which his foot was run over by the train, was corroborated by two witnesses, a verdict for plaintiff will not be disturbed on the ground of insufficiency of the evidence.[4]

98. Passenger intoxicated.—Hayes *v.* Forty-Second, etc., R. Co., 97 N. Y. 259.

99. Sudden stopping.—Timms *v.* Old Colony St. R. Co., 66 N. E. 797, 183 Mass. 193.

1. Sudden jerking or lurching of car.—Byron *v.* Lynn, etc., R. Co., 58 N. E. 1015, 177 Mass. 303.

In an action to recover for an injury received by plaintiff in falling from defendant's surface car, he testified that the car "went right from under him," but there was no other evidence to indicate any sudden start, jerk, or jolt of the car. Defendant's witnesses testified that plaintiff stepped off while the car was moving, and that there was no change in its movement. Held, that a finding of negligence was not justified. Armstrong *v.* Metropolitan St. R. Co., 48 N. Y. S. 597, 23 App. Div. 137.

Plaintiff's intestate fell or was thrown from an open street car while in rapid motion, and was killed. A witness, who was sitting at a fourth story window, over one hundred feet away from the place of the accident, testified that the car came to a sudden jerk back, which threw deceased off on her head, and then went on, and that after she fell the danger signal was rung, and the car then stopped suddenly. There was no other evidence of defendant's negligence. The conductor, motorman, several passengers, and a policeman who was riding on a bicycle just behind the car, all testified that there was no sudden check or jerk of the car until the ringing of the danger signal after the accident. Held, that a verdict for plaintiff's intestate against the street car company was not justified by the evidence. Ehrhard *v.* Metropolitan St. R. Co., 68 N. Y. S. 457, 58 App. Div. 613.

Where there is evidence that a passenger was seen upon the train near the rear of the car just before a sudden and violent jolt of the train occurred and he was afterwards run over and killed while lying across the track at this point, the evidence authorizes a verdict that his death was caused by the negligent operation of the train which threw him off. Southern R. Co. *v.* Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

Expressions such as "very fast," "jerk," and "sudden jerk," used in testimony in an action against a carrier for injuries, caused by being thrown from a car, are vague, indefinite, and meaningless, and, unaccompanied by other and more definite evidence, do not tend to prove negligence. Chicago Union Tract. Co. *v.* Duckstein, 136 Ill. App. 389, judgment affirmed in 85 N. E. 195, 234 Ill. 617.

2. Robinson *v.* Chicago, etc., R. Co., 97 N. W. 689, 135 Mich. 254.

3. San Antonio, etc., R. Co. *v.* Choate, 56 S. W. 214, 22 Tex. Civ. App. 618.

4. San Antonio, etc., R. Co. *v.* Choate, 56 S. W. 214, 22 Tex. Civ. App. 618.

Passenger Riding on Platform.—In an action by a street car passenger for injuries by being thrown from a platform, plaintiff does not make out a prima facie case merely by proof that the car gave a jerk or similar motion, and that he was hurt; but must further show that it was due to a defect in the track or to negligence in operating the car.[5] In an action for the death of plaintiff's intestate caused by a fall from defendant's train, the declaration alleged that the intestate was a passenger, that he was in the exercise of due care and caution for his own safety, that defendant did not furnish intestate a seat inside the cars, and that he was obliged to ride on the platform of the car, and while so riding defendant was negligently running its train, that the car on which intestate was riding was so violently swayed from side to side that intestate was thrown from the platform and killed. The preponderance of evidence showed that there were vacant seats in some of the coaches, and that the train was moving at a very slow rate of speed, and that there was no violent motion or swaying of the cars, but only the usual motion of the cars was noticeable. The evidence did not sustain the allegation of negligence, and a judgment for plaintiff should be reversed.[6]

Failure to Turn Switch.—A passenger who was injured by the derailment of defendant's street car testified that it was too dark to observe the destination of the car; that he went to the door to inquire; that he was obliged to place one foot outside the door to make room for another, when, by failing to turn the switch at the junction, the car, which was running rapidly, was derailed, throwing him off; and that the car had no conductor. There was evidence to corroborate the passenger, but the driver contradicted it in most important particulars, testifying that the passenger came to the platform, and remained there; that he directed him to go inside; and that the car was not going rapidly; that the switch turned automatically by the weight of the horse, but in this instance turned the wrong way, owing to the driver's attention being drawn by the passenger. The evidence was sufficient to sustain a verdict for plaintiff.[7]

§ 3255. Negligent Pushing Passenger from Car.—When the testimony of a passenger leaves it in doubt whether he fell off or was pushed off the car, and also leaves it in doubt if he was pushed off whether the conductor or some third person pushed him off, there being no evidence to clear up this doubt, the plaintiff's complaint will be dismissed.[8]

By Turning Brake.—In an action for causing the death of a passenger it appeared that, upon first entering the car, the deceased obtained a seat; that the car, for some cause, ran off the track; and the conductor requested the assist-

5. **Passenger ridding on platform.**—McGann *v.* Boston Elev. R. Co., 85 N. E. 570, 199 Mass. 446, 18 L. R. A., N. S., 506.

6 Krug *v.* Chicago, etc., R. Co., 155 Ill. App. 114.

7. **Failure to turn switch.**—Farrell *v.* Houston, etc., R. Co., 51 Hun 640, 4 N. Y. S. 597, 21 N. Y. St. Rep. 84.

8. **Negligent pushing passenger from car.**—Pixley *v.* Third Ave. R. Co., 33 N. Y. Super. Ct. 406.

Plaintiff passenger stated positively that he was pushed off the train by one of defendant's train crew in uniform, which each of the crew but the conductor and porter of the sleeper denied. Held that, though plaintiff was unable to state whether he was on the steps or platform of the car, there was evidence to support a verdict for him. Louisville, etc., R. Co. *v.* Ray, 46 S. W. 554, 101 Tenn. 1.

After refusal to pay fare.—Plaintiff, a boy eight years of age, voluntarily, and without the knowledge of the conductor, went to the front platform of a horse car to join his companion. The conductor opened the wicket in the front door, and asked plaintiff's companion for his fare, and, upon the latter stating that he had paid his fare on another car, said he must either pay or get off, and opened the door. As he did so, plaintiff stepped with one foot down on the step of the car, and attempted to get off backward. The driver caught him, and placed him back on the platform, saying, "Don't you get off, you will fall;" but almost immediately, plaintiff repeated the act, and was either thrown off or jumped off backward, and was injured. Held, that there was no evidence of negligence on the part of the company. Sandford *v.* Hestonville, etc., R. Co., 136 Pa. 84, 20 Atl. 799.

ance of the passengers to put it on. The deceased did not regain his seat, and, from the crowded condition of the car, was compelled to stand on the front platform. Thus he was brought into close proximity to the brake, which was used by the driver, at or about the time of the accident. There was evidence from which the jury might fairly have inferred that he was thrown from the platform by the sudden turning of the brake. A verdict against the company was sustained.[9]

By Closing Gate.—An elevated car was standing at a station with the gate open. Two of plaintiff's witnesses stated that intestate had one foot on the car, and was about to step on with the other, when the train started with a jerk, and she fell between the station and the car. This testimony was held not to contradict plaintiff's other witnesses, who stated that the slamming of the gate pushed her back and made her fall as she was entering.[10]

By Another Passenger.—In an action against a street railway company for injuries alleged to be due to the overcrowding of a trolley car, and lack of facilities for alighting, the plaintiff and her daughter testified that in leaving the car, at night, she was pushed from the step of the front platform by the passengers behind her, and fell upon the fender, through which one foot was thrust. The testimony for the defendant showed that she alighted safely, but, failing to think of the fender, attempted to pass in front of the car, and thus met with the accident. As the weight of evidence showed no negligence on the part of defendant, a verdict for plaintiff would be set aside.[11]

§ 3256. Negligence after Passenger Has Fallen.—When a passenger falls from a fast running train, every officer of the train, as soon as he knows of the fall, must be conscious of the impelling duty to stop the train, or to take some other prompt measure to rescue the passenger, and the failure so to do, unless in extraordinary cases, is strong evidence of a reckless disregard of duty.[12]

§ 3257. As to Cause of Derailment.—Proof that a passenger on a railroad train was injured by derailment is sufficient to establish a prima facie case of defendant's negligence.[13] In an action by a passenger for personal injuries

9 By turning brake.—Chicago City R. Co. *v.* Young, 62 Ill. 238.

10. By closing gate.—Schestauber *v.* Manhattan R. Co., 44 Hun 628, 9 N. Y. St. Rep. 215.

11. By another passenger.—Hansen *v.* North Jersey St. R. Co. (N. J.), 43 Atl. 663, reversed in 46 Atl. 718, 64 N. J. L. 686.

12. Negligence after passenger has fallen.—Brice *v.* Southern Railway, 67 S. E. 243, 85 S. C. 216, 27 L. R. A., N. S., 768.

13. As to cause of derailment.—Winters *v.* Baltimore, etc., R. Co., 163 Fed. 106.

The derailment of a car establishes prima facie negligence toward a passenger, where his due care is not contested. Minihan *v.* Boston Elev. R. Co., 91 N. E. 414, 205 Mass. 402.

Evidence that an electric car was derailed, and that plaintiff, a passenger, was injured in consequence of the derailment, is sufficient evidence prima facie of defendant's negligence. Berry *v.* Atlantic Railway, 84 Atl. 740, 109 Me. 330.

In an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite exploded thereby, evidence held to support a finding that the carrier was negligent in loading slabs on a flat car in front of the car loaded with dynamite, and that the slabs fell from the car and caused the derailment. Roberts *v.* Sierra R. Co., 111 Pac. 519, 14 Cal. App. 180, rehearing denied in 111 Pac. 527.

In an action for injuries to a passenger by derailment of a train being run over a completely submerged track, evidence held sufficient to establish defendant's negligence. Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682.

Evidence in an action against a carrier for injuries sustained by a passenger in consequence of the derailment of the train examined, and held to support a verdict of negligence on the part of the carrier. Illinois Cent. R. Co. *v.* Porter, 94 S. W. 666, 117 Tenn. 13.

Evidence, in a street car passenger's action for injuries in a derailment, held to support a verdict in some amount for plaintiff. Emerson *v.* Butte Elect. R. Co., 129 Pac. 319, 46 Mont. 454.

Evidence, in an action for injury to a passenger by derailment of a street car,

caused by the derailment of a train, a verdict for the plaintiff will not be disturbed where it appears that the carrier did not have a suitable track, that the outside of the curve where the accident occurred was lower than the inside and that the train was behind time and running rapidly when derailed.[14] Where, in an action by a passenger for personal injuries alleged to have been caused by the derailment of a car, the evidence as to the nature and extent of the injuries and their cause is conflicting, but there is sufficient evidence to sustain the verdict for the plaintiff, it is not error to refuse to grant a new trial.[15]

Where Circumstances Not Explained.—In an action against a street railroad company for injuries to a passenger caused by the derailment of a car in which he was riding, it appeared from the plaintiff's evidence that the car was thrown from the track while turning a curve, and that the driver at the time was looking at some boys who were quarreling in the street. The defendant introduced evidence that the track at the place of the accident was in good condition, and was constructed in such manner as to materially reduce the chances of derailment, but no explanation was attempted as to what took place. The evidence was sufficient to carry the case to the jury on the question of the defendant's negligence.[16]

Running at Excessive Rate of Speed.—A railroad company is liable for injury to a passenger by derailment caused by running at an excessive rate of speed.[17] In an action against a railroad to recover for injuries to a passenger caused by a railroad accident, evidence tended to show that the train was going at a high rate of speed; that the ties were rotten, spikes loose, and the rails worn at the place where the accident occurred; and that the outside rail in a curve was not high enough to prevent the throwing of the train by its own momentum. A verdict of the jury for plaintiff would not be disturbed on appeal.[18]

held sufficient to authorize the jury to find that the car left the track because of defects in the flange of a wheel, and because the car was run around a curve at the usual rate at which sound cars are run around it. Johnson *v.* St. Louis, etc., R. Co., 73 S. W. 173, 173 Mo. 307.

In an action for injuries to a passenger, caused by an alleged sudden stop following the derailment of a car, physical facts held to require a verdict for defendant on the ground that plaintiff could not have been injured in the manner claimed. St. Louis, etc., R. Co. *v.* Britton, 190 Fed. 316, 111 C. C. A. 216.

In an action for injuries to a passenger caused by delay after the train had been derailed, because of a broken rail, evidence held to sustain a finding of negligence by the company. Arkansas Cent. R. Co. *v.* Janson, 90 Ark. 494, 119 S. W. 648.

14. Central R. Co. *v.* Sanders, 73 Ga. 513.

15. Central R., etc., Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

16. Where circumstances not explained.—Pollock *v.* Brooklyn, etc., R. Co., 60 Hun 584, 15 N. Y. S. 189, 39 N. Y. St. Rep. 568.

17. Running at excessive rate of speed.—In an action by a passenger against a railroad company for injuries caused by a car being thrown from the track by reason of the breaking of a wheel, it appeared that the train was running at the rate of sixteen or twenty miles per hour, where the schedule rate was four miles; that the air brakes were defective, but for which the engineer might have stopped the train; that the rails were old and battered, the ties rotten, and the roadbed rough and uneven. Held, that these facts warranted the jury in finding the company negligent. Texas, etc., R. Co. *v.* Hamilton, 66 Tex. 92, 17 S. W. 406.

Plaintiff's evidence tended to show that the train was derailed while running at a high rate of speed, that the ties were rotten and the roadbed in an unsafe condition at the point where the accident occurred, and defendant's evidence as to the appearance of the nuts, bolts, and bars used in connecting the rails and the appearance of the rails tended to show that they had been removed by some malicious person, but no evidence was given as to who removed them, or that any person was seen about the place. Held, that a judgment for plaintiff will not be set aside as against the weight of evidence. Houston, etc., R. Co. *v.* Lee, 69 Tex. 556, 7 S. W. 324.

18. Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

Down grade.—Defendant's train, while going down a grade of sixty feet to the mile, with engine and tender reversed, left the track. The roadbed was old, but had not been used till two months before the accident, when it had been covered with six inches of fresh dirt. The testimony of several railroad men was that there was no curve within a quarter of a mile, and they were supported by the

In an action for injuries to a passenger on a street car, where it was shown that the car, while being driven rapidly on a curve, left the track, whereupon plaintiff was thrown from the platform into the street, receiving the injuries complained of, it was error to dismiss the complaint for failure of proof of defendant's negligence.[19]

Defect Known to Employee.—In an action for injuries to a passenger by a wreck caused by derailment due to the breaking of an equalizer over the trucks which had been partially broken for a long period of time and not discovered by the railroad's inspection, such facts held sufficient to sustain a verdict for plaintiff.[20] A passenger was injured while riding in the caboose of a freight train by its derailment, caused by the falling of a brake attached to the next car in front. The train was running up grade at a speed not as fast as a man could walk, and could have been stopped in one hundred feet. The danger was discovered before the train reached a switch, and the conductor said there would be danger of derailing the caboose when the switch was reached. The train was run over four hundred feet after it passed the switch before the accident occurred. There was a conflict in the evidence as to whether the conductor gave the engineer a simple stop signal or an emergency signal, but the train did not stop until after the accident. Such evidence was sufficient to support a verdict in favor of plaintiff on the theory that the trainmen failed to use ordinary care to prevent the accident after the danger was discovered.[21]

Defective Ties.—In an action for damages for injuries to a passenger by the derailment of a car, several witnesses for the plaintiff testified that the ties at the point where the accident occurred were in a very rotten condition, and that the rail was much worn and mashed. The only testimony to rebut this was that of the defendant's section boss, who testified that he examined the track a day or two before the accident, and that the rail was sound, but admitted that one of the ties was somewhat decayed. The defendant did not produce the broken portion of the rail. The plaintiff was held entitled to recover.[22]

Defective Switch.—In an action for injuries caused by derailment of a train, due to a defective switch, it appeared that none of the weakness of the switch were hidden before the accident; that the rails weighed seventy pounds to the yard, and were made by a reputable manufacturer; and also that the switch had been inspected a short time before the accident. These facts did not prove that the accident might not have been prevented by the exercise of the highest practicable care, which defendant was required to exercise for the safety of passengers.[23]

Rail Removed by Third Person.—In an action by a passenger on a derailed train for injuries received, witnesses for plaintiff testified that they counted a certain number of rotten ties out of a certain number of ties on the roadway in the vicinity, and others that some rotten ties were burning in fires kindled immediately after the accident. Defendant's evidence showed that the ties in use were sufficiently good to make a first-class track and hold the spikes, and that a rail had been intentionally removed; tools adopted for that purpose being found near the track. Such tools belonged to another company, and had been

map of the route. Others testified that within six hundred yards there was a curve of two feet, and that there was an extra curve of six inches where the train went off. The rate of speed testified to was from twelve to fifteen miles an hour, and the highest rate at which, under the circumstances, the train could safely run, was set at from ten to fifteen miles an hour. In an action for the death of passengers, held, that the evidence was sufficient to show negligence on the part of the company. Berry *v.* Missouri Pac. R. Co., 124 Mo. 223, 25 S. W. 229.

19. Ludinsky *v.* New York City R. Co., 103 N. Y. S. 711, 53 Misc. Rep. 569.

20. **Defect known to employee.**—St. Louis, etc., R. Co. *v.* Leflar, 104 Ark. 528, 149 S. W. 530.

21. Merrielees *v.* Wabash R. Co., 63 S. W. 718, 163 Mo. 470.

22. **Defective ties.**—Newman *v.* Alabama, etc., R. Co., 38 Fed. 819.

23. **Defective switch.** — Terre Haute, etc., R. Co. *v.* Sheeks, 56 N. E. 434, 155 Ind. 74.

placed in the tool house a mile or so distant, and were found missing the next morning. The house had apparently been broken into. Two suspicious characters were seen, soon after the accident, hastening from the vicinity. A verdict for plaintiff should be set aside as against the preponderance of the evidence.[24]

Caused by Windstorm.—A judgment for defendant in an action against a railway company for damages for negligently running its train through a windstorm, resulting in its derailment, is proper, where there is a mere scintilla of evidence of such negligence, and prima facie inference of negligence arising from the fact of derailment is rebutted.[25]

Position of Car after Derailment.—Proof that an electric car left the track and turned around, so as to stand almost at right angles to the track, injuring a passenger, justifies a finding of negligence of some kind.[26]

Passenger Riding in Unsafe Place.—In an action against a railroad company for personal injuries received while a passenger on defendant's freight train, there was evidence that plaintiff was ordered out of the caboose, and with defendant's knowledge, was riding on a buggy on a flat car, and that the train was derailed on account of the negligence of defendant's employees, seriously injuring him. A verdict for plaintiff was supported by the evidence.[27]

§ 3258. As to Negligence Causing Collision.—In an action by a passenger against a carrier for hire to recover for personal injuries sustained, a prima facie case is established by proof of the relation, a collision while the relation existed, and resulting injury and damages.[28] The allegations of negligence being shown, a prima facie case in favor of the plaintiff is established by evidence tending to show that the defendant was the owner of and operating the cars in collision; that the plaintiff was a passenger upon one of the colliding cars; that the cars came into collision while he was in the exercise of due care for his own safety; and that he was injured as a result of such collision.[29] The

24. Rail removed by third person.—Whipple *v.* Michigan Cent. R. Co., 90 N. W. 287, 130 Mich. 460.

25. Caused by wind storm.—Pierce *v.* Great Falls, etc., R. Co., 56 Pac. 867, 22 Mont. 445.

26. Position of car after derailment.—James *v.* Boston Elev. R. Co., 87 N. E. 474, 201 Mass. 263.

27. Passenger riding in unsafe place.—Mexican Cent. R. Co. *v.* Lauricella (Tex. Civ. App.), 26 S. W. 301.

28. As to negligence causing collision.—Burgoyne *v.* Chicago City R. Co., 167 Ill. App. 59.

Proof that the plaintiff was a passenger for hire; that the car in which he was riding collided with another train of the defendant, while the plaintiff was in the exercise of due care, and that he was injured by reason of such collision, makes a prima facie case of negligence on the part of the defendant. Illinois Cent. R. Co. *v.* Rothschild, 134 Ill. App. 504.

29. Wilson *v.* Chicago City R. Co., 144 Ill. App. 604.

Instances of evidence held sufficient.—*California.*—Kimic *v.* San Jose-Los Gatos, etc., R. Co., 104 Pac. 986, 156 Cal. 379.

Illinois.—Sandy *v.* Lake St. Elev. R. Co., 85 N. E. 300, 235 Ill. 194, affirming judgment in 137 Ill. App. 244.

Kentucky.—Louisville, etc., R. Co. *v.* Marshall, 110 S. W. 885, 33 Ky. L. Rep. 639.

Michigan.—Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185; Sloan *v.* Detroit United Railway, 172 Mich. 68, 137 N. W. 691.

Minnesota.—Willard *v.* Iowa Cent. R. Co., 122 N. W. 169, 108 Minn. 304.

Missouri.—Price *v.* Metropolitan St. R. Co., 119 S. W. 932, 220 Mo. 435.

New York.—Smith *v.* Metropolitan St. R. Co., 86 N. Y. S. 1087, 92 App. Div. 213; Giltman *v.* Brooklyn Heights R. Co., 113 N. Y. S. 1046, 129 App. Div. 654; S. C., 113 N. Y. S. 1048, 129 App. Div. 919.

Utah.—Dearden *v.* San Pedro, etc., R. Co., 93 Pac. 271, 33 Utah 147.

Leaping from car to avoid collision.—In an action by a street car passenger against a street railway company and a steam railroad for injuries caused by leaping from the car to avoid a threatened collision at a crossing between the car and a locomotive, evidence examined and held to warrant a finding that the servants in charge of the car were free from negligence. Horton *v.* Houston, etc., R. Co., 46 Tex. Civ. App. 639, 103 S. W. 467.

Car overcrowded.—In an action by a street car passenger for injuries by collision of the car with a wagon, evidence held to justify a finding of negligence by the motorman in permitting the front platform to be so overcrowded that he could

fact that the plaintiff at the trial attempted to prove specific acts of negligence is not material as affecting the prima facie case thus made out.[30]

Preponderance of Evidence.—In an action for the death of deceased, caused by a collision between a street car on which he was a passenger and a railroad train, the court properly charged that the jury could find a verdict against the street-car company from the mere fact of the collision, unless the presumption of negligence on its part was rebutted; but that, to justify a verdict against the railroad company, a preponderance of the evidence must show negligence on its part contributing to the accident.[31]

Question for Jury.—Where, in an action for injuries to a passenger caused by a collision between defendant's car and another, plaintiff's testimony that he was riding on the front platform, and not on the guard rail in front of the car, is contradicted by two witnesses of the defendant, the question of his position is for the jury.[32]

Necessity for Proof of Negligence.—One injured by a collision with a horse and buggy while riding in a cable car, whose curtains were drawn to keep out the rain, must show, by a preponderance of evidence, some neglect of duty or want of care on the part of the trainmen.[33]

Proximate Cause of Injury.—In an action against a steamship company for causing the death of the plaintiff's intestate in a collision between two of the defendant's vessels, on one of which the intestate was going from New York to Stonington, where the only evidence as to the intestate's death was that of a witness who testified that he saw the dead body at Stonington two days after the collision, there being no evidence as to what caused the intestate's death, or how his body came to be found there, it is error to direct the jury to find for the collision.[34] The plaintiff claimed to have been ruptured, while a passenger on the defendant's train, by a collision. The train on which the defendant was riding, he being seated in the rear car, was run into from behind by a train running at the rate from one to three miles per hour. The pilot slid under the hind end of the rear car, raising it up about eight inches, and showing the entire

not operate the brakes or control the car. Garber *v.* Joline (App. Term), 119 N. Y. S. 1070.

Instances of evidence held insufficient.—*Louisiana.*—Trenchard *v.* New Orleans R., etc., Co., 48 So. 575, 123 La. 36.

Maryland.—Stewart Taxi Service Co. *v.* Getz, 84 Atl. 338, 118 Md. 171.

New York.—Gorman *v.* New York, etc., R. Co., 87 N. E. 682, 194 N. Y. 488.

North Carolina.—Hollingsworth *v.* Skeldin, 55 S. E. 212, 142 N. C. 246.

Ohio.—Ohio Tract. Co. *v.* Miller, 22-32 O. C. D. 348.

Philadelphia.—Gaines *v.* Chester Tract. Co., 73 Atl. 7, 224 Pa. 52.

Washington.—Hyde *v.* Seattle Elect. Co., 93 Pac. 903, 48 Wash. 393.

In an action for the negligent killing of a person in a rear end collision between defendant's trains, evidence held to show that decedent took passage on the train pursuant to an arrangement with the conductor for free passage, and knowing that the conductor had no right to allow him to ride free, rendering him merely a trespasser on the train, to whom the carrier was not liable for injuries, unless willfully or wantonly inflicted. Sessions *v.* Southern Pac. Co., 114 Pac. 982, 159 Cal. 599.

Wagon turning from another track.—A street car on which plaintiff was a passener collided with a team attached to a beer wagon. The car was going at the rate, of eight miles an hour, and would travel thirty feet in about twelve seconds. The wagon, heavily loaded and drawn by four horses, was proceeding along another track, when a second car, coming up behind, caused it to turn upon the track where the injury occurred. The wagon and horses covered a distance of thirty-five or forty feet. The distance between the colliding car and the team at the time the latter turned was not shown. Held, that there was evidence to sustain the finding of negligence in the gripman in not stopping the car in time to avoid the collision. West Chicago St. R. Co. *v.* Williams, 87 Ill. App. 548.

30. Wilson *v.* Chicago City R. Co., 144 Ill. App. 604.

31. Preponderance of evidence.—Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117.

32. Question for jury.—Hourney *v.* Brooklyn City R. Co., 7 N. Y. S. 602, 27 N. Y. St. Rep. 49.

33. Necessity for proof of negligence.—Potts *v.* Chicago City R. Co., 33 Fed. 610.

34. Proximate cause of injury.—Providence, etc., Steamship Co. *v.* Clare, 127 U. S. 45, 8 S. Ct. 1094, 32 L. Ed. 199.

train about twenty feet. The plaintiff testified that his first sensation was a push in his back, and that he was then thrown in his stomach on the seat in front, and he sank down between the seats, becoming insensible; that when he came too he tried to get up, and found that he could not use his right arm; that with the assistance of some one unknown to him he got into another car; that he felt terrible pains in his groin, and that it was only by pressing the affected part that he obtained any relief; and that he kept his hand pressed against that part until he reached his destination. A passenger and several of the defendant's employees testified that the shock was not severe enough to disturb any one; that after the accident they made inquiries all through the train as to whether any one was hurt, but heard no complaints. The medical experts testified that rupture could have been produced by such an accident. Witnesses also testified to complaints by plaintiff after reaching his home, and visits to physicians. The finding that the plaintiff had been hurt in the collision was not disturbed.[35]

Where View Not Obstructed.—Where a street car passenger, suing for injuries in a collision between the car and a wagon, proved the collision and the injury, and the omission of the motorman to give any warning of the approach of the car, and that the collision occurred in broad daylight and on an unobstructed street, the jury could find a failure of the motorman to exercise the care required for the protection of passengers.[36] Evidence that the defendant's street car was being driven very rapidly, and ran into the end of a van drawn by horses, which had crossed the track; that the accident happened at midday, and when there was no obstruction in the street; and that the plaintiff, a passenger, was free from negligence,—will sustain a verdict in his favor, for injuries received by the collision.[37]

Where Dray Skidded on Track.—In an action for injuries to a passenger on a street car resulting from a collision between the car and defendant's dray, the fact that the collision would not have occurred except for the slipping of wheels of the dray on the street-car track does not conclusively repel the imputation of negligence.[38]

Caused by Defective Brake.—In an action for injuries to a passenger resulting from a collision, proof that the collision was occasioned by reason of a defective brake, and that plaintiff was in the exercise of due care at the time, makes out a prima facie case, and puts upon the defendant the onus of rebutting the negligence presumed.[39] Where, in an action against a railroad company for injuries to a passenger, a witness for defendant who set the brake on one of the cars which slid into a collision testified that the reason the brakes did not work was on account of the drum of the brake having too much oil on it causing it to slip, the jury was justified in accepting such evidence as explanatory of the accident.[40]

Caused by Misplaced Switch.—Proof that a trespasser on a railroad train was injured in a collision caused by a misplaced switch showed ordinary negligence only, and not a willful, wanton, or reckless injury.[41]

35. Wedekind *v.* Southern Pac. Co., 20 Nev. 292, 21 Pac. 682.

Excessive speed.—In an action for injuries to a passenger by a collision between two street cars, evidence held sufficient to sustain an averment that the direct cause of the collision was the high rate of speed at which one of the cars was moving. Chicago City R. Co. *v.* Pural, 79 N. E. 686, 224 Ill. 324, affirming judgment 127 Ill. App. 652.

36. Where view not obstructed.—Doherty *v.* Boston, etc., R. Co., 92 N. E. 1026, 207 Mass. 27.

37. Franklin *v.* Forty-Second, etc., R. Co., 50 Hun 605, 3 N. Y. S. 229, 21 N. Y. St. Rep. 944.

38. Where dray skidded on track.—Seigel *v.* Eisen, 41 Cal. 109.

39. Caused by defective brake.—Szczech *v.* Chicago City R. Co., 157 Ill. App. 150.

40. North Chicago St. R. Co. *v.* Boyd, 57 Ill. App. 535.

41. Caused by misplaced switch.—Denny *v.* Chicago, etc., R. Co., 150 Iowa 460, 130 N. W. 363.

Collision at Crossing.—Where a freight train of one defendant collided with an electric street car of the other, on which plaintiff was a passenger, at a grade crossing, where the view was obstructed by buildings, and plaintiff was injured in jumping from the car through fright occasioned by the collision, findings that the proximate cause of plaintiff's injury was the negligence of defendants, and that plaintiff's negligence did not contribute to the injury, were proper and final on appeal.[42] In an action against a street railway company for injuries to a passenger in a collision with a train at a railroad crossing, the evidence showed that the car was partly over, or immediately adjacent to, the first rail of the first main track of the crossing when the noise of the train was heard or made known to the motorman or conductor. There was no headlight on the engine of the coming train, and no whistle was sounded to signal its approach. When the conductor heard the train he immediately apprised the motorman thereof, and directed him so speed the car, which was done, but it failed to clear the crossing before the train collided with it. The evidence was contradicted by calculations based on statements of witnesses as to the speed of the approaching train, the speed of the car before, and at the time, and after the persons in its control heard the approaching train. The calculations were speculative in their character and could have no probative force as against the positive evidence. The evidence, as a matter of law, showed that the employees in charge of the car were not guilty of negligence.[43] In an action against a street railway company for injury to a passenger in a collision with a train at a crossing, the evidence showed that the conductor preceded the car to a point where he had a clear view of the railroad track in both directions, and then signaled the motorman to proceed. The evidence was held sufficient to show, as a matter of law, a compliance by the conductor with a city ordinance requiring every conductor to pass in front of his car, approaching a railroad crossing, a sufficient distance to enable him to ascertain whether there is any danger before signaling the car to cross.[44]

42. Collision at crossing.—Brockett *v.* Fair Haven, etc., R. Co., 47 Atl. 763, 73 Conn. 428.

Crossing of railroad and street railroad.—In an action against a railroad and a street railroad for injuries sustained while a passenger of the street railroad, resulting from collision with a railroad train at a crossing, evidence held sufficient to warrant the finding that the street railroad was not guilty of negligence. Snider *v.* Chicago, etc., R. Co., 83 S. W. 530, 108 Mo. App. 234.

In an action by a passenger on defendant's street car for injuries caused by a collision of the car with a locomotive at a railroad crossing, evidence examined, and held to warrant findings that defendant's motorman was negligent in attempting to cross the railroad track, and that, had he exercised due care, he would have seen that a street car approaching in the opposite direction was obstructing a switch over which he must pass in order to clear the railroad crossing. Lindenbaum *v.* New York, etc., R. Co., 84 N. E. 129, 197 Mass. 314.

43. Bartholomaus *v.* Milwaukee Elect. R., etc., Co., 109 N. W. 143, 129 Wis. 388.

44. Bartholomaus *v.* Milwaukee Elect. R., etc., Co., 109 N. W. 143, 129 Wis. 388.

In an action against a street railway company for injuries to a passenger in a collision with a train at a crossing, the conductor and motorman testified that the car was stopped before crossing the railroad track, and that the conductor passed in front of the car and ascertained that there was no danger in sight before signaling the motorman to cross. The gatekeeper at the crossing testified that he saw the conductor in front of the car before it passed the track, and that he saw the car moving, but he did not state that the car did not stop. Held, to show, as a matter of law, that the conductor and motorman complied with an ordinance requiring every motorman to stop his car at least twenty feet from a railroad crossing, and every conductor to pass in front of his car to enable him to ascertain whether there is any danger, before signaling the car to cross. Bartholomaus *v.* Milwaukee Elect. R., etc., Co., 109 N. W. 143, 129 Wis. 388.

But an action for injuries to a street car passenger in a collision between the car and the railroad train at a crossing, evidence held sufficient to warrant a finding that the operatives of the street car were guilty of a violation of Code 1896, § 3441, requiring the operatives of a car to come to a full stop at a railroad crossing. Montgomery St. R. Co. *v.* Lewis, 41 So. 736, 148 Ala. 134.

Collision with Car on Main Track.—Proof of a collision between a passenger train and unprotected box cars on the main track of a railway company is prima facie evidence of negligence which when uncontradicted or unexplained will support a finding in favor of a passenger injured thereby.[45] The plaintiff's intestate was a passenger on the defendant's railroad, and was killed by an accident caused by a collision between the train she was on and an empty car on the track. It appeared probable that the car had been blown onto the track from a side track by a high wind. The train consisted of two locomotives and eleven coaches, and was fitted only with hand brakes, and manned by three brakemen. It was running at the rate of twenty-six miles per hour when the train struck the car. It was shown that a field of corn near by was not affected by the wind, and an expert testified that to move the car with the brakes set would require the wind to blow with a velocity of eighty-one miles per hour. It also appeared that the wind had been very violent, and blew down some large trees near by. It was shown that when the car was left on the track on the day before the brakes were set, but how tightly did not appear, and no other precautions were taken to prevent the removal of the car. The evidence of negligence was held sufficient to submit to the jury.[46]

Collision with Car Thrown on Track by Another Collision.—An electric car, running at a high rate of speed, came into collision with a car on a parallel track, which had collided with a beer wagon a few seconds before. There was no evidence as to the manner of operating the car which collided with the beer wagon, nor as to who was answerable for such car being thrown on the track of the car on which plaintiff was a passenger. The distance between the cars at the time of the first collision was about one hundred and fifty yards and the interval of time about five seconds. The evidence was held to justify a finding that defendant was not guilty of negligence.[47]

Collision While Backing Train.—A special verdict finding that the train of the defendant, in which plaintiff was traveling, was backed down upon the car of another company, and that the car was passing over the crossing of the two roads, does not make such a showing of negligence as to justify a judgment for plaintiff.[48]

Collision While Engine Pushing Train.—Evidence that a train was running on a track where horses were frequently seen, with the locomotive with its front end to the rear of the last car, pushing the train, which method of running was, in the opinion of experts, dangerous, and the engine could have been placed at the front end in a few minutes, is sufficient to support a verdict for a passenger who was injured in a collision of the train with a horse on the track.[49]

Where Force of Impact Slight.—In an action by a street car passenger for injuries received in a collision, the court, sitting without a jury, found on sufficient evidence that the tracks were wet and slippery, by reason of which, and notwithstanding all reasonable and proper efforts by the motorman of the colliding car, in applying brakes, the car slid on the rails, and the fender came in contact with that of the car in which plaintiff was; and that the force of the impact did not injure the fender or woodwork of either car, nor were other passengers affected beyond the sensation of a jar. A judgment for defendant, based on an absence of negligence, was proper, notwithstanding the motorman on cross-examination had testified that he took the risk; it being for the court

45. Collision with car on main track.—Ft. Worth, etc., R. Co. *v.* Day, 50 Tex. Civ. App. 407, 111 S. W. 663.

46. Bowles *v.* Rome, etc., R. Co., 46 Hun 324, 12 N. Y. St. Rep. 457.

47. Collision with car thrown on track by another collision.—Snediker *v.* Nassau Elect. R. Co., 58 N. Y. S. 457, 41 App. Div. 628.

48. Collision while backing train.—Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186.

49. Collision while engine pushing train.—Chicago, etc., R. Co. *v.* Grimm, 57 N. E. 640, 25 Ind. App. 494.

to say what the motorman meant by that statement, and whether, under the circumstances, it was negligence for him to take the risk.[50]

Failure to Stop Car Where Collision Imminent.—Where there was evidence that the conductor of an open street car did not stop it although he knew a passing truck on the street was dangerously close, and that the plaintiff, a passenger, was on the side step of the car, a finding that plaintiff's injuries by collision with the truck were caused by defendant's negligence was sustained.[51]

§§ 3259-3269. As to Negligence in Taking Up Passengers in General—§ 3259. In General.—For instances of evidence held sufficient to prove negligence of a carrier in taking up passengers, see cases in footnote.[52]

§ 3260. Place of Taking Up Passengers.—The plaintiff had not been directed to take the car at the place where he attempted to do so, although an employee of defendant heard him say he would do so, and saw him go towards the train. A witness testified that he had on one occasion boarded the train at the same place. Another witness testified that an employee of the defendant had directed him to take the train at the same place. A third witness testified that he had seen persons board the train at the same place. It was held that there was no evidence to justify the finding that the defendant had invited the traveling public to enter the train at that place.[53]

§ 3261. Passenger Boarding Moving Train.—Where the case hinged on whether the defendant's car was at a standstill when the plaintiff endeavored to board it, the jury might believe the defendant's witnesses, who showed that the car was moving rapidly, and that the plaintiff was negligent, though there was some difference of opinion among them as to the exact rate of speed.[54]

50. Where force of impact slight.—Mullin *v.* Boston Elev. R. Co., 70 N. E. 1021, 185 Mass. 522.

51. Failure to stop car where collision imminent.—Faris *v.* Brooklyn City, etc., R. Co., 61 N. Y. S. 670, 46 App. Div. 231.

52. As to negligence in taking up passengers in general.—Chicago Union Tract. Co. *v.* Lundahl, 74 N. E. 155, 215 Ill. 289, affirming judgment 117 Ill. App. 220; Louisville, etc., R. Co. *v.* Arnold, 102 S. W. 322, 31 Ky. L. Rep. 414; Brice *v.* South Covington, etc., St. R. Co., 93 S. W. 37, 29 Ky. L. Rep. 373; Quagliana *v.* Jersey, etc., St. R. Co., 71 Atl. 43, 77 N. J. L. 101.

Evidence held to sustain a finding of breach of duty by a street railroad company in refusing to bring a car back seventy-five yards for a boarding passenger after running by him. Christian *v.* Augusta, etc., R. Co., 69 S. E. 17, 87 S. C. 123.

Evidence held insufficient.—Kruck *v.* Connecticut Co., 80 Atl. 162, 84 Conn. 401; Winchell *v.* St. Paul City R. Co., 90 N. W. 1050, 86 Minn. 445; Tobin *v.* Pennsylvania Railroad, 60 Atl. 999, 211 Pa. 457; Northington *v.* Norfolk R., etc., Co., 46 S. E. 475, 102 Va. 446.

In an action against a railroad for failure to stop its train a sufficient time to allow an intending passenger to board the same, a verdict for punitive damages on the theory of misconduct of the conductor in abusing plaintiff, which was testified to only by plaintiff, and whose testimony in this respect was contradicted by many other witnesses, held against the weight of the evidence. Mobile, etc., R. Co. *v.* Reeves, 80 S. W. 471, 25 Ky. L. Rep. 2236.

53. Place of taking up passengers.—Judgment 35 N. Y. S. 1109, 90 Hun 605, reversed in Jones *v.* New York, etc., R. Co., 50 N. E. 856, 156 N. Y. 187, 41 L. R. A. 490.

54. Passenger boarding moving train.—Levy *v.* New York City R. Co. (App. Term), 116 N. Y. S. 655.

Acceleration of speed of car.—In an action against a street car company for injuries received while boarding a street car, based on the alleged negligence of the conductor in giving the signal to the motorman to increase the speed of the car, causing plaintiff to fall to the pavement, evidence held to sustain a finding of negligence on the part of the conductor in giving the signal. Orth *v.* Saginaw Valley Tract. Co., 162 Mich. 353, 127 N. W. 330.

Train leaving station.—Plaintiff, shortly before a train on which he intended to take passage was due to leave a station, went into a saloon, where he met the conductor, who asked him if he was going on it. Plaintiff replied that he was, and the conductor said, "All right!" and left the place. Plaintiff remained until the train was pulling out, when he ran and tried to board it while it was running at the rate of from one to three miles an hour, but fell and was injured. He testified that, when he undertook to take hold of the railing of the car, the train gave a jerk and threw him back; the jerk

After Signaling to Stop.—Where one signaled a motorman of a street car, who was looking toward him, and who then slowed up the car, there was enough to warrant the inference that the signal was seen, and the car slowed up to permit the taking of passage on it.[55] A street car, on being signaled to stop, merely slackened its speed, without stopping, whereupon the plaintiff attempted to get on it while in motion, and was injured. There was no evidence that the car had slowed down in response to the signal, or that the conductor or motorman knew of the attempt to board it. A finding in an action to recover for such injuries, that the persons in charge of the car were negligent, was not warranted by the evidence.[56] In an action against a street railroad for damages for death, it appeared that the deceased was struck by the footboard of a car while passing a platform on which he was standing; that the deceased had ample space on the platform to stand without coming in contact with the footboard; that the car passed in perfect safety four other persons standing on the same platform before it reached decedent; that he had an uninterrupted view of the approaching car, and had an opportunity, from the passing of two previous cars, to notice the portion of the platform which would be covered by the footboard; that the platform had been in use for years, and had accommodated ten persons with perfect safety. There was no evidence that the motorman in charge of the car acted in a negligent or unlawful manner, though the car came up and passed at the rate of thirty miles an hour, and did not stop on signal to do so. The evidence was held insufficient to establish negligence on the part of the street railroad.[57]

Between Stations.—In an action against a street railway company for killing the plaintiff's intestate, all the witnesses fixed the place of the accident midway between two streets. Two witnesses for the plaintiff testified that the train stopped at the said place, when the witnesses and the deceased, with his arms full of bundles, boarded the cars, and that the train started up with a jerk, which caused one of the witnesses to be thrown backward, striking the deceased, who was then on the bottom step, and throwing him to the ground. Two witnesses for the defendant and the train employees testified that the train was moving at from four to seven miles an hour when the deceased attempted to board it, and that the train did not stop between the said streets; and one of such witnesses testified that no one was with the deceased at the time he attempted to board the train. A city ordinance prohibited trains from stopping between said streets. The trainmen testified that the trucks which passed over deceased were thrown from the track. The preponderance of the evidence was so greatly in the defendant's favor as to require a new trial after verdict for plaintiff.[58]

being caused by putting on more steam. Held insufficient to prove actionable negligence on the part of the railroad company, because of the failure to show that plaintiff was a passenger, or to prove that the jerk was anything more than was necessary in the movement of the train. Southern R. Co. *v.* Johnson, 39 So. 376, 144 Ala. 361, 113 Am. St. Rep. 48.

55. After signaling to stop.—Mulligan *v.* Metropolitan St. R. Co., 85 N. Y. S. 791, 89 App. Div. 207.

In an action for injuries received while boarding defendant's street car, plaintiff testified that he signaled the motorman to stop, whereupon the speed of the car was slackened, and plaintiff grabbed the front rail of the front platform with his right hand, and got both feet on the step, when the car made a sudden jolt, and inflicted the injury complained of. No one corroborated plaintiff's testimony. Eight witnesses for defendant testified that the car was moving at the ordinary speed when plaintiff attempted to get on; that plaintiff missed the hand rail with his left hand, and was dragged while he was holding on with his right hand. Plaintiff had at the time a package of rope and a hammer in his left hand. Held, that the evidence did not show negligence on the part of defendant. Paulson *v.* Brooklyn City R. Co., 13 Misc. Rep. 387, 34 N. Y. S. 244, 68 N. Y. St. Rep. 123.

56. Reidy *v.* Metropolitan St. R. Co., 58 N. Y. S. 326, 27 Misc. Rep. 527.

57. Egner *v.* United R., etc., Co., 56 Atl. 789, 98 Md. 397.

58. Between stations.—Birmingham Elect. R. Co. *v.* Clay, 108 Ala. 233, 19 So. 309.

Danger to Passenger Known to Carrier.—The deceased attempted to board a combination street car moving between four and six miles per hour. He lost his hold, fell under the car, and received injuries from which he died. There was no evidence that the motorman saw him. The conductor was inside the closed portion of the car, collecting fares, at the time of the accident. The motorman testified that after a blockade which had occurred they had orders to pass streets without taking passengers to equalize the traffic; that he did not slow up for passengers at the street where the deceased attempted to board the car, and was not aware that any one attempted to do so. Such facts were held insufficient to establish negligence on the part of the railway company.[59]

§ 3262. Passenger Boarding Car on Wrong Side.—In an action against a street railroad company by a passenger, it appeared that the defendant used chains on the sides of the cars to prevent passengers from boarding them. At a transfer station, the plaintiff went between the two tracks to enter a car. Such car had no chain on the side next to the adjacent track, and a car on such track came along at a rapid rate, and struck the plaintiff. The defendant's only witness, the motorman on the latter car, testified that the plaintiff darted from behind the former, and, in attempting to board it, fell under his car. A verdict for the plaintiff was not disturbed.[60]

§ 3263. Negligent Starting Car.—Evidence that while the plaintiff was attempting to board a street car, which had stopped in response to his signal, the car started, and the plaintiff fell on the street, without showing in what manner the car started, and without showing that the plaintiff's fall was caused by the starting of the car, is insufficient to show negligence on the part of the defendant.[61] Proof that a passenger was injured by the sudden and untimely starting of a train which he was attempting to board is sufficient to entitle him to recover, without showing that each person in charge of the train was negligent.[62]

Danger to Passenger Known to Carrier.—The testimony of the plaintiff that he gave a signal indicating that he desired to take a car, which was in the sole charge of the driver, and had stopped on a crossing where it usually stopped to receive passengers, and that the driver saw and understood the signal, but started up when he had placed one foot upon the platform, throwing him to the ground, is sufficient to sustain a verdict against the company, though his testimony as to the signal is disputed by the driver, and also by the driver of another

59. Danger to passenger known to carrier.—Fremont *v.* Metropolitan St. R. Co., 82 N. Y. S. 307, 83 App. Div. 414.

60. Passenger boarding car on wrong side.—Gaffney *v.* Brooklyn City R. Co., 6 Misc. Rep. 1, 25 N. Y. S. 996, 58 N. Y. St. Rep. 119.

61. Negligent starting car.—Meyerowitz *v.* Interurban St. R. Co., 84 N. Y. S. 233.

62. Alabama, etc., R. Co. *v.* Siniard, 26 So. 689, 123 Ala. 557.

Evidence held sufficient.—*Arkansas.*—Arkansas Cent. R. Co. *v.* Bennett, 82 Ark. 393, 102 S. W. 198.

California.—Spearman *v.* California St. R. Co., 57 Cal. 432.

Iowa.—Boice *v.* Des Moines City R. Co., 153 Iowa 472, 133 N. W. 657.

Massachusetts.—Rand *v.* Boston Elev. R. Co., 84 N. E. 841, 198 Mass. 569; McCarthy *v.* Boston Elev. R. Co., 208 Mass. 512, 94 N. E. 749.

Minnesota.—Koenig *v.* St. Paul City R. Co., 124 N. W. 832, 110 Minn. 212.

Missouri.—Schmitt *v.* St. Louis Trans. Co., 90 S. W. 421, 115 Mo. App. 445.

South Carolina.—Harrell *v.* Columbia Elect. St. R., etc., Co., 71 S. E. 359, 89 S. C. 97.

Evidence in the action for injury to a passenger injured by the closing of the vestibule door and the starting of the train while he was on the lower step leading to the vestibule held to authorize a finding that there was under the circumstances an invitation to board the train on its side farther from the depot. Rainey *v.* Grand Trunk R. Co. (Vt.), 80 Atl. 723.

Evidence held insufficient.—Howard *v.* Louisville R. Co., 105 S. W. 932, 32 Ky. L. Rep. 309; Wick *v.* St. Paul City R. Co., 116 N. W. 929, 104 Minn. 428; Mullarkey *v.* Interurban St. R. Co., 88 N. Y. S. 699.

car, which was near by.[63] In an action for injuries received while attempting to enter the defendant's railroad train, it appeared that when the train stopped at the station it was very dark, and the station house was shut. Neither the conductor nor the brakeman noticed whether any passenger left or took the train. Immediately after the train started a jolt was felt, the train was stopped, and it was found that the plaintiff's foot had been run over and crushed. The plaintiff testified that he attempted to get on the train, when it suddenly started, and caused him to fall. A verdict for the plaintiff was not disturbed.[64]

After Giving Signal to Start.—A judgment for the plaintiff is supported by evidence that he attempted to board the defendant's street car while it was at a standstill immediately on the alighting of a passenger, and that it started while he was stepping on it, though the plaintiff approached the car after the signal to start had been given by the conductor, who was inside the car.[65]

Without Giving Signal to Start.—In an action for injury to a passenger when attempting to board a railroad train at a station, negligence may fairly be inferred by the jury from the starting of the train without warning when a large number of passengers were attempting to enter.[66]

Where Platform Crowded.—The plaintiff signaled a horse car, which stopped, but, as he was getting aboard, having one foot on the lower step, was started again suddenly on signal of the conductor, and plaintiff was thrown off and injured. The plaintiff testifies that the platform was crowded, and by reason of the sudden shock he could not reach it with either foot, or get hold of the hand rail. The evidence being conflicting, the verdict for plaintiff was conclusive of the questions of negligence.[67]

While Passenger Has One Foot in Car.—Testimony that the defendant's car had come to a stop to take on passengers, and that the plaintiff mounted the footboard, and had placed one foot inside on the main platform, and was in the act of raising the other, so as to enter the car, when the car was started, with the result that he fell into the street, authorizes an inference that the fall was caused by the sudden movement of the car, and a finding of negligence on the part of those in charge of the car.[68]

Before Passenger Seated.—The plaintiff entered the defendant's street car, walked to the forward end, and before he was seated the car started, throwing him to the floor. There was no proof that the time given him to get into the car and seated was not sufficient, or that the car was started with a jerk or in an unusual manner. The driver assisted the plaintiff to arise, said he was sorry, and thought plaintiff was seated. It was held that the evidence was not sufficient to prove negligence of the defendant.[69] Where the evidence tends to show that the plaintiff's husband was killed by falling from the running board of a summer car within eight or ten seconds after he had stepped on it, and while he was endeavoring to get into the car, the car having started as soon as he stepped on it, he having been thrown from the car by its rapid motion when it entered a switch, or knocked off by striking a standing car on the main track, the track and switch being near each other, a judgment against the street railway company for causing his death will be sustained.[70] Where, in an action to recover damages for loss of services and expenses incurred by reason of the injury of plaintiff's infant son, there was evidence that the

63. Danger to passenger known to carrier.—Ganiard *v.* Rochester, etc., R. Co., 50 Hun 22, 2 N. Y. S. 470, 18 N. Y. St. Rep. 692.

64. Chicago, etc., R. Co. *v.* Drake, 33 Ill. App. 114.

65. After giving signal to start.—McGill *v.* Central Crosstown R. Co., 84 N. Y. S. 477.

66. Without giving signal to start.—Pennsylvania R. Co. *v.* Stockton, 184 Fed. 422, 106 C. C. A. 433.

67. Where platform crowded.—Black *v.* Brooklyn City R. Co., 108 N. Y. 640, 15 N. E. 389, 1 Silvernail Ct. App. 580.

68. While passenger has one foot in car.—Fine *v.* Interurban St. R. Co., 91 N. Y. S. 43, 45 Misc. Rep. 587.

69. Before passenger seated.—Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

70. Miller *v.* Philadelphia Rapid Trans. Co., 80 Atl. 1108, 231 Pa. 627.

conductor of defendant's car signaled the driver to start before plaintiff's five year old boy and his attendant had reached a place of safety upon the car, and the car immediately started with a jerk, thereby throwing the child under the car, and crushing his leg, a verdict for plaintiff will be sustained, though such evidence rests solely on the testimony of the child's attendant.[71]

Testimony of Passenger.—In an action for injuries to a passenger on a street car, testimony of the plaintiff that, when the car stopped at a street intersection, he attempted to board it, and that the car started suddenly and without warning, throwing him to the ground, warranted the jury in finding for plaintiff.[72] Where, in an action for injuries received while attempting to board a street car, the defendant offered no evidence, and the plaintiff's testimony, which was corroborated by one apparently disinterested witness, clearly supported the allegations of the complaint that while plaintiff was attempting to board the car after it had come to a standstill, and before he had a reasonable time to do so, the car was started, and he was thrown to the ground and injured, a verdict for the defendant was unwarranted.[73]

Contradicted by Other Witnesses.—The plaintiff testified that a street car was started after it had stopped, and after he had a foot on a step, and he was thrown into an excavation, and injured. A person on the opposite side of the street partially corroborated and partially contradicted the plaintiff's testimony. Six other persons who were near the place of the accident, two of whom were disinterested passengers, testified that the car did not stop at all, and that the plaintiff fell into the excavation before he touched the car. It was held, that a judgment for the plaintiff was not sustained by the evidence.[74]

Contradicted by Physical Facts.—In an action against a street car company for injuries received by a passenger while attempting to board a car, the plaintiff testified that he was thrown ten feet by the movement of the car on it starting while he was boarding it. The conductor testified that the plaintiff was dragged along some distance and thrown to the ground. Other witnesses showed that he was not thrown ten feet. The verdict for the plaintiff was not reversed because his testimony was contradicted by physical facts based on the improbability that a car could start from a motionless state with such violence as to throw a person in the act of stepping on it ten feet away.[75]

§ 3264. Negligent Backing Car.—In an action for injuries sustained in boarding defendant's street car, evidence that, after the car had stopped, it moved slightly backward, causing plaintiff to fall, is insufficient to justify a finding that plaintiff's injuries were caused by defendant's negligence, where there was also evidence that plaintiff made a misstep in trying to board the car,

71. Akersloot *v.* Second Ave. R. Co., 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489, 4 Silvernail Ct. App. 71, affirming 56 Hun 640, 8 N. Y. S. 926.

72. Testimony of passenger.—McLaughlin *v.* Syracuse Rapid Trans. Co., 101 N. Y. S. 196, 115 App. Div. 774.

73. Klein *v.* Interurban St. R. Co., 105 N. Y. S. 95, 55 Misc. Rep. 211.

74. Contradicted by other witnesses.—Hansen *v.* Third Ave. R. Co., 58 N. Y. S. 282, 27 Misc. Rep. 524.

A train stopped at a station long enough for plaintiff and his family to pass from the front of the car, where they should have gotten on, to the rear platform, and to get on there. No reason was shown why they walked the whole length of the car, and there was no evidence that they would not have had time to get safely seated had they got on in front. The testimony of all the witnesses but plaintiff's wife was that the train started slowly. No one saw plaintiff's wife fall, and she deposed before the trial that she did not know what caused her to fall from the train. At the trial she testified the train started off rapidly, and caused her to fall from the platform, but she was contradicted by her husband and brother and others. Held, that the evidence was insufficient to show negligence of the railway company. Houston, etc., R. Co. *v.* Stewart, 50 S. W. 580, 21 Tex. Civ App. 33.

75. Contradicted by physical facts.—Schmitt *v.* St. Louis Trans. Co., 90 S. W. 421, 115 Mo. App. 445.

and that the backward movement, if any, was insufficient to cause him to fall.[76]

§ 3265. Negligent Coupling Cars.—Evidence that, when a passenger had reached the car, and before she had time to seat herself, a train or engine was propelled against the car with such force that she was thrown against the back of a seat, warranted a finding of negligence.[77]

§ 3266. Negligent Pushing of Passenger from Train.—The plaintiff, a lad thirteen years of age, was injured while attempting to board a moving street car, and, in an action therefor, alleged that the cause of the injury was his being caught by the motorman on car going in the opposite direction, which caused him to fall to the ground. This allegation was supported only by the plaintiff's own testimony, and was denied by the motorman. The evidence showed that both cars were stopped as quickly as possible. It was held that the plaintiff could not recover.[78] A street railway company permitted persons to line up along a track approaching its terminal and board cars before they reached their final stopping point. On account of the danger incident to such a proceeding, special employees were placed on the rear steps of the car to prevent persons entering until the passengers had been discharged, and the cars came to a full stop. On the morning this order went into effect, the plaintiff made an attempt to board a car while it was moving, and was struck in the chest by an employee of the company, and thrown a considerable distance, sustaining serious injuries. An announcement was made by the special officers warning persons not to attempt to get on the car, but plaintiff testified that he did not hear such warning. A verdict for plaintiff should be sustained.[79] The plaintiff, while attempting to board the defendant's train at a station, fell between the platform and the car steps. She testified that the brakeman rushed ahead of her, and reached a higher step, thus preventing her from getting on the car, and causing her to fall. The brakeman denied this statement, and said that she fell while he was behind her, and without any interference on his part. The evidence was held sufficient to submit to the jury on the question of the defendant's negligence.[80]

§ 3267. Negligent Shutting of Gate on Passenger.—The plaintiff's evidence was that, after the signal was given to start a train, his decedent attempted to board one of the cars, but that the conductor shut the gate, imprisoning decedent's hand, so that, in spite of his cries to the conductor to "let go," he was dragged fifteen or more feet, and crushed against a bridge railing. The defendant's evidence was that the decedent held on, though told by the conductor to "let go." The defendant furnished many witnesses, but they were not in accord, while the condition of decedent's hand corroborated plaintiff's evidence. A verdict for plaintiff was not disturbed.[81]

§ 3268. Passenger Injured by Brake Handle.—Where plaintiff was struck by the handle of a street car brake as she was boarding the car, and the motorman admitted that after he had wound up and set the brake he aban-

76. Negligent backing car.—Schmeltzer *v.* St. Paul City R. Co., 80 Minn. 50, 82 N. W. 1092.

77. Negligent coupling cars.—Missouri, etc., R. Co. *v.* Allen, 53 Tex. Civ. App. 433, 115 S. W. 1179.

78. Negligent pushing of passenger from train.—Omaha St. R. Co. *v.* Baker, 44 Neb. 511, 63 N. W. 25.

In an action by an administratrix for injuries causing the death of her intestate in attempting to board a moving train, evidence as to the negligence of the carrier in forcing or pushing intestate from the train held not to preponderate, so as to sustain a verdict for the plaintiff. Sheehan *v.* Nassau Elect. R. Co., 143 App. Div. 621, 128 N. Y. S. 545.

79. Ditchfield *v.* Philadelphia, etc., Tract. Co., 32 Pa. Super. Ct. 531.

80. Philadelphia, etc., R. Co. *v.* Alvord, 128 Pa. 42, 18 Atl. 391.

81. Negligent shutting of gate on passenger.—Ericius *v.* Brooklyn Heights R. Co., 71 N. Y. S. 596, 63 App. Div. 353.

doned it, and stepped back into the vestibule of the car, in order to avoid being jostled by incoming passengers, leaving the brake unguarded, though it was apparent that it might be released by an awkward step of the passenger or by the jostling of the car, such admission constituted sufficient evidence of defendant's negligence.[82]

§ 3269. Failure to Control Conduct of Other Passengers.—Where, in an action against a carrier for injuries to a passenger by reason of the pushing of a crowd while attemptng to enter a car at a station, there was evidence that there was usually a large crowd in the station at that time of day, and that there had been on many previous occasions the same struggle to get on the car as occurred at the time of the accident, and that the carrier ought to have anticipated the happening of the accident, and ought to have taken reasonable precautions to guard against such injuries, the refusal to charge that there was no evidence of negligence of the carrier was proper.[83]

§§ 3270-3277. As to Negligence in Setting Down Passengers—§ 3270. In General.—Proof by Preponderance of Evidence.—If the alleged negligence in an action for injury to a passenger while alighting is denied, plaintiff must prove it by a preponderance of the whole evidence.[84]

82. Passenger injured by brake handle.—Kentucky, etc., R. Co. *v.* Shrader, 80 S. W. 1094, 26 Ky. L. Rep. 206.

83. Failure to control conduct of other passengers.—Kuhlen *v.* Boston, etc., R. Co., 79 N. E. 815, 193 Mass. 341, 7 L. R. A., N. S., 729.

In an action against a railroad company for injuries to a passenger due to the pressure of a crowd passing through its gates to a train, plaintiff and another witness testified that but one of the five gates was open. Several witnesses for defendant testified that all the gates were open, but they had other duties to perform at the train which would interfere with their observation on this point, and the gate keepers and policemen stationed at the other four gates were not examined. Held, that a finding by the jury that but one gate was open would not be disturbed on motion for new trial. Taylor *v.* Pennsylvania Co., 50 Fed. 755.

84. As to negligence in setting down passengers.—Wyatt *v.* Pacific Elect. R. Co., 103 Pac. 892, 156 Cal. 170.

Evidence held sufficient.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Russell, 96 Ark. 647, 131 S. W. 679; St. Louis, etc., R. Co. *v.* Brabbzson, 87 Ark. 109, 112 S. W. 222.

Connecticut.—Elwood *v.* Connecticut R., etc., Co., 58 Atl. 751, 77 Conn. 145.

Georgia.—Southern R. Co. *v.* Parham, 73 S. E. 763, 10 Ga. App. 531; Southern R. Co. *v.* Bandy, 47 S. E. 923, 120 Ga. 463, 102 Am. St. Rep. 112; Southern R. Co. *v.* Clay, 61 S. E. 226, 130 Ga. 563.

Iowa.—Hannestad *v.* Chicago, etc., R. Co., 132 Iowa 232, 109 N. W. 718.

Kansas.—Walters *v.* Missouri Pac. R. Co., 109 Pac. 173, 82 Kan. 739, 28 L. R. A., N. S., 1058; Atchison, etc., R. Co. *v.* Loewe, 74 Pac. 234, 69 Kan. 843, judgment affirmed on rehearing 76 Pac. 431; Koran *v.* Metropolitan St. R. Co., 118 Pac. 875, 85 Kan. 707.

Kentucky.—Illinois Cent. R. Co. *v.* Hurt, 134 S. W. 144, 142 Ky. 198; Houghton *v.* Louisville R. Co., 81 S. W. 695, 26 Ky. L. Rep. 393; Louisville, etc., R. Co. *v.* Roney (Ky.), 127 S. W. 158; Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349, 29 Ky. L. Rep. 1277.

Louisiana.—Morris *v.* Illinois Cent. R. Co., 53 So. 698, 127 La. 445, 31 L. R. A., N. S., 629.

Michigan.—Krouse *v.* Detroit United Railway, 170 Mich. 438, 136 N. W. 434; Spangler *v.* Saginaw Valley Tract. Co., 116 N. W. 373, 152 Mich. 405.

Minnesota.—Patzke *v.* Minneapolis, etc., R. Co., 113 Minn. 168, 129 N. W. 124; Newbury *v.* Great Northern R. Co., 109 Minn. 113, 122 N. W. 1117.

Mississippi.—Yazoo, etc., R. Co. *v.* Hatch (Miss.), 35 So. 941.

Montana.—Lehane *v.* Butte Elect. R. Co., 97 Pac. 1038, 37 Mont. 564.

New York.—Cross *v.* Coney Island, etc., R. Co., 137 N. Y. S. 993, 153 App. Div. 319, reargument granted in 137 N. Y. S. 1116, 152 App. Div. 907; Bente *v.* Metropolitan St. R. Co., 72 N. E. 1139, 180 N. Y. 519, affirming judgment 86 N. Y. S. 85, 90 App. Div. 213.

Pennsylvania.—Mahoney *v.* Philadelphia Rapid Trans. Co., 63 Atl. 429, 214 Pa. 180; Englehaupt *v.* Erie R. Co., 58 Atl. 154, 209 Pa. 182.

Evidence held insufficient.—*Georgia.*—Georgia, etc., R. Co. *v.* Hutchins, 48 S. E. 939, 121 Ga. 317; Southern R. Co. *v.* Hobbs, 49 S. E. 294, 121 Ga. 428.

Kansas.—Union Pac. R. Co. *v.* Luck, 100 Pac. 278, 79 Kan. 320.

Kentucky.—Wade *v.* Illinois Cent. R. Co. (Ky.), 112 S. W. 1103; Cole *v.* Chesapeake, etc., R. Co. (Ky.), 113 S. W. 822

Massachusetts.—Stevens *v.* Boston Elev. R. Co., 85 N. E. 571, 199 Mass. 471; Far-

Presumption of Self-Preservation.—In an action for personal injuries in alighting from a street car, in determining where the preponderance of the evidence is the jury may take into consideration the presumption and instincts which naturally lead men to avoid injury and preserve their own lives.[85]

§ 3271. Defective Instrumentalities or Premises.—Defective Step.—In an action against a street railroad company for injuries received in alighting from a car, a verdict for plaintiff can not be sustained where the only ground alleged in support of it is evidence of a defect in the car step, and plaintiff testifies that he looked at the step, and saw nothing wrong, and numerous witnesses agree that it was not defective.[86]

Where Stepping Stool Turned under Passenger.—A judgment for injuries received by a woman in alighting from a train will not be disturbed, as contrary to the evidence, where she was obliged to step down onto a box about eleven inches square at the top, and somewhat larger at the bottom; and plaintiff and several witnesses testify that she was unassisted, that the box was standing on rough stones, and that it tipped as she stepped on it, though several witnesses for defendant testify that plaintiff was assisted in alighting, that the box stood on level gravel, that the accident was due to her stepping on its edge, and that several others alighted by means of the box with safety.[87]

Passenger Injured by Hand Catching in Door.—Where a passenger suing for injuries caused by her hand being caught in the door of a car while alighting did not show the cause of the door catching her hand, or any commission or omission of the carrier or its servants, she failed to show facts justifying an inference of negligence.[88]

Putting Passenger Down at Unsafe Place.—Where plaintiff, a passenger on defendant's car, requested the conductor to stop at the first entrance to a cemetery, where she was in the habit of alighting, and where the highway was level with the roadbed, which he failed to do, but stopped a short distance beyond, opposite a hole, into which plaintiff fell in alighting and was injured, the objection that there was no evidence to support a verdict that defendant was guilty of negligence was not well taken.[89] In an action against a carrier for injuries received by plaintiff while alighting from a train by reason of defendant's alleged negligence in failing to provide a safe place for passengers to alight, evidence that there were holes or depressions in the surface of broken lime or gravel used as a platform for passengers to alight on did not warrant

rington *v.* Boston Elev. R. Co., 202 Mass. 315, 88 N. E. 578.

Michigan.—Snyder *v.* Michigan Tract. Co., 117 N. W. 889, 154 Mich. 418.

Minnesota.—Lamson *v.* Great Northern R. Co., 130 N. W. 945, 114 Minn. 182, Ann. Cas. 1914A, 15.

Mississippi.—Gulf, etc., R. Co. *v.* Cole, 101 Miss, 411, 58 So. 208.

Montana.—Lehane *v.* Butte Elect. R. Co., 97 Pac. 1038, 37 Mont. 564.

New Jersey.—Spencer *v.* Erie R. Co., 75 Atl. 155, 79 N. J. L. 5.

Pennsylvania.—Howell *v.* Union Tract. Co., 51 Atl. 885, 202 Pa. 338; Margo *v.* Pennsylvania R. Co., 62 Atl. 1079, 213 Pa. 463.

South Carolina.—Crosby *v.* Seaboard, etc., Railway, 61 S. E. 1064, 81 S. C. 24.

Texas.—Gulf, etc., R. Co. *v.* Williams, 70 Tex. 159, 7 S. W. 88; International, etc., R. Co. *v.* Sampson (Tex. Civ. App.), 64 S. W. 692.

85. Presumption of self preservation.—Chicago City R. Co. *v.* Dinsmore, 62 Ill. App. 473.

86. Defective instrumentalities or premises.—Hitchcock *v.* Brooklyn City R. Co., 50 Hun 606, 3 N. Y. S. 218, 21 N. Y. St. Rep. 945.

87. Where stepping stool turned under passenger.—Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

88. Passenger injured by hand catching in door.—Cornette *v.* Baltimore, etc., R. Co., 195 Fed. 59, 115 C. C. A. 61.

89. Putting passenger down at unsafe place.—Bass *v.* Concord St. Railway, 46 Atl. 1056, 70 N. H. 170.

In an action for injuries to a passenger by his falling into a ditch in going from a train to the platform on a dark night after he had alighted on direction of the trainmen, the evidence held to show that the company had failed to exercise that degree of care which the law required. Chesapeake, etc., R. Co. *v.* Harris, 49 S. E. 997, 103 Va. 635.

a finding that such holes or depressions caused the injuries.[90] In an action for injuries to a passenger, evidence that a depression into which she stepped on alighting from the car had been there for a long time, that at the time of the accident grading was being done to level up the ground adjacent to the rails near by, that the defendant had established a white pole as a stopping place near the point of the accident, and that the depression was hid from view as she sat in the car, was sufficient to import notice to the defendant of the unsafe condition of the ground and to make out a prima facie case of its negligence.[91]

Platform Not Lighted.—Where a passenger's testimony that the platform provided for passengers to alight was not well lighted, and that the brakeman did not offer to assist her in alighting, and had no lantern, was contradicted, and the jury found that the platform was reasonably safe, and that the brakeman had a lantern and offered to assist plaintiff, and the evidence established that there were several lights on or near the platform, a finding that the platform was not sufficiently lighted to enable plaintiff to alight in safety, which was the proximate cause of her injury, was contrary to the evidence.[92]

§ 3272. Passenger Alighting from Moving Train.—That a passenger in a street car was injured by alighting before the car stopped did not of itself constitute a prima facie case of the carrier's negligence.[93]

Positive and Expert Testimony Conflicted.—Where, in an action for personal injuries received by a passenger while alighting from a train, there is positive testimony that the train was not in motion when plaintiff attempted to alight, a judgment in his favor will not be reversed on the ground that the manner of his fall showed that, under the laws of mechanics, the train must have been in motion at the time.[94]

Proximate Cause of Injury.—That a passenger strained in alighting from a moving train began suffering immediately, and after continuous pain for several days miscarried, warrants a finding that the strain proximately caused the miscarriage.[95]

Refusal of Carrier to Stop Train at Station.—In an action against the railroad for wrongful death resulting from the defendant's failure to stop its train at the decedent's station so as to enable him to alight, evidence that there was no usual or customary place for stopping at that station two years prior to the time of the accident, was not evidence that there was no such place when the accident occurred.[96]

Sudden Acceleration of Speed of Car.—Where a passenger arose from his seat as the car approached his destination, went out on the platform, and mentioned the name of the street to the motorman, which was the customary manner of signifying a desire that the car be stopped, and the speed of the car was reduced to about four or five miles an hour, and, under the impression that it was about to stop, he stepped from the platform to the first step of the car, and the car continued at a slow rate of speed for some distance beyond the crossing, when suddenly the speed was increased with a violent jerk, and the passenger was thrown off and injured, it established a prima facie case of negligence.[97] Where a passenger was injured when about to alight from a street

90. Truesdell *v.* Erie R. Co., 99 N. Y. S. 694, 114 App. Div. 34.

91. Tilden *v.* Rhode Island Co., 63 Atl. 675, 27 R. I. 482.

92. **Platform not lighted.**—Duell *v.* Chicago, etc., R. Co., 92 N. W. 269, 115 Wis. 516.

93. **Passenger alighting from moving train.**—Armstrong *v.* Portland R. Co., 97 Pac. 715, 52 Ore. 437.

94. **Positive and expert testimony conflicted.**—Enches *v.* New York, etc., R. Co., 135 Pa. 194, 19 Atl. 939.

95. **Proximate cause of injury.**—Illinois Cent. R. Co. *v.* Hurt, 142 Ky. 198, 134 S. W. 144.

96. **Refusal of carrier to stop train at station.**—De Castillo *v.* Galveston, etc., R. Co., 42 Tex. Civ. App. 108, 95 S. W. 547.

97. **Sudden acceleration of speed of car.**—Knuckey *v.* Butte Elect. R. Co., 109 Pac. 979, 41 Mont. 314.

car, before the car had reached its stopping place, by an acceleration of speed, evidence merely that the car "went ahead with a jerk," or started up violently with a "lurch or jerk," was insufficient to show that it was negligently operated.[98] In an action against a street railroad for injuries to a passenger, it appeared that he was standing on the step of the car preparatory to alighting when it should stop on the further side of a cross-street, which the car was then crossing, when the car, according to his evidence, "jumped," and he fell within a few feet from tracks laid in the cross-street. It was shown that when crossing the other tracks there was no power on the car on which he was riding. The facts were held insufficient to show negligence on the part of defendant.[99]

After Car Had Slowed Down.—Where a passenger gave a conductor the stop signal, and he recognized it and indicated a purpose to stop where requested, and, as the passenger with his knowledge is in the act of alighting, the speed is suddenly increased, the court ought not to disturb a conclusion of negligence.[1] Evidence that the plaintiff, who was upon the platform to alight as soon as the car, which was slowing up, stopped at the far side of the street, its usual stopping place, was thrown from the car, by a sudden jerk, when the car was only halfway across the street, is insufficient, in the absence of evidence as to the cause of the sudden jerk, to warrant a recovery by plaintiff.[2] Plaintiff, who was injured while getting off of one of defendant's street cars, on which she was a passenger, testified that, before reaching the crossing where she wished to get off, she nodded to the conductor, which was the usual signal to stop, and that he commenced to stop the car, and she went to the platform, but that the car was going too fast to get off, but the speed gradually decreased after the crossing had been passed till it seemed as if the car had stopped, when, while stepping to the ground, the car started with a jerk, and she was injured. The conductor testified that he did not see the plaintiff nod, and did not commence to decrease the speed of the car till it had passed the crossing, and then only to keep from frightening a horse, and that the speed was not reduced to less than three miles an hour, and was increased without a jerk after it had passed the horse. A third person corroborated the conductor as to the speed of the car, but he had made contradictory statements out of court, and he also testified that the plaintiff alighted before the speed was increased. The plaintiff knew that the cars only stopped at crossings. It was held that there was sufficient evidence of negligence to sustain a judgment for plaintiff.[3]

Intention to Alight Known to Carrier.—In an action for personal injuries sustained by plaintiff in jumping from a moving train, the evidence showed that after the train stopped at the station, for which the plaintiff held a ticket, the conductor called out the name of the station, but did not leave the train, being engaged in collecting tickets; but by his order the brakeman got off, and assisted some passengers to alight, and, seeing no others, cried, "All aboard;" that after the train was under way plaintiff left the rear car, which she had occupied, and, without warning to the conductor or brakeman, and without looking to see where she would alight, jumped from the train, and was injured; that ample

98. Dwyer *v.* Auburn, etc., Elect. R. Co., 115 N. Y. S. 364, 131 App. Div. 477.

99. Adams *v.* New York City R. Co., 101 N. Y. S. 510, 116 App. Div. 315.

1. After car had slowed down.—Cohen *v.* Sioux City Tract. Co., 141 Iowa 469, 119 N. W. 964.

2. Etson *v.* Fort Wayne, etc., R. Co., 110 Mich. 494, 68 N. W. 298.

3. Root *v.* Des Moines City R. Co., 113 Iowa 675, 83 N. W. 904.

In an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car after it had slowed down, evidence held to justify the inference that the motorman's act in slowing down the car was such as to charge him with knowledge that passengers might on account thereof place themselves in a position to be injured by any sudden movement of the car, and that he was required before suddenly moving his car to look to see the situation of the passengers, and that his sudden starting of the car on a signal given by a passenger, without looking to learn of the position of passenger, was actionable negligence. Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 1028, denying rehearing 93 N. E. 34.

time was given to alight at the station; that plaintiff was a young woman of average intelligence, and well acquainted with the premises. The evidence was insufficient to show the negligent starting of the train without giving the plaintiff sufficient or reasonable time to alight.[4]

Alighting at Invitation of Carrier.—The act of a conductor, in inviting and assisting a passenger to alight before the complete stopping of a slowly moving train, may be evidence of negligence in failing to exercise the high degree of care due to passengers, but does not authorize the inference that he acted willfully, or in conscious disregard of his duty towards passengers.[5] In an action by a passenger injured while alighting from a moving train, evidence that the porter who directed plaintiff to get off the train at the time he did, assisted in helping passengers off at stations such as that where plaintiff alighted, was sufficient to justify a finding that it was within the scope of the porter's duty to direct passengers to alight.[6] In an action against a railroad company for injuries to a passenger, the plaintiff testified that, as the train was barely moving, the brakeman told him to be quick if he wanted to get off, and put his hand on the plaintiff's shoulder to steady him, and told him to step with the train; that he did not ask that the train be stopped, but stepped off and was injured. Such evidence is sufficient to sustain an affirmative answer to an interrogatory as to whether the plaintiff alighted at the invitation of the brakeman.[7]

§ 3273. Negligent Stopping of Car.—The plaintiff, seventy-two years old and somewhat infirm, took passage on the defendant's train, being placed in charge of the conductor. When a transfer point was reached, the conductor saw her safely seated in the other train, and enjoined her to remain seated until it stopped at her destination. The plaintiff testified that, on nearing the depot, some one came to the door of the coach and cried, "All hands get out here;" that she could not hear very well; that her head was all bundled up; that she rose from her seat, and was thrown down by a movement of the train, and injured. There was no evidence of any unusual jerk or suddenness in the stopping of the train. It was held that the defendant was not liable.[8]

§ 3274. Negligent Starting of Car.—Where a train is started while a passenger is attempting to alight, and he is injured, a prima facie case of negligence is made against the company.[9] In an action against a railroad company for injury to a passenger while alighting at her destination, it was proper to instruct that if the plaintiff was a passenger and was injured, and the injuries were caused by defendant's moving train, there was sufficient proof of negligence.[10] Evidence tending to show that when the train stopped at the station where the plaintiff was injured the conductor was on the platform of the rear end of the

4. **Intention to alight known to carrier.**—Chicago, etc., R. Co. *v.* Landauer, 36 Neb. 642, 54 N. W. 976.

5. **Alighting at invitation of carrier.**—Crosby *v.* Seaboard, etc., Railway, 61 S. E. 1064, 81 S. C. 24.

In an action by a passenger for personal injuries sustained in getting off a moving train, evidence considered, and held sufficient to sustain the special finding of the jury that defendant was negligent in telling plaintiff to get off the train, and that defendant caused plaintiff to take the jump. St. Louis, etc., R. Co. *v.* Leamons, 82 Ark. 504, 102 S. W. 363.

6. Texas, etc., R. Co. *v.* Whiteley, 43 Tex. Civ. App. 346, 96 S. W. 109.

7. Pittsburgh, etc., R. Co. *v.* Gray (Ind. App.), 59 N. E. 1000.

8. **Negligent stopping of car.**—Illinois Cent. R. Co. *v.* Boles, 73 S. W. 1034, 24 Ky. L. Rep. 2282.

9. **Negligent starting of car.**—St. Louis, etc., R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644.

10. St. Louis, etc., R. Co. *v.* Malone (Ark.), 150 S. W. 116.

The testimony, in an action for injuries to a street car passenger while alighting from a car, that the conductor was told to stop at a crossing, that he did so, that the passenger, accompanied by her little son, went to get off, and that, as she was in the act of stepping down from the running board, the car started with a jerk, and she fell, sufficiently showed that the jerk of the car caused the fall to sustain a recovery. Cohen *v.* Brooklyn Heights R. Co. (App. Div.), 118 N. Y. S. 803.

rear coach, taking a farewell drink with several persons, and that when they alighted the signal to start was given the engineer, was sufficient to sustain a finding that defendant was negligent.[11]

Necessity for Proof of Negligence.—In an action for injuries to a passenger on a freight train, preparing to alight therefrom, testimony that the "train made a heave forward just like lightning," that "it was an awful hard jerk," and that "the jerk was the most severe I had ever experienced," is valueless as evidence, and does not prove that the jerk resulted from negligence.[12]

Preponderance of Evidence.—In an action for injuries to a passenger, which he alleged were caused by the sudden starting of the car on which he was riding as she was about to alight therefrom, the plaintiff, to recover, must show by a preponderance of the evidence that his injuries were caused by the negligence of defendant, as alleged.[13]

Circumstances Giving Rise to Inference of Negligence.—To justify a finding of actionable negligence by a motorman in suddenly starting his car with a jerk, so as to throw off a passenger attempting to alight, it is only necessary that the evidence affirmatively establishes circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the motorman might have taken.[14]

Car Standing When Passenger Started to Alight.—In an action against a carrier for injuries received by plaintiff while alighting, evidence that the train was at a stand when plaintiff started to alight was held sufficient to support a verdict for the plaintiff.[15]

While Passenger Has One Foot on Car.—The testimony of the plaintiff that, after the defendant's car had stopped, she was alighting from the rear platform, with her right hand on the rail of the dashboard, and one foot in the air, ready to step off, when the car started, throwing her "forward," is not necessarily untrue.[16] In an action against a street railway company for personal injuries, plaintiff testified that as he stepped off the car, having one foot on the step of the car and the other on the ground, the driver drove off, giving plaintiff a jerk which threw him on the ground, dislocated his hip, and broke his leg. It was proved that he was permanently disabled and incapacitated for his business. The only evidence for defendant was that of the car driver, who testified that

11. St. Louis, etc., R. Co. *v.* Turner (Tex. Civ. App.), 84 S. W. 1094.

Evidence held sufficient.—*United States.*—Pittsburgh R. Co. *v.* Bloomer, 146 Fed. 720, 77 C. C. A. 146.

Arkansas.—St. Louis, etc., R. Co. *v.* Byrne, 84 S. W. 469, 73 Ark. 377.

Kentucky.—South Covington, etc., St. R. Co. *v.* Geis, 135 Ky. 192, 123 S. W. 306.

Maryland.—United R., etc., Co. *v.* Weir, 62 Atl. 588, 102 Md. 286.

Massachusetts.—McDermott *v.* Boston Elev. R. Co., 94 N. E. 309, 208 Mass. 104.

Michigan. — Malinowski *v.* Detroit United Railway, 117 N. W. 565, 154 Mich. 104.

Missouri.—Millar *v.* St. Louis Trans. Co., 215 Mo. 607, 114 S. W. 945.

Montana.—Knuckey *v.* Butte Elect. R. Co., 122 Pac. 280, 45 Mont. 106.

North Carolina.—Kearney *v.* Seaboard, etc., Railway, 74 S. E. 593, 158 N. C. 521.

Wisconsin.—Champane *v.* La Crosse City R. Co., 99 N. W. 334, 121 Wis. 554; Baermann *v.* Chicago, etc., R. Co., 153 Wis. 235, 140 N. W. 1119.

Evidence held insufficient.—*Massachusetts.*—Coneton *v.* Old Colony St. R. Co., 98 N. E. 602, 212 Mass. 28.

Michigan.—Baldwin *v.* Grand Trunk R. Co., 87 N. W. 380, 128 Mich. 417.

New York.—Gunn *v.* Metropolitan St. R. Co., 86 N. Y. S. 241; Fox *v.* Metropolitan St. R. Co., 87 N. Y. S. 754, 93 App. Div. 229.

Oregon.—Armstrong *v.* Portland R. Co., 97 Pac. 715, 52 Ore. 437.

12. Necessity for proof of negligence.—Young *v.* Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175, affirmed in 88 S. W. 767, 113 Mo. App. 636.

13. Preponderance of evidence.—Benson *v.* Wilmington City R. Co., 1 Boyce's (24 Del.), 202, 75 Atl. 793.

14. Circumstances giving rise to inference of negligence.—Winona, etc., R. Co. *v.* Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028.

15. Car standing when passenger started to alight.—Saeger *v.* Wabash R. Co., 110 S. W. 686, 131 Mo. App. 282.

16. While passenger has one foot on car.—Basting *v.* Brooklyn Heights R. Co., 57 N. Y. S. 119, 39 App. Div. 629.

he always stopped until every one was off of the car, and that he did so on the night that plainitff was hurt, and that he did not know after starting that plaintiff had been hurt. It was held, that a verdict for the plaintiff was warranted by the evidence.[17] But a verdict for the plaintiff in an action against a street railway for injury received in alighting from a car should be set aside as against the weight of evidence, plaintiff testifying that, when the car had passed beyond the further side of the street crossing, is came to a stop, and while he was in the act of alighting, and had one foot on the ground, it suddenly started, and threw him, he being corroborated in no respect except by one witness, who showed that at best he had little knowledge of how the accident occurred, and who, in many respects, contradicted plaintiff; and six disinterested witnesses testifying that the car had not reached the further side of the street when the accident occurred; and the driver and another testifying that he told plaintiff to wait till the car came to a full stop, and that it would stop on the further side, and that, while it was still moving, plaintiff stepped or slipped from it.[18]

While Passenger Attempting to Take Hold of Support.—In an action for injuries received in alighting from a street car, plaintiff testified that the car suddenly started as she was attempting to take hold of a brass rail on the car to aid her in getting off, thereby throwing her to the ground. The conductor and two disinterested witnesses testified that, while the car was still in motion, plaintiff, though told by the conductor to wait until it stopped, got off, and was thrown to the ground. A finding that the plaintiff's injuries were caused by starting the car too soon is against the weight of the evidence.[19]

While Passenger Taking Off Baggage.—The plaintiff, upon the announcement of the arrival of the train on which she was riding at her destination, proceeded to leave the train, carrying with her a basket and bundle of wall paper. She testified that on leaving the train she placed the bundle on the end of the car, stepped down onto the platform, deposited her basket, and turned round to reach for the bundle, when the train started, and she, holding onto the railing of the car, was dragged some distance, receiving the injuries complained of. The conductor and telegraph operator testified that the train had started before she reached for the bundle, and that she placed one foot on the car step, holding onto the rail; and that the car remained at the station about two minutes. It was held that, as the evidence might have warranted a finding that the car started after she stepped on the car step, a finding for the plaintiff would not be set aside.[20]

Before All of Passengers Could Get Off.—In an action against a carrier for injuries sustained while attempting to alight, evidence that plaintiff promptly started to get out as soon as the train stopped; that it started suddenly, while she was in the car steps, causing her to fall therefrom, that other passengers did not have sufficient time to alight; and that the conductor was compelled to make a second stop beyond the platform, warrants a finding that defendant was negligent, though there is evidence that the train stopped for two or three minutes.[21]

After Stopping Sufficient Time.—The carrier must stop and holds its trains at stations a reasonably sufficient time to enable passengers to alight; and, where the passenger uses ordinary diligence to get off and is injured by the train starting, the jury may infer that the time was insufficient.[22] In an action for

17. City, etc., Railway *v.* Findley, 76 Ga. 311.

18. Black *v.* Second Ave. R. Co., 60 N. Y. S. 631, 44 App. Div. 333.

19. **While passenger attempting to take hold of support.**—Ormond *v.* Metropolitan St. R. Co., 58 N. Y. S. 335, 27 Misc. Rep. 526.

20. **While passenger taking off baggage.**—Simpson *v.* Rome, etc., R. Co., 48 Hun 113, 15 N. Y. St. Rep. 539.

21. **Before all of passengers could get off.**—Illinois Cent. R. Co. *v.* Taylor, 46 Ill. App. 141.

22. **After stopping sufficient time.**—Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340.

injury to a passenger, alleged to have been caused by the train suddenly starting while he was alighting from it, eleven witnesses, many of them disinterested, testified that the train stopped long enough to allow passengers to alight safely; and their testimony was only contradicted by that of plaintiff and two boys. Two disinterested witnesses testified that plaintiff had left the car, and was standing on the ground leaning against a car when the train started. Several witnesses testified that the usual signals were given before the train started. A verdict for the plaintiff was clearly against the weight of the evidence.[23] Where a passenger testified that the street car did not stop long enough to enable him to alight in safety, that as he was in the act of stepping to the rear platform the car suddenly started, that he was "rushed" out on the platform by the momentum, that the conductor "grabbed" him as he was attempting to seize the handhold, and that in that manner he was thrown form the car and injured, but this theory was rendered highly improbable by the construction of the car and other physical facts, he did not show a right to recover.[24]

After Signal to Start Given.—Where, in a suit by a passenger for injuries caused by the sudden starting of a train as she was leaving it, the brakeman testified that he received a signal to start, and some passengers gave evidence to show that the train was started by one of their number taking hold of the bell rope by accident, a charge that it was for the jury, in such a conflict of evidence, to decide the question as to how the train was started, is proper.[25] The plaintiff sued for injuries received by being thrown from an electric car as she was stepping off. She alleged that the defendant carelessly caused the car to start by its servants, and testified that the conductor rang two bells, on which the car started, but on cross-examination admitted that all she knew about it was that the car started. Her witnesses did not see who rang the bell. The conductor testified that he was collecting the fares, when, just as she was getting off, some one on the rear platform rang the bell. The evidence was held not to justify a finding that the negligence of any employee of defendant caused the car to start.[26] Evidence by an injured street car passenger that she did not remember whether she heard bells given to start the car, but only knew that the car started, was not evidence that it started by reason of a bell signal.[27]

After Stop to See That Track Clear Ahead.—In an action by a passenger against a street railway company to recover damages for personal injuries, the evidence showed that the car stopped in order to allow the conductor to go ahead and see whether the track of the steam railroad was clear. The plaintiff testified that the stop was also for a street where she had been in the habit of alighting. She also testified that she was in the act of alighting with one foot on the lower step of the car, when it moved and threw her to the ground, injuring her. Three witnesses testified that she stepped from the car while it was moving. One of these witnesses had been called by plaintiff. A verdict and judgment for plaintiff should be sustained.[28]

Causing Door to Shut.—The evidence showed that the train had reached the passenger's destination before she went on the platform; that the train had so far slowed up that the conductor and brakeman were both off the train, and that the express purpose of its stopping was to let the passenger off, and

23. Gulf, etc. R. Co. *v.* Williams, 70 Tex. 159, 7 S. W. 88.

24. Berkley St. R. Co. *v.* Simpson, 56 S. E. 331, 106 Va. 548.

25. After signal to start given.—Ferry *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 325, 6 N. Y. St. Rep. 821.

In an action against a street railroad for injuries to a passenger through the starting of the car while plaintiff was alighting therefrom, evidence held to support a finding that another passenger, and not the conductor, gave the signal to start. Fanshaw *v.* Norfolk, etc., Tract. Co., 61 S. E. 790, 108 Va. 300.

26. O'Neil *v.* Lynn, etc., R. Co., 62 N. E. 983, 180 Mass. 576.

27. Killam *v.* Wellesley, etc., R. Co., 101 N. E. 374, 214 Mass. 283.

28. After stop to see that track clear ahead.—Skean *v.* Schuylkill Valley Tract. Co., 32 Pa. Super. Ct. 558.

that the brakeman told her to remain on the platform, and that she was not attempting to get off when injured by the shutting of the car door owing to a sudden starting of the train. The evidence was held sufficient to support a finding for the passenger.[29]

Passenger on Wrong Train.—Plaintiff testified that, having found she had gotten on the wrong car, she asked the conductor to wait a moment, so she could get off; that the car was standing still until she attempted to get off, when it started up with a jerk, and threw her off. A passenger testified that the car did not move more than eight feet after it started up before she fell off; that "it was all done in two seconds' time." There was much evidence tending to prove that plaintiff stepped off the car after it had started and run about forty feet. There was evidence reasonably tending to support a verdict for plaintiff.[30]

Passenger Dragged.—A verdict is properly directed for the defendant in an action against a railroad by a passenger whose unsupported testimony is that, as he was about to alight at the station, the train started, and his clothing caught on the step, and was dragged some distance when his clothing gave way, and his foot was run over; two witnesses testifying that he was not dragged at all from the station, but was on the steps while the car was being backed out, and four others agreeing that he was picked up at a certain point, one-half mile from the station, in order to reach which the train, after going in one direction, stopped, and then went in another direction, and he not having denied that he was picked up at such point.[31]

Passenger Incumbered with Bundles.—A train stopped so short a time at a station that a passenger without bundles could scarcely get off before it started. A passenger incumbered with packages was found, at the station to which he had bought a ticket, mortally wounded by the cars. No one saw him get off. A jury could infer that the accident was caused by the sudden starting of the train.[32]

Passenger Intoxicated.—In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, the evidence tended strongly to show that, contrary to plaintiff's own testimony, he was drunk when the accident occurred. Plaintiff testified to a mental stupor resulting from the accident, and his statements to others as to how he was injured were conflicting. While his statement that he was not drunk might affect his credibility, if false, yet the drunkenness itself might explain his failure to remember such condition, his supposition that the stupor resulted from the injuries, and his conflicting statements, and that hence the question of his drunkenness was not vitally material.[33]

Testimony of Plaintiff.—Where plaintiff, in an action against a street railway for personal injuries, testified that the car had stopped and she had put her foot on the step, when the conductor suddenly started the car and she was thrown to the ground, a prima facie case is made for the jury.[34]

Corroborated by Other Witnesses.—In an action against a street railroad for injuries, the plaintiff, who was corroborated by two others, testified that, just as she was stepping from the car, it started with a jerk, and threw her down, and the conductor, motorman, and three others gave testimony that the

29. Causing door to shut.—Kentucky, etc., Bridge Co. *v.* Quinkert, 2 Ind. App. 244, 28 N. E. 338.

30. Passenger on wrong train.—Joyce *v.* St. Paul City R. Co., 73 N. W. 158, 70 Minn. 339.

31. Passenger dragged.—Daly *v.* Central R. Co., 57 N. Y. S. 44, 38 App. Div. 632.

32. Passenger incumbered with bundles.—Flanagan *v.* New York, etc., R. Co., 55 Hun 611, 8 N. Y. S. 744, 29 N. Y. St. Rep. 543, 5 Silvernail 495.

33. Passenger intoxicated.—Louisville, etc., R. Co. *v.* Deason, 96 S. W. 1115, 29 Ky. L. Rep. 1259.

34. Testimony of plaintiff.—Rea *v.* Media, etc., Elect. R. Co., 70 Atl. 554, 221 Pa. 129.

plaintiff alighted while the car was in motion, but some of the latter witnesses did not see all the transactions. A verdict for the plaintiff was not against the evidence.[35] In an action for injuries to the plaintiff caused by being thrown from a street car, the plaintiff testified that the car stopped, and, as she was stepping off, the driver started the car suddenly, throwing her to the ground. Her statement as to the injuries was corroborated by her physician. The defendant's witnesses swore that she attempted to get off when the car was in motion, without notice to the driver. There was sufficient evidence to sustain a verdict for the plaintiff.[36]

Contradicted by Other Evidence.—Where plaintiff was injured while alighting from a street car, and her testimony that the car had stopped before she attempted to alight, and that she was injured by the premature starting of the car, was uncorroborated, and several disinterested witnesses testified that she attempted to alight before the car had stopped and was thrown down in so doing, a verdict in favor of plaintiff was contrary to the weight of evidence.[37]

35. Corroborated by other witnesses.—Nash *v.* Yonkers R. Co., 71 N. Y. S. 594, 63 App. Div. 315.

In an action against a street railway company for the wrongful death of a passenger, decedent's deposition tended to establish that he signed his intention to get off; that the conductor rang the bell, and the mortorman thereupon stopped the car; and that it was suddenly started while he was getting off, causing his injury. Two disinterested witnesses corroborated his testimony. Several witnesses for defendant testified that the car had not stopped. Others testified that decedent, immediately after he was injured, stated that he attempted to get off while the car was in motion, in order to get a train, and that it was not the fault of defendant's servants. Held, that a verdict for decedent's administratrix would not be disturbed. Ludeman *v.* Third Ave. R. Co., 76 N. Y. S. 128, 72 App. Div. 26.

36. Corroborated in part.—Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108.

In an action for personal injuries against a street railway plaintiff testified that, after the car on which he was a passenger had been stopped in response to his signal to the conductor, he stepped down upon the running board, and from that position was thrown to the ground by a sudden starting of the car. Another passenger corroborated his statement, except as to the car starting up again before he was injured, but she did not explain how he could have been injured with the car standing still. A third passenger testified that plaintiff was injured by stepping from the car while it was in motion. Neither the conductor nor motorman was called, nor was their absence explained. Held, that a verdict in favor of plaintiff was not against the preponderance of the evidence. Judgment 78 N. Y. S. 1069, 77 App. Div. 221, affirmed in Muller *v.* Metropolitan St. R. Co., 69 N. E. 1127, 177 N. Y. 565.

37. Contradicted by other evidence.—Andrews *v.* Metropolitan St. R. Co., 86 N. Y. S. 338, 91 App. Div. 63.

In an action against a street railway to recover for injuries alleged to have been received by plaintiff by reason of defendant's negligence in starting its car while plaintiff was alighting therefrom, plaintiff was the sole witness as to the accident, although there were a number of other passengers on the car, including an acquaintance of plaintiff, who sat on the seat beside her, and alighted just before plaintiff did. The conductor, motorman, and such passengers as were called as witnesses positively denied that the accident occurred. Held, that a verdict for plaintiff was not sustained by the evidence. Heltzen *v.* Union R. Co., 59 Atl. 918, 26 R. I. 576.

Plaintiff testified that the street car started suddenly while she was alighting, throwing her to the ground. The conductor, the motorman, and three passengers testified that the car came to a full stop before plaintiff attempted to alight, and that it made no movement until after she had fallen. Held, that a judgment for plaintiff would be reversed. Hart *v.* Metropolitan St. R. Co., 58 N. Y. S. 1087, 28 Misc. Rep. 766.

The plaintiff sued to recover for injuries sustained in falling from a street car, alleged to have been caused by a sudden movement forward of the car. The plaintiff stepped to the rear platform, and from it sought to step down to the pavement, when he fell. The car was in good order, and the conductor was on the platform. The motorman testified that there was no attempt to start the car at the time the accident happened, and he was corroborated by several witnesses, though the plaintiff was positive in his statement that the car moved, causing him to fall. As the preponderance of the evidence was that the car did not move, there was a want of testimony to sustain the allegation of the complaint. Gretzner *v.* New Orleans, etc., R. Co., 29 So. 496, 105 La. 266.

Plaintiff testified that, after the car stopped, and while he was stepping off, it "made a jerk," and threw him down, so

A verdict for the plaintiff in an action against a street car company for injuries alleged to have been received by the car starting while she was alighting at a street crossing is not conclusive, but will be set aside, as against the weight of the evidence, where the uncorroborated evidence of plaintiff that the car started while she was alighting was contradicted by the conductor, gripman, and two disinterested witnesses, who testified that the accident happened north of the crossing, and that the plaintiff alighted from the car before it came to a stop.[38] Where the plaintiff in an action against a street car company testified that as she was holding the handrail of the car with her left hand, with her foot out to step on the ground, she heard the bell ring, became insensible, and when she regained consciousness found her left arm pulled out of its socket, the jury were warranted in inferring that the car started as she was alighting.[39] Where disinterested evidence shows that plaintiff, a passenger on a street car, alighted while the car was in motion, after a signal by the conductor to stop, a verdict for plaintiff will be set aside, though she states that the car came to a full stop, and started while she was attempting to get off.[40] In an action against a street railway for injuries received by a passenger while alighting from a car, where plaintiff's contention that the car had come to a full stop before suddenly starting was practically uncorroborated, his only witness refusing to swear that the car had stopped, and defendant's claim that plaintiff endeavored to alight while the car was in motion was supported by the testimony of five witnesses, three of whom were disinterested, and whose testimony was strongly supported by the probabilities of the case, a verdict for plaintiff was clearly against the weight of evidence.[41] But the contrary has also been held. The plaintiff's testimony that the car lurched forward as he attempted to alight has been held sufficient to sustain a verdict in his favor though the motorman, conductor, and three

that his shoulder and head struck on the curbstone was from ten to thirteen feet from the car, and five or six witnesses for defendant testified that plaintiff safely left the car, and when several feet from it was knocked down by a bicycle, and struck on the curbstone. Held, that a verdict for plaintiff was against the weight of evidence. Colvin *v.* Brooklyn Heights R. Co., 52 N. Y. S. 698, 32 App. Div. 76.

Where plaintiff sued for an injury on the theory that the street car which he was a passenger stopped for him to alight, and, while he was doing so, started, without giving him sufficient time, throwing him to the ground, a verdict for him is against the weight of evidence; he having no testimony but his own, the conductor's testimony that plaintiff attempted to alight while the car was moving being corroborated by two passengers, and plaintiff admitting that he told defendant's claim agent that the car "did not stop, and as it was turning slowly and kind of stopped I stepped off," though he explained that by "kind of stopped" he meant it stopped "for a minute or half a minute or 10 seconds, enough to step off." Maurer *v.* Brooklyn Heights R. Co., 96 N. Y. S. 1065, 110 App. Div. 900.

Plaintiff having testified on her direct examination that on her signal the car came to a full stop, and she stepped on the footboard, and as she was about to put her left foot to the ground, while having the other on the step, the car started, and she was thrown; and on cross-examination that she got on the footboard, and as she was putting her left foot to the ground the car started off; and on redirect examination that she had hold of the car, and it started and jerked her around and threw her on her left hip, she can not be considered as affirming that when the car started she was in a firm and safe position on the footboard, and as matter of simple volition and from motives of saving herself inconvenience she left such place of safety and stepped from the car while it was in motion, though on cross-examination, before testifying as above, she answered "Yes" to the questions, "You got down on the footboard?" "Then the car started?" "And then you tried to step down?" and to the question, "There was no reason why you did not step back?" answered, "It was not handy for me, I being crippled;" and to the question, "You preferred to step off?" answered, "Yes;" and to the question, "You thought it was going slow enough for you to step off?" answered, "It started off fast." United R., etc., Co. *v.* Beidelman, 52 Atl. 913, 95 Md. 480.

38. Connor *v.* Metropolitan St. R. Co., 58 N. Y. S. 340, 27 Misc. Rep. 541.

39. Bartle *v.* Houghton County St. R. Co., 93 N. W. 620, 132 Mich. 290.

40. Pierce *v.* Metropolitan St. R. Co., 47 N. Y. S. 540, 21 App. Div. 427.

41. Kramer *v.* Metropolitan St. R. Co., 86 N. Y. S. 33.

disinterested witnesses testified to the contrary.[42]

§ 3275. Negligent Backing of Car.—Evidence that an engineer suddenly and violently backed his train without warning at a place where passengers might be expected to alight was some evidence of wantonness.[43] Evidence that, after a train had been brought to a stop to allow a passenger who had been taken past a station to alight, the engineer backed the train so forcibly as to seriously injure the passenger by throwing her against the car door, is sufficient to justify the jury in finding that the engineer was wantonly reckless, and awarding the passenger exemplary damages on that ground.[44] A railroad train, stopping at a station, went beyond the station platform, so that passengers alighting were compelled either to jump three or four feet to the ground, or descend by stepping on the link connecting the passenger car and a box car. Some of the passengers got off, but another stepping on the link for that purpose, had her foot crushed between the bumpers by the train backing. In an action against the railroad company for the injury, there was evidence that the conductor, who had got off the train, was taking plaintiff's goods out of the box car before she alighted, but this was denied by him; and there was also a conflict of testimony as to whether the bell was rung or the whistle blown before backing the train. There was sufficient evidence of negligence to sustain a verdict for plaintiff.[45]

§ 3276. Carrying Passenger Past Station.—Where deceased, who was a passenger, was injured by alighting from the train after it had stopped beyond the usual stopping place, a finding of negligence of the company was sustained where there was no evidence explaining the failure to stop at the regular station, nor any explanation of the failure to give warning, nor of the cause of stopping at such dangreous place.[46]

Where Conductor Could Not Signal Engineer to Stop.—A woman, with her children, purchased tickets, and boarded a train to go to a certain "crossing" where there was no station. The train was a long freight train with a passenger coach in the rear. The conductor was unable to communicate the signal to the

42. Wible *v.* Metropolitan St. R. Co., 127 Pac. 625, 88 Kan. 55.

Where the only question in dispute was as to whether or not a street car was in motion when a passenger attempted to alight, and plaintiff's testimony that the car stopped and as she was stepping off it started was corroborated by other evidence, while the conductor and six passengers testified that the car was in rapid motion when she attempted to get off, a finding that the car had stopped, and started as plaintiff was getting off, was not against the clear weight of the evidence. Bartle *v.* Houghton County St. R. Co., 93 N. W. 620, 132 Mich. 290.

43. Negligent backing of car.—Hiers *v.* Atlantic, etc., R. Co., 55 S. E. 457, 75 S. C. 311, 9 Am. & Eng. Ann. Cas. 1114.

44. Appleby *v.* South Carolina, etc., R. Co., 38 S. E. 237, 60 S. C. 48.

45. Johnson *v.* Winona, etc., R. Co., 11 Minn. 296, Gil. 204, 88 Am. Dec. 83.

46. Carrying passenger past station.—Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, 49 Am. Rep. 168.

Evidence in an action by a passenger who was carried by her station, and who alleged that on her return and while leaving the cars she was surrounded by a drunken crowd, who pushed against her and abused her with menacing speeches, using profane language, held not to support a verdict for plaintiff. Taylor *v.* Atlantic, etc., R. Co., 59 S. E. 641, 78 S. C. 552.

In an action by a passenger who was carried past his station, and there told to alight, the conductor using abusive language and personal violence, evidence held sufficient to support a verdict for the passenger. King *v.* Southern R. Co., 57 S. E. 507, 128 Ga. 285.

Plaintiff, who was seventy years old, failed to leave defendant's train on which she was a passenger at the station, and was put off a few hundred yards beyond, between eight and nine o'clock at night, in the rain. At the trial she was suffering from a bronchial affection, but the evidence was conflicting as to whether it resulted from exposure or other causes. Held, that to charge that if her sickness was not the result of her being put off, and that it was reasonably certain to have resulted from other causes, defendant is not liable, was erroneous, as requiring proof beyond reasonable doubt. St. Louis, etc., R. Co. *v.* Burns, 71 Tex. 479, 9 S. W. 467.

engineer in time to stop at their destination, and stopped at another crossing three-fourths of a mile beyond, where he assisted them to alight. A shower had come up, and it was raining when they got off the train, and they were wet when they reached a farm residence near by. There was no unnecessary force used or rudeness shown by the conductor. The woman was not put to any extra expense, and would have been wet if let off at her destination. She was sick afterwards, but her physician testified that she would have been sick anyway. A judgment of nonsuit was properly ordered.[47]

Name of Station Announced by Carrier.—A passenger was hard of hearing, but such fact was not disclosed to the company or its employees, and she alighted at a wrong station, though the porter had twice announced its name. The plaintiff testified that the porter took her grip, and told her to sit still until the train stopped, which was denied by the porter, and that she left the car when the train stopped, and the porter deposited her grip on the ground. The evidence was not sufficient to sustain a judgment for the plaintiff for negligently setting her down at a wrong station.[48] In an action for damages for being carried past her station, plaintiff testified that she did not know the station, that she was sick, and that she so informed the conductor, who promised to let her know when the station was reached; that he did not do so; and that she did not hear the station called. Her attorney testified that he was on the same train, and got off at the station in question, and that he did not hear the station called, but he admitted that he was familiar with its locality, and did not listen particularly to hear it called. The porter whose duty it was to call the station testified that he did so on the occasion in question, and that he was sure, because his attention was called to the matter the next day. The conductor denied that the plaintiff had any such conversation with him as stated. It appeared that the plaintiff was a morphine eater, and subject to fits of unconsciousness. The evidence did not warrant a recovery.[49]

After Failure to Assist Passenger to Alight.—Where the plaintiff, a passenger on a train, in charge of her invalid and helpless sister and her aged mother, the circumstances being known to the carrier's servants in charge of the train, obtained the promise of the conductor before they arrived at their destination that he would assist them from the train as soon as they arrived at the station, that they could immediately procure a conveyance, and be carried to a hotel, and he failed to have assistance rendered, and the train with them on it was moved into the yards, away from the depot, and they had to remain there some time before a carriage was procured, and were then driven about to several hotels before they could obtain a room, this with evidence that it was a cold night, and that they were being deprived of the comforts of a room, which possibly could have been procured if they could have left the train immediately on its arrival at the station, is sufficient evidence of physical and mental suffering from the negligence of the carrier's servants.[50]

§ 3277. Passenger Injured after Alighting.—In an action for injuries in alighting from a street car, wherein the evidence was conflicting as to whether plaintiff safely reached a cross-walk and received her injury thereafter, the

47. **Where conductor could not signal engineer to stop.**—Smith *v.* Wilmington, etc., R. Co., 41 S. E. 481, 130 N. C. 304.

48. **Name of station announced by carrier.**—Texas Mid. R. Co. *v.* Terrry, 65 S. W. 697, 27 Tex. Civ. App. 341.

Wrong station announced.—In an action for damages, where a train porter negligently called the wrong station, and by reason thereof a passenger left the train before reaching her station, and contracted sickness in driving across country to it, evidence held to warrant a verdict against defendant on the theory of freedom from contributory negligence. St. Louis, etc., R. Co. *v.* Foster, 46 Tex. Civ. App. 517, 103 S. W. 194.

49. Tillery *v.* Bond, 38 Fed. 825.

50. **After failure to assist passenger to alight.**—Gulf, etc., R. Co. *v.* Overton (Tex. Civ. App.), 107 S. W. 71, judgment reversed in 110 S. W. 736.

jury had a right to accept her account as true.[51]

By Fall after Stepping from Car.—Opposed to the plaintiff's testimony that her injuries were caused by the sudden starting of defendant's cable car, while she was in the act of alighting therefrom, was the testimony of five eye-witnesses that plaintiff fell after she stepped from the car, and was assisted to her feet by some of the witnesses, during all which time the car was motionless. It was held, that a verdict for the plaintiff should be set aside, as against the clear weight of evidence.[52]

By Negligent Act of Employee.—In a suit against a street railway company for personal injuries, the plaintiff's evidence tended to show that the plaintiff, a man eight-three years old, had alighted from the defendant's car, but was precipitated to the pavement by reason of the conductor holding on to his coat after starting the car. The evidence for the defendant was to the effect that the plaintiff fell after the car had passed him, and after the conductor had ceased to hold on to him. It was held that, taking the plaintiff's evidence to be true, he was entitled to recover.[53]

Before Car Started Again.—Where, in an action for injuries to a passenger as he was alighting from a street car, the preponderance of the evidence showed that the car stopped before he alighted, and was not started again until after the accident occurred, which was fully accounted for by the plaintiff's falling after he reached the sidewalk, without any fault imputable to the carrier or its servants, a verdict for the plaintiff was erroneous.[54]

Injured by Another Train.—In an action for injuries received in getting off a moving cable car, by a car passing on another track, evidence that the cars were running at a higher rate of speed than was authorized by city ordinances, coupled with some evidence that the bell on the passing car was not rung, is sufficient to show negligence of defendant.[55] A passenger, arriving at a certain station after night, was killed by a rapidly moving train passing between his train and the station. The interval between the arrival of the two trains was variously described by the witnesses as almost simultaneous, or with an interval of from one to three minutes. Several swore that deceased had reached the station, and was returning to the train. None of them, however, had any previous acquaintance with deceased, or saw him at the instant of the accident, but testified merely to having seen a person whom they took to be him on the station platform, just prior thereto. The case was twice tried, resulting each time in a judgment against the railroad. It was held, that the judgment would not be disturbed.[56]

Passenger Ill.—In an action for injuries causing death, where the evidence showed that the deceased was found lying beside the defendant's tracks, severely injured, soon after the defendant's train, from which he had alighted, had passed, but failed to show more particularly how the injury was received,

51. Passenger injured after alighting.—Farrington *v.* Boston Elev. R. Co., 88 N. E. 578, 202 Mass. 315.

52. By fall after stepping from car.—Empey *v.* Grand Ave. Cable Co., 45 Mo. App. 422.

53. By negligent act of employee.—Bonney *v.* Bushwicke R. Co. (N. Y.), 1 How. Prac., N. S., 66.

54. Before car started again.—Sullivan *v.* Union R. Co. (R. I.), 69 Atl. 923.

55. Injured by another train.—Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 18 Am. St. Rep. 541, 7 L. R. A. 819.

In an action against a street railroad company for injuries to a passenger alighting from a street car and being struck by passing behind the rear end of such car by one going in the opposite direction, held, that evidence was sufficient to sustain verdict for plaintiff. Swanson *v.* Duluth St. R. Co., 124 N. W. 219, 109 Minn. 464.

In an action by a passenger, who, after the station had been announced, alighted from the car, and was struck while crossing the track between his train and the station by another train running on the intervening track in violation of the rules of the company, evidence held to sustain verdict for plaintiff. Besecker *v.* Delaware, etc., R. Co., 69 Atl. 1039, 220 Pa. 507, 14 Am. & Eng. Ann. Cas. 21.

56. Denver, etc., R. Co. *v.* Hodgson, 18 Colo. 117, 31 Pac. 954.

though it appeared that the deceased, while on the train, was obviously ill, and in need of the defendant's help to reach a place of safety, a judgment for the defendant will not be disturbed.[57]

§ 3278. As to Companies or Persons Liable for Injuries.—Where, in an action against a street railway for injuries, the defendant answered by general denial, and there was no evidence, positive or circumstantial, that the defendant owned or operated the road or car on which the plaintiff was a passenger, a judgment in the plaintiff's favor was error.[58]

Relation of Carrier and Passenger.—Where, in a personal injury suit by a passenger against a street railway company, the evidence showed that defendant received and undertook to carry plaintiff and others in a car which it owned over a line of a street railway, in the absence of any contrary showing, that the inference that the defendant was operating the car for the benefit of those who wished to avail themselves thereof was warranted.[59] A judgment for plaintiff for injuries sustained by falling from a street car will not be disturbed on the ground that the evidence failed to show that the plantiff was at the time a passenger on a car of the defendant, where a letter to the defendant offered in evidence by the defendant, and received without limitation, stated that the plaintiff "was thrown from one of your cars," though the plaintiff did not directly state that she was an a car of the defendant, and though, after the accident, she made a complaint at a stable of another company.[60] An allegation in a declaration that a railroad ticket was from one to another specified station is sufficiently supported by the statement of the plaintiff that the ticket in question was from one to the other of such points, where such statements is uncontradicted, notwithstanding there was no evidence as to how the ticket read.[61] In an action for damages brought by a passenger for injuries caused by carelessness of the driver in overturning the coach, it was held that the fact that the driver was informed, before the accident, that a passenger was to be left at the

57. Passenger ill.—Brady *v.* Old Colony R. Co., 162 Mass. 408, 38 N. E. 710.

58. As to companies or persons liable for injuries.—Indianapolis St. R. Co. *v.* Lawn, 66 N. E. 508, 30 Ind. App. 515.

A judgment against a railroad company for injuries to a passenger while alighting from a train will be reversed where there is no satisfactory evidence that defendant was the owner or lessee in possession of the train or the tracks, or was the employer of those in charge of the train, and there is no proof that defendant owns any road or tracks. Kurzmann *v.* New York, etc., R. Co., 27 N. Y. S. 132, 6 Misc. Rep. 440, 58 N. Y. St. Rep. 584.

In an action against the Pennsylvania Railroad Company for breach of a special contract of carriage, where it appeared that plaintiff purchased from the B. & P. Railroad Company a round trip excursion ticket to Atlantic City, entitling him to transportation on that road to and from Camden and over the C. & A. Railroad Company from Camden to Atlantic City and return, which ticket was refused on the last named road on plaintiff's return from Atlantic City, evidence considered, and held insufficient to so connect the Pennsylvania Railroad Company with the other companies as to render it liable to plaintiff. Tyler *v.* Pennsylvania R. Co., 18 App. D. C. 31.

Where, in an action for an assault on a passenger, defendant street railway company appeared, answered, and made defense, admitting that at the time of the accident it was engaged in hauling passengers for hire in the city in question, and the evidence showed the occurrence to have taken place in one of the streets in such city, and that plaintiff was ejected with force from one of the "company's" cars by one of the "company's" employees, the jury was justified in finding that defendant was the "company" referred to. Citizens' St. R. Co. *v.* Clark, 71 N. E. 53, 33 Ind. App. 190, 104 Am. St. Rep. 249.

59. Relation of carrier and passenger.—Chaffe *v.* Consolidated R. Co., 196 Mass. 484, 82 N. E. 497.

60. Demann *v.* Eighth Ave. R. Co., 10 Misc. Rep. 191, 30 N. Y. S. 926, 62 N. Y. St. Rep. 476.

Evidence that plaintiff was a passenger upon the cars of the "Consolidated Street Railway Company" and the "Springfield Consolidated Railway" is sufficient to show that she was a passenger on the cars of the Springfield Consolidated Railway Company. Judgment 71 Ill. App. 162, affirmed in Springfield Consol. R. Co. *v.* Hoeffner, 51 N. E. 884, 175 Ill. 634.

61. Chicago, etc., R. Co. *v.* Stratton, 111 Ill. App. 142.

plaintiff's destination, and that, after the accident, the agent of the defendant informed the driver that the plaintiff was to stop at the station designated, was sufficient to establish prima facie the allegation in the complaint, of a contract to safely carry.[62]

Carrier for Hire.—Where plaintiff's place of employment as a railroad car inspector was changed to a town some distance from his home, and at the time of the change he was informed that his wages would be the same, but that he would be furnished free transportation between his home and his place of employment, such facts justified an inference that the passbook was a part of the consideration for his services, and that the carriage was not gratuitous.[63]

Slight Evidence of Ownership Sufficient.—In an action for injuries to a passenger while attempting to board a street car, slight evidence in support of the allegations as to defendant's ownership or operation of the car at the time of the injury is sufficient where it is not combatted, and, except for the general denial, there is no intimation that defendant resists the claim on the ground that it was not the operator of the car.[64]

Ticket Purchased of Carrier.—In an action for personal injuries received while the plaintiff was a passenger on a railroad train, the evidence is sufficient to show that the defendant was the carrier, where it appears that the plaintiff purchased her ticket from the defendant, and that the car in which she was riding had the defendant's name on it.[65] From evidence that a railroad company sold a passenger a ticket over a leased road, knowing it would cease to operate it before the time to which the ticket was limited would expire, willful failure to transport her over the leased line after the lease had expired, and while the ticket was good, may be inferred, though failure to operate the same was not willful.[66] Where, in an action for injuries to a street car passenger, the only evidence that the defendant operated the cars on the line on which plaintiff was injured was a transfer slip bearing defendant's name, which transfer slip the defendant's superintendent testified was issued by another railroad company, and not by the defendant, the plaintiff was not entitled to recover.[67]

Carrier's Name on Car.—Where a passenger, suing for injuries sustained while alighting from a car, showed that the defendant company's name was on the car, and the motorman testified that he was working for the company, the proof prima facie showed that the company was operating the car.[68]

Map Alone in Evidence.—There was no evidence in an action by a passenger against a street railroad company for injuries that the defendant company owned or operated the road at the place where the plaintiff was hurt, except a map by the railroad company which designated the railroad by name; and there was no evidence as to the existence of the defendant corporation, or that it owned or operated any railroad. The engineer making the map testified that certain lines designated the street railway tracks. A judgment in favor of the plaintiff was reversed.[69]

Road Leased to Defendant.—At the trial of an action to recover damages for an assault committed by a person alleged to have been in defendant's employ as a conductor on one of its horse cars, plaintiff proved that a certain other company had, a year before the accident, leased to the defendant for term of years certain railroad routes, including one passing through the street

62. Thorne *v.* California Stage Co., 6 Cal. 232.

63. Carrier for hire.—Eberts *v.* Detroit, etc., Railway, 115 N. W. 43, 151 Mich. 260.

64. Slight evidence of ownership sufficient.—Reisenleiter *v.* United R. Co. (Mo. App.), 134 S. W. 11.

65. Ticket purchased of carrier.—Kunzmann *v.* New York, etc., R. Co., 8 Misc. Rep. 689, 29 N. Y. S. 327, 60 N. Y. St. Rep. 822.

66. Pickens *v.* South Carolina, etc., R. Co., 32 S. E. 567, 54 S. C. 498.

67. Dista *v.* Westchester Elect. R. Co. (App. Term), 103 N. Y. S. 738.

68. Carrier's name on car.—Baermann *v.* Chicago, etc., R. Co., 140 N. W. 1119, 153 Wis. 235.

69. Map alone in evidence.—Citizens' St. R. Co. *v.* Stockdell, 62 N. E. 21, 159 Ind. 25.

where the assault was shown to have occurred. Thereafter, in the course of the trial, defendant's counsel, while denying that defendant operated any cars, admitted that they owned and operated a railroad on that street. In the absence of any evidence in support of the denial by counsel, there was enough to warrant the presumption that the car from which the plaintiff was thrown was under defendant's control and management.[70]

Connecting Carriers.—Where a passenger who bought a through ticket on connecting roads from one company was injured on the train of the other, sued both, and it was admitted that the relations of the defendants to each other were defined by written contracts, which they, upon notice, refused to produce, and a verdict was rendered against both the defendants, from the judgment on which the second company appealed, objecting that there was not sufficient evidence that it was a joint contractor with the company issuing the ticket, it was held that, while the proof to establish a joint interest in defendants was slight, yet there was some; and defendants knowing the truth, and omitting to speak, every inference warranted thereby should be taken against them; and the verdict should therefore be sustained.[71]

Passenger Injured by Falling Pole.—Where the plaintiff was injured by the fall of a trolley pole from a street car running on a certain avenue in a city, and the plaintiff's son testified that cars running on such avenue bore the inscription, "The Chicago City Railway," which was the defendant's corporate name, and the defendant introduced medical witnesses who testified that on the same day the plaintiff was injured they were directed by defendant to make an examination of the plaintiff, and were paid by the defendant for so doing, such evidence was sufficient to show that the defendant owned and operated the cars on such avenue.[72]

Passenger Injured by Hole beside Track.—Where, in an action for injuries to a passenger by stepping into a hole dug by the side of the street railway track for a trolley pole while he was transferring at night from one car to another, evidence that the defendant's railway was operated by electricity, and that the hole was close to defendant's track and was dug for a trolley pole, was sufficient to justify the conclusion that the defendant dug the hole, in the absence of evidence in the contrary.[73]

Passenger on Logging Train.—Though the defendant, engaged in the logging business, and operating as part of its appliances a logging steam railroad with engines and logging trucks, is not engaged in the passenger business, and neither charges nor receives fares of persons carried, its implied consent to the carriage of a person on one of its trucks may be found from evidence tending to show not only that the defendant's manager had actual knowledge that the persons in charge of its trains were in the habit of permitting persons to ride thereon, and also that such practice was so open, notorious, and continuous that it was hardly probable that it could have been without his knowledge.[74]

§ 3279. Limitation of Liability.—In an action against a railway company by a wife for injuries sustained while riding on a pass, testimony of the husband is not sufficient to show that the pass was not issued as a mere gratuity, when it is merely to the effect that the pass was given him with four other passes; one being issued to the general manager of the advertising service, of which the witness was the superintendent, another to the Baltimore agent of such advertis-

70. **Road leased to defendant.**—Reidman *v.* Brooklyn, etc., R. Co., 51 N. Y. S. 196, 28 App. Div. 540.

71. **Connecting carriers.**—Wylde *v.* Northern R. Co., 53 N. Y. 156, 14 Abb. Prac., N. S., 213.

72. **Passenger injured by falling pole.**—Judgment 102 Ill. App. 202, affirmed in Chicago City R. Co. *v.* Carroll, 68 N. E. 1087, 206 Ill. 318.

73. **Passenger injured by hole beside track.**—Colorado Springs, etc., R. Co. *v.* Petit, 86 Pac. 121, 37 Colo. 326.

74. **Passenger on logging train.**—Harvey *v.* Deep River Logging Co., 90 Pac. 501, 49 Ore. 583, 12 L. R. A., N. S., 131.

ing service, another to the witness, marked as being issued on account of advertising service, instead of complimentary, and the others to the wives of such recipients, and all being issued at the same time and pursuant to the same conversation with the general passenger agent of the defendant, but where there is no attempt on the part of the witness to relate such conversation.[75]

§ 3280. Passenger in Elevators.—In an action for injuries through the falling of an elevator, evidence tending to prove that the defendants were operating the elevator, and were common carriers of passengers, that the plaintiff was a passenger on the elevator, together with proof of the accident and attending circumstances and the plaintiff's injuries, is sufficient to make out a prima facie case, entitling the plaintiff to go to the jury.[76] Where the evidence shows that a passenger elevator refused to stop, but continued to the top of the shaft, where the hoisting cables parted, causing the car to fall, injuring a passenger, a presumption of negligence arises, establishing a prima facie case for the passenger.[77] But where the plaintiff was injured by the falling of an elevator, and it appeared that there was nothing broken, out of order, or defective about the elevator, and the defendant's expert testified that it could have been run safely immediately after the accident if operated carefully, there was no proof of negligence on the part of defendant.[78]

Evidence to Overcome Presumption of Negligence.—Where the plaintiff was injured by the falling of an elevator in defendant's building, in which plaintiff was employed, and it appeared that defendant had furnished a competent engineer, whose duty it was to inspect the elevator each morning; that the latter had inspected it the morning before the accident, and found it to be in good condition; that the operator was a competent person; that during the three years that the elevator was in use no accident had ever happened; and that it worked properly immediately after the accident without any repair; and it did not appear that there was any defect in the construction of the elevator, or that it was out of order, or that the operator or any other employee of defendant was in fault—judgment for the plaintiff was not sustained, even assuming that the maxim res ipsa loquitur applied.[79]

Sudden Starting.—The plaintiff was injured while riding in the defendant's elevator. The elevator was ordinarily operated at the maximum rate of one

75. Limitation of liability.—Boering *v.* Chesapeake Beach R. Co., 20 App. D. C. 500, affirmed in 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742.

76. Passengers in elevators.—Orcutt *v.* Century Bldg. Co., 112 S. W. 532, 214 Mo. 35.

In an action for personal injuries received in an elevator, evidence that the injury was caused by the negligent operation of the elevator, plaintiff being lawfully in it, is sufficient to sustain a recovery. Franklin Printing, etc., Co. *v.* Behrens, 80 Ill. App. 313, affirmed in 54 N. E. 896, 181 Ill. 340.

77. Keller *v.* Wove Realty Co., 112 N. Y. S. 538, 128 App. Div. 154; Diepenbrock *v.* Wove Realty Co., 112 N. Y. S. 539, 128 App. Div. 888.

78. Elevator in good repair.—Hubener *v.* Heide, 70 N. Y. S. 1115, 62 App. Div. 368.

The only access to the fourth floor of defendant's building was by way of an elevator, which took sections of the floors through which it passed with it as it went up, replacing them as it came down. The elevator cable passed through holes in the center of these floor sections, and guard rails were maintained around such sections, one of them being movable, so as to allow access to the elevator. Plaintiff's intestate, one of defendant's customers, was taken up on the elevator, and left on the fourth floor, to pack the goods purchased by him; it being understood that he was to shake one of the elevator ropes when he wished to come down. Thereafter the porter heard the agreed signal, and started the elevator up, calling out that he was coming. When he reached the fourth floor, the guard railing was down, and deceased was found mashed between the top of the elevator and the ceiling of the room. It appeared that there was plenty of light around the elevator, and there was no evidence of any defects, or of negligence in its operation. Held not to show negligence on defendant's part. State *v.* Green, 52 Atl. 673, 95 Md. 217.

79. Evidence to overcome presumption of negligence.—Hubener *v.* Heide, 76 N. Y. S. 758, 73 App. Div. 200.

hundred and fifty feet per minute, within which its speed was in the control of the operator. The plaintiff stepped into the elevator, which immediately started at the maximum speed, resulting in a jerk which threw plaintiff to the floor. His arm was caught between the floor of the elevator and the ceiling of the second floor of the building. The plaintiff and his brother testified that the elevator was started before the plaintiff had time to get entirely into it. The evidence was held to be sufficient to sustain a verdict for the plaintiff.[80] The fifth floor of the defendant's building where the elevator passed, was cut away too much, and, to prevent passengers from stepping into the space between the elevator and the floor, an iron plate was attached to the floor, thus closing the space when the elevator was flush with the floor, but not when it was a few inches lower. The plaintiff was injured while leaving the elevator on the fifth floor, the heel of her shoe being wrenched off and the shoe otherwise torn, and her foot being badly bruised on top, and when found, immediately after the accident, she was lying on the floor immediately in front of the elevator door. The plaintiff was the only witness as to how the accident occurred, the elevator boy not being introduced; and, though her testimony was confused, it tended to show that the elevator stopped, and the boy opened the door, but that when she started out the elevator moved upwards, catching her foot, and that then, by her direction, the elevator was moved downwards again, releasing her foot, and she fell, she thought, inside the elevator. The evidence was sufficient to sustain a verdict based on the theory that through the defendant's negligence the plaintiff's foot was caught under the iron plate by reason of the elevator stopping below the floor, and then moving upwards, with the door open, while the plaintiff was attempting to get out.[81]

Negligent Moving of Lever.—Where, in an action for the death of an elevator passenger caused by the fall of the elevator, the evidence showed that the car was in perfect condition and under complete control of the operator, who stood with his hand on the lever, and that the elevator could not descend unless the lever was moved, there was evidence justifying the conclusion that the operation voluntarily, or through inattention to duty, moved the lever, thereby causing the elevator to fall, and plaintiff to recover need not produce a witness who saw the operator move the lever.[82]

§§ 3281-3287. Evidence to Rebut Presumption of Negligence Arising from Injury—§ 3281. In General.—Where negligence is proved, or where from the nature of the accident negligence is presumed, the carrier is then required to show that it was in no wise at fault, or that plaintiff was guilty of some contributory negligence.[83] The presumption of negligence of a

80. Sudden starting.—Russo *v.* Morris Bldg., etc., Ass'n, 29 So. 46, 104 La. 426.

81. Bullock *v.* Butler Exch. Co., 52 Atl. 122, 24 R. I. 50.

Plaintiff's intestate rode in the elevator from the sixth to the ground floor in defendant's building. The elevator man opened the gate and stepped out, walking away from the elevator; and, as deceased attempted to follow, the elevator shot upward, catching her against the wall and killing her. The elevator was operated by a rope which had to be pulled with a force of twenty-five pounds a distance of twenty-six inches to start it. There were two other persons in the elevator, but neither of them touched the rope. The mechanism was in perfect order, and, when the elevator man heard her scream as the elevator started, he ran back, seized the rope, and stopped it, but not in time to save her life. The evidence did not disclose whether the rope was so situated that it could be reached by persons standing outside the elevator shaft or on the upper floors when the gates were closed or whether all such gates were closed. Held, that a finding that the accident resulted from defendant's negligence was justified. Ingrafia *v.* Samuels, 75 N. Y. S. 718, 71 App. Div. 14.

82. Negligent moving of lever.—Chambers *v.* Kupper-Benson Hotel Co. (Mo. App.), 134 S. W. 45.

83. Evidence to rebut presumption of negligence arising from injury.—Lincoln Tract. Co. *v.* Webb. 102 N. W. 258, 73 Neb. 136, 119 Am. St. Rep. 879; Roanoke R., etc., Co. *v.* Sterrett, 111 Va. 293, 68 S. E. 998.

It is only necessary to a recovery against a carrier to show that the person

carrier arising from proof of injury to a passenger while in transit obtains until the carrier has overcome the same by proving that it discharged every obligation laid on it to the end of insuring the safety of the passenger in the circumstances of the case.[84]

Statutory Provisions.—Under a statutory provision creating a presumption of negligence against a railroad in an action for injuries to a passenger, and requiring carriers of passengers to use extraordinary diligence, defendant, in order to rebut such presumption, must prove that its servants exercised extraordinary care in connection with those things in which negligence is charged.[85]

Preponderance of Evidence.—In an action against a carrier for injuries to a passenger, received under circumstances giving rise to a presumption of negligence, defendant is entitled to a verdict if it produces sufficient evidence to overbalance the presumption without overcoming it by the preponderance of the evidence.[86] The presumption of negligence arising from an accident to a railroad train must be overcome by clear and explicit proof that the accident could not have been avoided by the utmost practical care and diligence.[87] The evidence must be sufficiently strong to show that the company exercised due care.[88]

Unavoidable Accident.—The carrier can only rebut the presumption by showing that the injury arose from an accident which could not have been prevented by the use of due care and diligence.[89] Where a passenger being carried on a train is injured by an accident to the train, the carrier, in order to overcome the presumption of negligence, must show that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, or that the injury would not have occurred but for the passenger's own negligence.[90] The presumption is also rebutted where the evidence shows that the carrier was wthout fault.[91]

Degree of Care to Avoid Accident.—When the plaintiff proves that he was injured as a passenger on the defendant's road, it is incumbent on the defendant to rebut the legal presumption of negligence by evidence that it exercised extraordinary diligence to prevent the accident which caused the injury to the plaintiff; that is to say that it exercised that extreme care and caution which prudent and thoughtful persons use in securing and preserving their own property.[92]

injured was at the time a passenger of the carrier, and that the injury resulted from the management of the carrier's road, whereupon a presumption arises that such management was negligent, which can be met only by showing that the injury was due to the contributory negligence of the person injured, or was the result of the violation of some express rule of the carrier, brought to the notice of the passenger. Fremont, etc., R. Co. *v.* French, 48 Neb. 638, 67 N. W. 472.

84. Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

85. Statutory provisions.—Civ. Code 1895, §§ 2266, 2321; Georgia R., etc., Co. *v.* Gilleland, 66 S. E. 944, 133 Ga. 621.

86. Preponderance of evidence.—Patterson *v.* San Francisco, etc., R. Co., 81 Pac. 531, 147 Cal. 178.

87. Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

88. Florida, etc., R. Co. *v.* Rudulph, 113 Ga. 143, 38 S. E. 328.

89. Unavoidable accident.—Dayton *v.* Pennsylvania, etc., R. Co. (Pa.), 1 C. P. Rep. 9.

If the accident which caused the injury to the plaintiff could not have been prevented by the exercise of extraordinary diligence on the part of the defendant, then it is not liable therefor under the law, and inasmuch as four unimpeached and uncontradicted witnesses swear that the accident was unavoidable, and their testimony being corroborated by the facts and circumstances connected with the transaction, the verdict was contrary to law, the legal presumption of negligence on the part of the defendant having been rebutted by unimpeached and uncontradicted evidences as disclosed in the record. Brunswick, etc., R. Co. *v.* Gale, 56 Ga. 322.

90. Louisville, etc., R. Co. *v.* Ritter, 85 Ky. 368, 3 S. W. 591, 9 Ky. L. Rep. 22.

91. Gardner *v.* Waycross, etc., R. Co., 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

92. Degree of care to avoid accident.—Brunswick, etc., R. Co. *v.* Gale, 56 Ga. 322; Stiles *v.* Atlanta, etc., Railroad, 65

Contributory Negligence of Passenger.—Evidence which shows that the passenger was at fault himself to the extent of failing to exercise ordinary care for his safety is sufficient to rebut the presumption.[93] So where the prima facie case in behalf of the plaintiff, so far as establishing negligence by the defendant is concerned, rests alone upon the presumption of negligence raised by a statute against the railroad company, and this presumption has been fully overcome by the uncontradicted evidence introduced by the defendant, and the undisputed physical facts manifestly indicate that the death of the plaintiff's husband was caused by his own gross negligence in attempting to board a moving train, a verdict against the company was not authorized by the evidence, and was therefore contrary to law.[94]

Uncontradicted Testimony.—A verdict against a carrier is contrary to law and should be set aside where the legal presumption against it upon which alone the plaintiff's right of recovery depends, has been fully overcome by uncontradicted testimony showing conclusively that its servants in charge of the train used due care and diligence to prevent the injuries complained of.[95]

Evidence of Circumstances of Accident.—While the presumption of negligence arises when the fact of a passenger's injury is shown, the very circumstances out of which the negligence arises may rebut the presumption.[96]

Evidence Introduced by Plaintiff.—The presumption of negligence, which an injury to a passenger raises against the carrier may be rebutted by the evidence introduced by the plaintiff and in such case it is not error to grant a nonsuit.[97] If the plaintiff's own testimony shows that the damage was caused by his own negligence or that by the exercise of ordinary care, he could have avoided it, the defendant, in order to defeat a recovery, would not be bound to make these facts more apparent by the introduction of additional testimony.[98]

Question for Jury.—It is for the jury to decide whether or not the evidence presented by the defendant in an action against a carrier of passengers for personal injuries overcomes the presumption of negligence and shows that it exercised extraordinary diligence in the management, control and movement of its train.[99] When the company has introduced evidence which warrants the conclusion that it was not negligent but exercised due care and there is evidence to the contrary on behalf of the plaintiff, the question of negligence is upon one to be finally determined by the jury.[1]

§ 3282. Injury Caused by Defective Means of Transportation.—Proper Inspection by Carrier.—In an action against a street railway for

Ga. 370; Central R. Co. *v.* Sanders, 73 Ga. 513; Central R. Co. *v.* Brinson, 64 Ga. 475.

Ordinary care.—As railroad companies are bound to exercise extraordinary care and diligence for the safety of passengers, the presumption of negligence is not rebutted by the company's showing the exercise of only ordinary care and diligence. East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 22 S. E. 660.

93. Contributory negligence of passenger.—Gardner *v.* Waycross, etc., R. Co., 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435.

94. Georgia, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813.

95. Uncontradicted testimony.—Central, etc., R. Co. *v.* Holmes, 110 Ga. 282, 34 S. E. 846.

96. Evidence of circumstances of accident.—East Tennessee, etc., R. Co. *v.* Green, 95 Ga. 736, 22 S. E. 658.

97. Evidence introduced by plaintiff.—Murphy *v.* Atlanta, etc., R. Co., 89 Ga. 832, 15 S. E. 774.

This presumption may be rebutted by any facts stated by the plaintiff or his witnesses which in any way show that the carrier's servants exercised proper diligence or were not in fault and if this is made to appear by the plaintiff's testimony the law is sufficiently complied with. While very slight evidence may, in many instances, remove the presumption against the carrier, unless this is done by some testimony the presumption stands. Western, etc., Railroad *v.* Abbott, 74 Ga. 851.

98. Central R. Co. *v.* Brinson, 70 Ga. 207.

99. Question for jury.—Florida, etc., R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. 283.

1. Florida, etc., R. Co. *v.* Rudulph, 113 Ga. 143, 38 S. E. 328.

injuries to a passenger caused by the breaking of an appliance underneath the car, where defendant's evidence showed, not only that it purchased the appliance from a reputable dealer, but also that it had made daily inspection of the same by an expert employed for that purpose, and plaintiff offered no evidence in rebuttal, relying wholly on the doctrine of res ipsa loquitur, a verdict for the defendant was supported by the evidence.[2]

Obstruction on Track.—The presumption of negligence of a carrier arising from proof of injury to a passenger in consequence of the train colliding with an obstruction on the track is not overcome in every case by the carrier showing conclusively that the obstruction was one not under its control, because there are instances where a carrier is otherwise negligent, and its negligence has operated proximately to occasion the obstruction.[3]

Defective Bridge.—Where it is shown, in an action against a railroad company for injuries caused by a train breaking through a bridge, that the accident was caused by defective construction of the roadway at the point where the derailment occurred, or its train or cars, or by the management of the train, this would create a presumption of negligence, and cast upon defendant the burden of proving that it was not caused by any negligence in the construction or maintenance of its roadway, or management of the train, but it is not required to prove that nothing about its entire train and railway was defective.[4]

Car Door.—In an action for injuries to a passenger caused by a sudden closing of the car door on his hand, any presumption of negligence arising from the accident was overcome by the uncontradicted evidence that the catch provided for the car door was in good repair, and that the train was not operated at a dangerous rate of speed, and hence a verdict was properly directed in favor of defendant.[5]

Controller of Street Car.—Proof that the controller of a street car may explode without any negligence of the company meets by the prima facie case of negligence established by the proof of the explosion of the controller and resulting injury to a passenger.[6]

Expulsion of Boiler on Ship.—In an action to recover for injuries to a passenger resulting from the explosion of a boiler on defendant's ship, the fact that defendant fully complied with the act of congress with respect to safeguards for the protection of passengers did not clear it from a presumption of negligence arising from evidence tending to show that it did not employ the latest, best, and most improved method of bracing its boiler.[7]

Gang Hoist on Ferry Boat.—A prima facie case of negligence made out by the breaking of a ferry gang hoist is not conclusively rebutted by evidence that it had been at intervals inspected.[8]

Spark Arrester.—Instructions in an action for an injury to a passenger by a cinder were erroneous which placed on the defendant the burden of proving that it had selected, or exercised the highest degree of care to select, the best spark arrester in use.[9]

2. **Injury caused by defective means of transportation.**—Murray *v.* Pawtuxet Valley St. R. Co., 55 Atl. 491, 25 R. I. 209.

3. **Obstruction on track.**—Rice *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 374.

4. **Defective bridge.**—Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

5. **Car door.**—Goss *v.* Northern Pac. R. Co., 87 Pac. 149, 48 Ore. 439.

Any inference that a car door catch was defective, arising from the fact that the door closed on a passenger's hand, was overcome by the conductor's testimony that the catch was in perfect order. Christensen *v.* Oregon, etc., R. Co., 35 Utah 137, 99 Pac. 676, 20 L. R. A., N. S., 255, 18 Am. & Eng. Ann. Cas. 1159.

6. **Controller of street car.**—Gay *v.* Milwaukee Elect. R., etc., Co., 120 N. W. 283, 138 Wis. 348.

7. **Explosion of boiler on ship.**—Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

8. **Gang hoist on ferry boat.**—Bartnik *v.* Erie R. Co., 55 N. Y. S. 266, 36 App. Div. 246.

9. **Spark arrester.**—Missouri, etc., R. Co. *v.* Mitchell, 79 S. W. 94, 34 Tex. Civ. App. 394.

§ 3283. Injury Caused by Negligent Management of Conveyance.—Where the evidence showed that a passenger was injured by the running of a locomotive of the carrier, the carrier did not meet the prima facie case thereby made, under a statute providing that, in actions against railroads, proof of an injury inflicted by the running of locomotives shall be prima facie evidence of negligence, by evidence leaving it a matter of conjecture as to how the accident happened; but it must clearly show how the injury occurred, and show facts exonerating it from liability.[10]

Giving Emergency Signal for Stop.—The conductor of a car on which the plaintiff was riding gave a signal for an emergency stop, whereupon the motorman applied the brakes so suddenly that his hand slipped through the glass of the front door, some of which fell on plaintiff and injured him. The defendant did not show the reason for giving the signal. Since, without further explanation, the slipping of the motorman's hand from the brake was presumably negligent, there was no refutation of the presumption of negligence by the proof of the giving of the emergency signal, and, having failed to show the necessity therefor, the presumption that the defendant was negligent was unaffected.[11]

§ 3284. Injury Caused by Negligent Setting Down Passengers.—In an action by a passenger against a street railway for injuries alleged to have been received by the sudden and careless starting of a street car as the plaintiff was about to alight, the defendant is only required to furnish sufficient proof to rebut that produced by the plaintiff on this point, and is not required to establish its freedom from negligence by a preponderance of the evidence.[12]

§ 3285. Injury Caused by Derailment.—Though a presumption of negligence arises from the derailment of a street car, if it is met by evidence which makes it equally probable that the accident was not due to negligence on the defendant's part, in the absence of other evidence establishing the affirmative, the defendant is entitled to a verdict.[13] Where a railroad passenger is injured

10. Injury caused by negligent management of conveyance.—Easley *v.* Alabama, etc., R. Co., 96 Miss. 396, 50 So. 491.

Upon proof of injury to a passenger of a railroad company by the running of its locomotives, cars, or other machinery, or by any person in its employment, there is a presumption of the railroad company's negligence, under Civ. Code 1910, § 2780, providing that a railroad company shall be liable for damage to persons by the running of the locomotives, cars, or other machinery of such company, unless the company shall make it appear that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company; and as such section must be construed with § 2714, providing that a carrier of passengers is bound to extraordinary diligence to protect its passengers, but is not liable for injuries to the person after having used such diligence, so that the phrase "reasonable care and diligence," in § 2780, must be deemed to mean "extraordinary" care and diligence, the presumption of negligence is not rebuttable by a showing that the railroad company exercised only ordinary care and diligence. Doughitt *v.* Louisville, etc. R. Co, 71 S. E. 470, 136 Ga. 351.

11. Giving emergency signal for stop.—Brumberger *v.* Joline (App. Term), 125 N. Y. S. 519.

12. Injury caused by negligent setting down passengers.—Lincoln Tract. Co. *v.* Shepherd, 104 N. W. 882, 74 Neb. 369, affirmed on rehearing 107 N. W. 764.

13. Injury caused by derailment.—Chicago, etc., R. Co. *v.* Brandon, 95 Pac. 573, 77 Kan. 612; Omaha St. R. Co. *v.* Boesen, 105 N. W. 303, 74 Neb. 764, 4 L. R. A., N. S., 122.

It is incumbent on the carrier in an action for injury to a passenger from derailment of a train to repel by satisfactory proof every imputation of the slightest negligence. Sherman *v.* Southern Pac. Co., 111 Pac. 416, 33 Nev. 385, Ann. Cas. 1914A, 287.

Where a passenger was injured without his fault by derailment of a train, defendant must show, to rebut the presumption of negligence, that the accident resulted from circumstances against which human care and foresight could not guard. Reems *v.* New Orleans, etc., R. Co. 52 So. 681, 126 La. 511.

Where a passenger coach is thrown from the track a presumption of negligence arises against the railroad company, and it must show affirmatively, in order to escape liability, that it has taken all usual and practical precautions, applied to the careful management of passenger railways, to maintain its track, roadway, and appliances in a safe condition. Cleve-

by the derailment of a train at a place where the track and train are entirely under the control of the company, a presumption of negligence arises, and the company must show that at the time of the accident it was exercising the utmost care and foresight reasonably compatible with the prosecution of its business, in order to escape liability.[14]

By Preponderance of Evidence.—If, in an action to recover for personal injuries resulting from the derailment of defendant's car, the evidence of negligence aside from the derailment is equally balanced, the derailment sufficiently shows negligence entitling the plaintiff to recover.[15]

Unaccountable Cause.—Proof that the derailment occurred from some unaccountable cause is insufficient to overcome the presumption.[16] And the fact that the cause of the derailment of the tender wheels is unknown will not rebut the presumption of negligence arising from the application of the rule res ipsa loquitur.[17] But the jury is authorized to find that the inference of negligence from derailment of a train is rebutted by evidence that the train had run two hundred miles without anything to indicate any defect or weakness in any of its equipment, that the track at the place of the accident was in good condition, that the engine, the mail car, and the front trucks of the baggage car passed over the place in safety, and that the train was going only six or eight miles an hour; and this, though it is not shown what caused the accident.[18]

Freshly Broken Flange on Wheel.—When, after the submission of evidence which authorized the jury to determine that the plaintiff was injured by a derailment of the defendant's train of cars, the plaintiff rested her case on the presumption of negligence raised by the law, and the defendant introduced evidence showing that at the time of the derailment the train was being run at a reasonable rate of speed; that the track and roadbed were in first-class condition; that the cause of the derailment was a freshly-broken flange on one of the wheels of a car; that the wheel was properly made, and before being used was thoroughly tested at the manufactory, again tested before being placed under the car, and was inspected during the trip the day the accident occurred, and was apparently in perfect condition—and such evidence was not only uncontradicted, but was the only evidence introduced as to the cause of the derailment, the presumption was rebutted, and in the absence of proof of negligence a verdict for the plaintiff was not sustained by the evidence.[19]

Stones Thrown at Car.—The presumption of negligence which arises against a street railroad from an injury to a passenger, caused by the car's running off the track, is rebutted by evidence showing that stones were thrown at the car, and got under it and threw it off the track.[20]

Obstructions Placed on Track by Strikers.—A passenger on a street car was injured by derailment on a dark evening. There was evidence that at the time of the occurrence a strike was in progress among the carrier's employees,

land, etc., R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

Where a railroad passenger is injured by the derailment of a train at a place where the track and train are entirely under the control of the company, a presumption of negligence arises, and the company must show that at the time of the accident it was exercising the utmost care and foresight reasonably compatible with the prosecution of its business, in order to escape liability. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

14. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

15. **By preponderance of evidence.**—Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

16. **Unaccountable cause.**—Sloan *v.* Little Rock R., etc., Co., 89 Ark. 574, 117 S. W. 551.

17. Shaw *v.* Chicago, etc., R. Co., 173 Ill. App. 107.

18. Davis *v.* Galveston, etc., R. Co., 42 Tex. Civ. App. 55, 93 S. W. 222.

19. **Freshly broken flange on wheel.**—Florida, etc., R. Co. *v.* Rudulph, 38 S. E. 328, 113 Ga. 143.

20. **Stones thrown at car.**—Swigelsky *v.* Interurban St. R. Co., 91 N. Y. S. 350.

and that obstructions had been placed on the track at various points, and several witnesses testified that the derailment was accompanied by a jolt as if an obstruction had been run over. A spike was picked up from the track near the place of the accident, which had the appearence of having been run over, and it was also proved that the car running at its maximum speed could not have been derailed at that point by its speed. The evidence sufficiently rebutted the presumption of negligence arising from the happening of the accident.[21]

Passsenger Injured by Jumping from Car.—In a suit for injuries received by plaintiff in jumping from a derailed railroad car, the plaintiff establishes a prima facie case by showing that he was a passenger on said car and was injured in consequence of the derailment; and it then devolves upon the railroad company to show that such derailment was occasioned by unavoidable casualty, which could not be prevented by the exercise of the greatest skill and diligence, or by the act of a stranger which it could not anticipate, and that it was in no wise attributable to the negligent acts of its servants.[22]

Broken Rail.—In an action against a railroad company for injuries received by a passenger of a car which was thrown from the track and upset by the breaking of a rail, the burden of showing negligence on the part of the company was not shifted on plaintiff by proof that the rail was sufficient in size and free from defects; it being necessary, to shift the burden of proof, that defendant should further show that the rail was properly laid and spiked on sufficient crossties.[23]

Cyclone.—When it is shown that the derailment was caused by a cyclone, the presumption of negligence arising therefrom does not obtain, and the burden is on plaintiff to prove defendant's negligence.[24]

Testimony of Experts.—In an action for injuries from the derailment of the car in which plaintiff was a passenger, evidence of persons who examined the railroad track and car after the derailment that the track was all right, and that they could see nothing the matter with the car, was insufficient to rebut the presumption of the railroad company's negligence, arising from the derailment itself, especially where the persons making the examination were not shown to have been competent inspectors.[25]

§ 3286. Injury Caused by Collision.—When an injury results to a passenger from a collision of the trains of a company, a prima facie presumption of negligence arises against the company, and unless the company relieves itself from liability by showing that the injury did not result from its carelessness, or by showing contributory negligence upon the part of the passenger, judgment should be rendered against it.[26] In an action against a carrier for injuries to a passenger, the prima facie case of negligence made out by evidence of a collision between the train upon which the plaintiff was riding and another train owned and operated by the defendant may be overcome by evidence of the defendant that the accident could not have been avoided by the exercise of the highest practical care and diligence on its part, and it was error to instruct that such prima facie case must be overcome by clear and explicit proof.[27]

Preponderance of Evidence.—Though, where in an action against a railroad for injuries to a passenger in a collision between a passenger train and

21. **Obstructions placed on track by strikers.**—Cheetham *v.* Union R. Co., 58 Atl. 881, 26 R. I. 279.

22. **Passenger injured by jumping from car.**—Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654.

23. **Broken rail.**—Pittsburg, etc., R. Co. *v.* Williams, 74 Ind. 462.

24. **Cyclone.**—Galveston, etc., R. Co. *v.* Crier, 45 Tex. Civ. App. 434, 100 S. W. 1177.

25. **Testimony of experts.**—Houston, etc., R. Co. *v.* Lindsey, 51 Tex. Civ. App. 67, 110 S. W. 995.

26. **Injury caused by collision.**—Iron R. Co. *v.* Mowery, 36 O. St. 418, 38 Am. Rep. 597; Cincinnati St. R. Co. *v.* Kelsey, 9 O. C. C. 170, 6 O. C. D. 209; Cincinnati, etc., R. Co. *v.* Brown, 9 O. C. C. 198, 6 O. C. D. 225.

27. Pittsburgh, etc., R. Co. *v.* Higgs,

unprotected box cars on the main track, it devolves on defendant to explain the occurrence in such a way as to free itself from the imputation of negligence, yet, where it has attempted to do so, the court is not authorized to charge that the burden is on defendant to establish by a preponderance of the evidence its freedom from negligence.[28]

Collision Caused by Storm.—In an action against a street-railway company for injuries received by a passenger from a collision between defendant's cars, the bare fact that the collision was occasioned by the team attached to one of the cars running away through fright at a storm does not, of itself, imply that the accident was inevitable, nor is it alone sufficient to rebut plaintiff's prima facie case, or to cast upon him the burden of proving specific negligence or mismanagement.[29]

§ 3287. Injury Caused by Another Passenger.—The rule that the legal presumption of the carrier's negligence when a passenger is injured without fault of his own can only be rebutted by proof that the injury arose from an accident, which proper skill, foresight, and diligence could not prevent, applied, where one was injured by bottle glass thrown by one of two drunken men, who were fighting with each other without the conductor's interfering to terminate the affray.[30]

§§ 3288-3320. Questions for Court or Jury—§ 3288. Actions for Breach of Contract in General.—In an acton against a carrier of passengers where the evidence upon a question is conflicting, or is such that different minds might draw different conclusions therefrom, the queston is for the jury.[31] Where the testimony of the plaintiff that a railroad agent, in selling a ticket, had promised that a certain train would stop at the purchaser's point of destination is contradicted, not directly but inferentially, by the testimony of the agent, the issue should be left to the jury.[32] Where there is any evidence upon which a recovery for plaintiff might be based, it is proper to refuse a motion for nonsuit.[33] So in an action against a carrier for a tortious failure to carry a person for whom a third person had paid for a ticket, failure of the plaintiff to prove

76 N. E. 299, 165 Ind. 694, 4 L. R. A., N. S., 1081.

28. Preponderance of evidence.—Ft. Worth, etc., R. Co. *v.* Day, 50 Tex. Civ. App. 407, 111 S. W. 663.

29. Collision caused by storm.—Smith *v.* St. Paul City R. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

30. Injury caused by another passenger.—Pittsburg, etc., R. Co. *v.* Pillow, 76 Pa. 510, 18 Am. Rep. 424.

31. Questions for jury—Whether passenger had reasonable opportunity to alight.—Lamson *v.* Great Northern R. Co., 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A, 15.

Whether signals at flag station sufficient to attract attention of engineer.—Louisville, etc., R. Co. *v.* Moore (Ky.), 121 S. W. 666.

Whether delay due to wreck.—In an action for injuries to a passenger by delay causing plaintiff to take cold which settled in his kidneys and back, whether the delay was due to a wreck or to the blocking of the carrier's yards or to some other cause that could have been avoided by the exercise of ordinary care held for the jury. Southern R. Co. *v.* Miller (Ky.), 120 S. W. 278.

Whether conductor had reasonable time to take up tickets.—Evidence in an action by a passenger for being carried by her destination held to make the question whether the conductor had had a reasonable time after leaving the station in which to take up tickets a question for the jury. Louisville, etc., R. Co. *v.* Seale, 160 Ala. 584, 49 So. 323.

Presumption of negligence from long delay not so completely rebutted as to leave no question for jury.—Mulligan *v.* Southern Railway, 84 S. C. 171, 65 S. E. 1040.

32. International, etc., R. Co. *v.* Kilgo (Tex. Civ. App.), 71 S. W. 556.

33. Nonsuit properly refused.—In an action by a passenger to recover because of delay in the movement of a train, evidence that it was due to leave a station twenty minutes late, and did so leave, and after moving about one hundred yards returned to the station where it remained for ten hours, is sufficient to prevent a nonsuit, where no information was given the passengers as to the probable duration of the delay or the cause thereof. Miller *v.* Southern R. Co., 48 S. E. 99, 69 S. C. 116.

Where there is evidence that a passenger was delayed eight or ten hours, and

a contract of carriage did not render the denial of the motion for a nonsuit erroneous.[34] A passenger having missed an appointment by misinformation given by a carrier's ticket collector, is not barred from recovering damages, as a matter of law, because he might have taken a train on another road and reached his destination in time, but the question should be left to the jury.[35]

Particular Questions.—What is a reasonable time in which to deliver a passenger and his baggage,[36] and whether an intending passenger was subjected to discomfort, inconvenience, and expense in walking between stops because of the failure of a street car to stop for him,[37] are questions for the jury. In an action against a carrier for failure to stop at a station, and allow plaintiff to take passage, whether the station was one at which the company was accustomed to stop its trains is a question of fact for the jury.[38]

Negligence and Contributory Negligence.—Whether the carrier has been negligent in a particular case is generally a question for the jury.[39] Where, by reason of the negligence of the carrier, a passenger has been carried past his station[40] or has left the train before reaching his station,[41] the question whether

because thereof incurred an extra expense of $2.50, there was no error in refusing a nonsuit as to the cause of action for negligence. Taber *v.* Seaboard, etc., Railway, 84 S. C. 291, 66 S. E. 292, 19 Am. & Eng. Ann. Cas. 1132.

34. Failure to prove contract of carriage.—Mims *v.* Seaboard, etc., Railway, 48 S. E. 269, 69 S. C. 338.

35. Wilcox *v.* Southern Railway, 91 S. C. 71, 74 S. E. 122.

36. Reasonable time to deliver passenger.—Gilhooly *v.* New York, etc., Nav. Co. (N. Y.), 1 Daly 197.

37. Whether passenger subjected to discomfort, etc.—Northern Texas Tract. Co. *v.* Hooper (Tex. Civ. App.), 80 S. W. 113.

38. Whether station customary stopping place.—Ballard *v.* Cincinnati, etc., R. Co., 15 Ky. L. Rep. 703.

39. Whether carrier negligent.—Plaintiff, a passenger, on giving her ticket to the conductor, told him that she desired to alight at A. and that she was not acquainted with the stations along the road. Thereafter defendant's flagman asked plaintiff where she was going, told her that the car she was on did not go to A., and directed her at a junction to go into another car, which proved to be the wrong car, and plaintiff was compelled to leave the train and await another; the right car having left. Held, that whether defendant was negligent was for the jury. Southern R. Co. *v.* Wooley, 158 Ala. 447, 48 So. 369.

In an action against a carrier for carrying plaintiff beyond a flag station, her destination, whether the carrier's conductor was negligent in not ascertaining that there was a passenger for that station, was for the jury. Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

In an action by a passenger against a carrier for damages resulting from being carried past his station, where the circumstances are in dispute, the question of defendant's negligence is a mixed one of law and fact, and the jury should pass on what facts amount to negligence, and assess reasonable damages therefor. Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801.

Failure to assist passenger changing cars.—Where a passenger is an old woman, having the care of four children, three to nine years of age, one of whom is sick, and the passenger requests the assistance of the conductor in changing cars, it is a question for the jury whether failure to render such assistance is negligence. Atkinson *v.* Mercer, 75 S. E. 676, 11 Ga. App. 462.

Failure to notify passenger of arrival at destination.—If a passenger, when a train stops at a water tank, is informed that it is not her station but that the next stop will be, and her informant, an employee, tells her that he will notify her of the arrival of the train at the station, and fails to do so, the question whether he is guilty of negligence is for the jury. Missouri, etc., R. Co. *v.* Miller, 50 S. W. 168, 20 Tex. Civ. App. 570.

40. Contributory negligence of passenger carried past destination.—Whether a passenger fifteen years old, who, when carried past her station walked back to her station, and was thereby injured, acted as might be reasonably expected of one in her situation and at her age, so as to make the carrier liable for the injuries received, was a question for the jury. Chesapeake, etc., R. Co. *v.* Lynch, 89 S. W. 517, 28 Ky. L. Rep. 467.

Plaintiff and his wife were carried three and a half miles past their station to a place in which they were strangers. It was evening, and there was no returning train until the next morning. It was necessary for plaintiff to be at home that night, and he and his wife walked back to their home. The wife was not in good health, and the walk made her ill. Held, that the question of the wife's contributory negligence was for the jury. St. Louis, etc., R. Co. *v.* Franks, 52 Tex. Civ. App. 614, 114 S. W. 874.

41. Leaving train before reaching des-

he was guilty of contributory negligence affecting the liability of the carrier for injuries thereafter received is for the jury. In an action against a carrier for carrying plaintiff beyond her destination, a flag station, whether the plaintiff was negligent in not informing the conductor or flagman that she wished to get off there, was for the jury.[42]

Proximate Cause of Injury.—It is generally held that whether the injuries received by a passenger were the proximate result of the carrier's negligence is a question for the jury.[43] So in an action against a railroad company for willful failure to transport plaintiff to the destination called for by her ticket, whether damages received by plaintiff from a storm which overtook her after leaving defendant's depot were proximate or too remote was for the jury, depending on whether the storm was reasonably to be expected or extraordinary.[44] And in an action against a carrier for compelling plaintiff to leave its train some distance from the depot, and to walk along a track having an open culvert, into which plaintiff fell, receiving the injuries complained of, where there is some evidence tending to show that plaintiff fell into the culvert while attempting to help a companion out, it is error to refuse to submit such question to the jury.[45]

Authority of Carrier's Employee.—Where a railroad ticket sold by the agent of one company was recognized as valid for passage to some extent over the road of another company, the authority of the agent to sell the ticket is a question for the jury.[46] And where a passenger sued for misinformation given by a carrier's ticket collector, the conductor and collector having testified that it was their duty to give correct information when requested, the court could not say, as a matter of law, that the ticket collector was not acting within the scope of his authority.[47]

Reasonableness of Carrier's Regulation.—The reasonableness of a railway company's regulation restricting the right of passengers to carriage on certain trains is for the court.[48] But it has been held that whether a regulation of a transportation company operating a ferryboat that foot passengers shall not go upon the boat through the gate provided for vehicles is reasonable is a question for the jury.[49]

tination.—Where in an action for damages, because a train porter negligently called the wrong station and by reason thereof a passenger left the train before reaching her station, it appeared that the next train was not due until the next evening, and the passenger was a stranger in the little place at which she got off, and did not know the conditions as to hotels and boarding houses, but was dressed in winter wear, and wore a shoulder cape, making the trip by buggy was not negligence per se. St. Louis, etc., R. Co. *v.* Foster, 46 Tex. Civ. App. 194, 103 S. W. 194.

A passenger on defendant's train was negligently set down after dark before she had reached her destination. The night was dark and cold, but she secured a conveyance and drove five miles to her destination, arriving there at ten o'clock, and the cold and exposure made her sick. Held, that whether she was guilty of contributory negligence in thus continuing her journey, was for the jury. Pittsburgh, etc., R. Co. *v.* Klitch, 11 Ind. App. 290, 37 N. E. 560.

42. Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

43. Proximate cause of injury.—See post, "Proximate Cause of Injury," § 3319.

A passenger on defendant's train was negligently set down after dark before she had reached her destination. The night was dark and cold, but she secured a conveyance, and drove five miles to her destination, arriving there at ten o'clock, and the cold and exposure made her sick. Held, that whether her injuries were the proximate result of defendant's negligence, was for the jury. Pittsburgh, etc., R. Co. *v.* Klitch, 11 Ind. App. 290, 37 N. E. 560.

44. Pickens *v.* South Carolina, etc., R. Co., 32 S. E. 567, 54 S. C. 498.

45. Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

46. Authority of agent to sell ticket.—Alabama, etc., R. Co. *v.* Brady, 160 Ala. 615, 49 So. 351.

47. Authority to give information.—Wilcox *v.* Southern Railway, 74 S. E. 122, 91 S. C. 71.

48. Reasonableness of carrier's regulation.—Doherty *v.* Northern Pac. R. Co., 115 Pac. 401, 43 Mont. 294, 36 L. R. A., N. S., 1139.

49. Compton *v.* Van Volkenburgh, 34 N. J. L. 134, wherein the court said: "There is no doubt that the rule thus intimated is in opposition to recent American authorities. * * * But the rule thus in-

Boarding Places for Passengers.—How far a street railroad company can vary the place of stops for boarding passengers without a breach of duty is ordinarily a question of fact, to be determined by the surrounding circumstances.[50]

Questions as to Damages.—Where, in an action for the carriage of a passenger beyond his destination, there is any evidence tending to establish a right to recover, the amount to be awarded is for the jury and should not be withdrawn from its consideration.[51] Where a passenger was carried several hundred feet beyond her station, and in her efforts to reach the station, in the dark, injured herself and became wet, whether her injured feelings were connected with a bodily injury so as to entitle her to damages for such feelings was for the jury.[52] In determining whether the plaintiff is entitled to punitive damages, the question as to gross negligence[53] or willfulness or wantonness,[54] is for the jury. But where there is no evidence of wantonness or willfulness the defendant's motion for a nonsuit as to the cause of action for punitive damages should be granted.[55] Where a passenger bought a limited ticket, but missed the connecting train at a junction, and took the next train after the time limit had expired, there is sufficient evidence to go to the jury on the question of exemplary damages, where the conductor, after full explanation, collected fare on threats of expulsion;[56] and so is evidence that the conductor knew that a railroad agent had made a mistake in the limit of the ticket, and required the passenger to pay additional fare under threat of expulsion.[57]

dicated was explicity adopted and enforced in the Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215, and I think that decision is binding on this court."

50. Boarding places for passengers.—Christian *v.* Augusta, etc., R. Co., 87 S. C. 123, 69 S. E. 17.

51. Amount of damages.—Dalton *v.* Kansas, etc., R. Co., 96 Pac. 475, 78 Kan. 232, 17 L. R. A., N. S., 1226, 16 Am. & Eng. Ann. Cas. 185.

52. Damages for injured feelings.—Rawlings *v.* Wabash R. Co., 97 Mo. App. 511, 71 S. W. 535.

53. Punitive damages—Gross negligence.—Evidence in an action by a passenger against a carrier for putting him off at the wrong station held to present a question for the jury whether there was such gross negligence on the part of defendant as warranted punitive damages, and, if such damages were allowed, such a case as warranted damages for mental suffering. Davis *v.* Yazoo, etc., R. Co., 95 Miss. 540, 49 So. 179.

54. Willfulness or wantonness.—If a flagman knew that the car occupied by plaintiff was the proper car to convey her to her destination, and that another was the wrong car, and realized that his action in directing her to the wrong car would probably result in inconvenience and injury to plaintiff, wantonness might be fairly attributed to him, a purpose to injure not being an ingredient of wantonness, and the question of wantonness was for the jury. Southern R. Co. *v.* Wooley, 158 Ala. 447, 48 So. 369.

Misinformation by ticket collector.—In an action for damages to a passenger by a ticket collector's misinformation, whether the mistake was due to mere inadvertence or was a reckless and wanton disregard of plaintiff's rights, so as to justify punitive damages, held for the jury. Wilcox *v.* Southern Railway, 91 S. C. 71, 74 S. E. 122.

Failure to stop train.—If the engineer of a passenger train sees a signal to stop at a flag station, and understands it, and does not stop, and there is no reasonable explanation as to why he does not do so, it is a question for the jury whether his acts are characterized by malice, willfulness, or wantonness, justifying punitive damages. Yazoo, etc., R. Co. *v.* White, 33 So. 970, 82 Miss. 120.

Where, in an action against a carrier for failing to stop its train at a flag station, plaintiff's testimony showed that a signal to stop was given in the usual manner and as soon as the train came in sight, and the engineer testified that he was on the lookout for signals and that he would have seen the signal had it been given as testified to by plaintiff's witnesses, the question of whether the failure to stop the train was willful, reckless, or capricious, so as to authorize punitive damages, was for the jury. Burns *v.* Alabama, etc., R. Co., 93 Miss. 816, 47 So. 640.

55. Ussery *v.* Augusta-Aiken R. Co., 79 S. C. 209, 60 S. E. 527. See Mulligan *v.* Southern Railway, 84 S. C. 171, 65 S. E. 1040.

56. Myers *v.* Southern Railroad, 42 S. E. 598, 64 S. C. 514.

57. Chiles *v.* Southern R. Co., 48 S. E. 252, 69 S. C. 327.

§§ 3289-3292. Actions for Wrongful Ejection—§ 3289. In General.—Where the evidence in an action for wrongful ejection is conflicting on material points, or where the facts though undisputed, are such that different minds might reasonably differ as to the conclusions to be drawn therefrom, the question is for the jury.[58] It is reversible error to submit to the jury the ques-

58. Actions for Wrongful Ejection—Questions for jury.—Louisville, etc., R. Co. *v.* Perkins, 144 Ala. 325, 39 So. 305; Chicago Union Tract. Co. *v.* Brethauer, 223 Ill. 521, 79 N. E. 287, affirming 125 Ill. App. 204; Texas Mid. R. Co. *v.* Geraldon, 54 Tex. Civ. App. 71, 117 S. W. 1004.

Whether a passenger wrongfully ejected from a train sustained any injury to his health caused by his having to walk to his home a distance of six miles held, under the evidence, for the jury. Light *v.* Detroit, etc., R. Co., 130 N. W. 1124, 165 Mich. 433, 34 L. R. A., N. S., 282.

Whether passenger tendered fare before ejection commenced.—Powell *v.* St. Louis, etc., R. Co., 229 Mo. 246, 129 S. W. 963.

Whether failure to warn ejected passenger of danger negligence.—Anderson *v.* Seattle-Tacoma, etc., R. Co., 36 Wash. 387, 78 Pac. 1013, 104 Am. St. Rep. 962.

Whether exclusion of intoxicated person from railroad station excusable.—Adams *v.* Chicago Great Western R. Co., 156 Iowa 31, 135 N. W. 21.

Whether station agent caused plaintiff to be searched by officer for a pistol.—Texas Mid. R. Co. *v.* Geraldon, 54 Tex. Civ. App. 71, 117 S. W. 1004.

Whether passenger was ejected.—Southern Kansas R. Co. *v.* Wallace (Tex. Civ. App.), 152 S. W. 873.

Whether plaintiff ejected as claimed.—In an action against a railroad for injuries alleged to have been sustained by plaintiff by being thrown from one of defendant's trains by the conductor, without opportunity to exhibit his ticket, the evidence showed that the train was the last one running between the point at which he boarded it and his alleged destination on the day of the injury. When found where he said he fell from the train, he had in his pocket a ticket from the place where he boarded the train to his alleged destination, stamped as of the day of the injury, which stamp was placed there by the selling agent. Physicians testified that his injuries were such as could follow from a fall at the place where he said he fell. Plaintiff, being confronted with the conductor, testified that he thought he saw him on the train, but that, at any rate, the man who threw him off was of about the same appearance. The conductor testified that he did not see plaintiff on the night of the alleged injury, and that he had no trouble with any one. Two porters testified that they were in a position to have seen if there was any trouble as claimed, and that there was none. Held, that the question whether plaintiff was ejected from the train as claimed was for the jury. Texas, etc., R. Co. *v.* Tems (Tex. Civ. App.), 77 S. W. 230.

Whether conductor was justified in striking passenger after they had both fallen from the train held under the evidence for the jury. Lindsay *v.* Wabash R. Co., 141 Mich. 204, 104 N. W. 656.

Whether reasonable opportunity given to obtain ticket or permit.—Rivers *v.* Kansas City, etc., R. Co., 86 Miss. 571, 38 So. 508.

Plaintiff reached the station fifteen minutes before the train started. The train was then at the station, and the agent of the railroad was on the platform, engaged in receiving freight from it. Plaintiff applied to the agent for the necessary permit to ride on the freight, and was told he could have one as soon as the agent had time to make it out. None was furnished, and, after waiting until just as the train was moving, plaintiff stepped on board. The testimony of the agent as to whether he had time to issue the permit was evasive. Held, that whether a reasonable opportunity to obtain a permit was accorded plaintiff was for the jury. Reed *v.* Great Northern R. Co., 78 N. W. 974, 76 Minn. 163.

Custom of conductor to furnish permits.—Defendant was operating a freight train, which carried passengers on permits issued by station agents and conductors, and plaintiff was ejected, though he had a ticket, and asked the conductor for a permit. The plaintiff testified that he asked the station agent for a permit, and was told to get it from the conductor, which was denied by the agent. The company introduced a rule by which conductors were only allowed to give permits at stations where no tickets were sold. The agent had not been furnished with blank permits up to such time, and plaintiff's evidence showed that the conductors had been in the habit of giving permits. Held sufficient, in an action for wrongful ejection, to authorize a submission of an issue whether it was the custom for conductors to furnish permits to passengers after they got on the train. Houston, etc., R. Co. *v.* White (Tex. Civ. App.), 61 S. W. 436; Houston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 61 S. W. 440.

Whether plaintiff's resistance was to enhance damages.—Plaintiff, a passenger on a railroad, traveling on a mileage book which stated in plain letters that it was not good over a certain bridge, stated to the conductor when his mileage was taken up that he would not pay the fare

tion of the substantial violation of a provision in a street car transfer that it was good only at the intersection of issuing line where there was no dispute as to the fact that plaintiff boarded the car at a point substantially distant from the intersection, notwithstanding testimony of the plaintiff that she first waited at the intersection between five and ten minutes for a car, that none came, that she was just convalescent, that the day was windy and chilly, and that she walked away on the street of intersection and boarded the car at the distance of a block therefrom.[59]

Nonsuit or Direction of Verdict.—In a passenger's action for personal injuries by being ejected, a prayer requested by defendant for a directed verdict, based upon the theory that plaintiff directly contributed to his injury by his intoxication, was properly refused, where there was some evidence, though slight, that plaintiff was not intoxicated.[60] And in an action for wrongfully ejecting a passenger on her return trip, the plaintiff's evidence that the regular fare from her starting point to her destination was a certain amount, but that on the present occasion she bought a round-trip ticket for a less amount, is sufficient to show her right to a return passage, so as to justify the refusing of a motion for a nonsuit.[61] When it appears that upon a case made by the plaintiff's evidence, all taken as true, the defendant is not liable, and that, taking the evidence in its strongest light against the defendant, the plaintiff has presented no case upon which he is entitled to recover, the court may instruct the jury to return a verdict for the defendant.[62]

Plaintiff's Belief.—It is held that it is error to submit to the jury the ques-

of fifty cents charged for crossing over such bridge, and that he could afford to be put off the train if the company could stand it. He was not molested on that trip, but on his return, the next night, when the train was stopped at the bridge for the bridge conductor to collect tolls, the toll was demanded and refused, and the bridge conductor testified that he told plaintiff if he did not pay he would have to be put off. He said, "Why don't you do it?" The conductor then said, "If you want me to take hold of you, which seems evident, I can do that," and then laid his hand on plaintiff's shoulder. He said, "That is all I want," and paid the toll, taking a receipt. Held, that the evidence was sufficient to justify submitting to the jury the question whether plaintiff's resistance until the assault was made was for the purpose of enhancing his damages. Patterson *v.* Southern Pac. Co., 66 S. W. 308, 28 Tex. Civ. App. 67.

Nature of contract of carriage.—Plaintiff, whose ejectment from defendant's train was unlawful, if his contract entitled him to ride on such train, produced as proof of the contract the information given him by defendant's agent who sold the ticket which the conductor refused to honor, the testimony of other commuters as to their customary use of similar tickets, and an admission by defendant that it sold such tickets. A bulletin of the company declaring how such tickets might be used was also put in evidence. The language of the ticket was inconclusive on the point at issue. Held, that the submission of all these circumstances to the jury on the question what was the contract between the railroad company and the plaintiff was proper. Wood *v.* Delaware, etc., R. Co., 63 Atl. 867, 73 N. J. L. 357.

Whether plaintiff had notice that round trip tickets were required for passage on excursion train.—Kirkland *v.* Charleston, etc., R. Co., 79 S. C. 273, 60 S. E. 668, 15 L. R. A., N. S., 425.

59. Hanley *v.* Brooklyn Heights R. Co., 96 N. Y. S. 249, 110 App. Div. 429.

60. Nonsuit properly refused.—Maryland, etc., R. Co. *v.* Tucker, 115 Md. 43, 80 Atl. 688.

61. Daniels *v.* Florida, etc., R. Co., 39 S. E. 762, 62 S. C. 1.

62. Direction of verdict.—Roberts *v.* Smith, 5 Ariz. 368, 52 Pac. 1120.

Plaintiff boarded a train made up of two freight cars, two empty coaches, and the superintendent's car, at a flag station, where it had slacked up on his signal, but not stopped. Not having been able to purchase a ticket because the station was closed, he tendered his fare to a conductor while on the platform, and before he had entered the coach, when, by order of the superintendent of the road, he was told to get off the train, and he did so after it had stopped and his money had been returned. It appeared that the train was a special freight, and no person had authority to permit passengers to be carried thereon on that day without permission of the superintendent. It was not shown that plaintiff suffered any damages. Held, that the giving of a peremptory charge for defendant was not error. Roberts *v.* Smith, 52 Pac. 1120, 5 Ariz. 368.

tion whether, from the evidence and from the reading of the contract on the back of a railroad ticket, the jury find that plaintiff believed he had a right to use the ticket.[63]

Misconduct Justifying Ejection.—It is held that in an action against a railroad for expelling a passenger, it is error to submit to the jury the question as to what, and how much, misconduct of the passenger would justify his expulsion, since it is for the court to tell the jury what facts disclosed by the proof would constitute such a justification, and it is for the jury to determine whether such facts were established by the proof.[64]

Whether Reasonable Time Given to Produce Ticket or Pay Fare.—Whether a passenger was given a reasonable time in which to produce his ticket or pay his fare is ordinarily a question of fact for the jury.[65]

Authority of Carrier's Employee.—Ordinarily in an action for being ejected the question whether the carrier's employee was acting within the scope of his employment is for the jury to determine.[66]

Kind of Ticket Purchased.—In an action against a carrier by a passenger for wrongful ejection, it appearing that plaintiff has lost her ticket, and defendant producing secondary evidence of its contents, consisting of the testimony of the agent as to what sort of tickets were sold for the excursion in question, it is proper to submit to the jury the question as to the kind of ticket plaintiff purchased.[67]

Whether Ticket Gave Right to Transportation on Certain Train.—Where, in an action against a carrier for wrongful ejection, plaintiff's ticket as well as the railroad company's rules affecting it were in evidence, the legal effect of such written testimony and whether plaintiff was entitled to ride on a given train was for the court.[68]

63. Plaintiff's belief.—Spiess *v.* Erie R. Co., 58 Atl. 116, 71 N. J. L. 90.

64. Misconduct justifying ejection.—Baltimore, etc., R. Co. *v.* Kirby, 88 Md. 409, 41 Atl. 777.

65. Whether reasonable time given to produce ticket or pay fare.—Seaboard, etc., Railway *v.* Scarborough, 52 Fla. 425, 42 So. 706.

What would be a reasonable time within which a passenger should produce and tender the extra fare demanded on a train where he is riding without a ticket is properly a question of fact to be submitted to the jury. Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308.

66. Authority of carrier's employee.—A conductor shoved from the platform of a street car a man who had paid his fare, but who was noisy and abusive. In a suit against the company, held, that the case was properly submitted to the jury, the facts being controverted as to whether the conduct of the conductor was malicious, and not within the scope of his authority. Flynn *v.* Central Park R. Co., 49 N. Y. Super. Ct. 81.

It is for the jury to determine whether a railroad ticket agent, who expels one intending to become a passenger from the station, was acting within the scope of his employment, so as to render his employer liable for injuries inflicted thereby on the passenger. McKernan *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 354.

There being no express agent at his destination, after arriving there the passenger went into the express car to get goods billed to him. The train started, but was stopped on the conductor's discovering him in the car, and he was then told to get out because he was delaying the train. This he refused to do unless he could get his express. The conductor then started the train, and the passenger attempted to get out, but, finding that the car had passed the station plaform, he tried to withdraw into the car, when he was seized by the conductor, who was on the ground, and pulled out. Held, that whether the conductor was acting within the scope of his duties, he having no authority to eject persons in the express car without right, was for the jury. Fremont, etc., R. Co. *v.* Root, 69 N. W. 397, 49 Neb. 900.

Whether the first assault upon one who was ejected from a railroad train was begun by the railroad company's servants while acting within the scope of their employment should be submitted to the jury. McDonald *v.* St. Louis, etc., R. Co. (Mo. App.), 146 S. W. 83.

67. Kind of ticket purchased.—Daniels *v.* Florida, etc., R. Co., 39 S. E. 762, 62 S. C. 1.

68. Whether ticket gave right to transportation on certain train.—Chicago, etc., R. Co. *v.* Carroll (Tex. Civ. App.), 151 S. W. 1116.

The reasonableness of a provision in a transfer ticket that it is good only at intersection of issuing line is a question of law.[69]

Construction of Contract for Carriage.—Where a firm contracted with a railway company in consideration of a ticket entitling either one of the firm to travel on the company's passenger trains, and the company issued to the firm an annual pass, on expiration of which the firm applied for and procured a renewal, but on the expiration of the latter did not apply for another renewal, the question whether it was the company's duty to issue a renewal without application is for the jury to determine in accordance with a practical construction put upon the contract by the parties themselves.[70]

As to Care Exercised by Plaintiff.—Where a passenger, who was ejected from a railway train, exercised the required care to ascertain whether he was on the right train, or in the proper car of the train, to reach his destination, is generally a question of fact.[71] As is also the question whether he used the proper care after the ejection.[72] Whether an aged female passenger, on being ejected from a train, was guilty of contributory negligence in disembarking at a place designed by the carrier's employees, is for the jury.[73]

Proximate Cause of Injury.—Whether the ejection of plaintiff was the proximate cause of injuries arising on his continuation of the journey by vehicle is ordinarily a question for the jury.[74]

Right to Punitive Damages.—Where, in an action for wrongful ejection, malice and wilfulness authorizing the award of punitive damages may be inferred from the evidence, it is the province of the jury to determine such question.[75]

69. Reasonableness of provision in transfer.—Hanley *v.* Brooklyn Heights R. Co., 96 N. Y. S. 249, 110 App. Div. 429.

70. Construction of contract for carriage.—Knopf *v.* Richmond, etc., R. Co., 85 Va. 769, 8 S. E. 787.

71. As to care exercised by plaintiff.—Spirk *v.* Chicago, etc., R. Co., 57 Neb. 565, 78 N. W. 272.

Examination of ticket by passenger.—It is held that whether due diligence in the effect to get on the right train requires the passenger to examine his ticket is ordinarily a question for the jury. Levan *v.* Atlantic, etc., R. Co., 86 S. C. 514, 68 S. E. 77.

72. Care used after ejection.—Tilburg *v.* Northern Cent. R. Co., 217 Pa. 618, 66 Atl. 846, 12 L. R. A., N. S., 359.

Illustrations.—Whether a passenger wrongfully ejected from a train acted as a reasonably cautious person in going back to the station held for the jury. Clare *v.* Northwestern Pac. R. Co. (Cal. App.), 131 Pac. 323.

Whether a passenger, who, being put off the train at a station other than hers, walked the rest of the night in the rain to her station, was justified in so doing, so as to be entitled to recover, as part of her damages for her resulting sickness, is a question for the jury; she testifying that she was without money to pay for hotel accommodations or for transportation, and knew no one in the place. Drew *v.* Wabash R. Co., 129 Mo. App. 459, 107 S. W. 478.

Evidence that when passengers, a woman and young child, were ejected at W. from a train for S. by way of C., having asked defendant's agent for a ticket for S. by way of C., and been furnished with one for S. by way of H., the next train for S. by way of H. would not arrive for seven or eight hours, that it was a cold winter day, that the waiting room was unheated, and that they were without money to procure accommodations, is sufficient to go to the jury on the question of a carriage trip back to the initial station taken by them, having been a necessity forced on them by defendant's breach of duty, and so prevents it being said as matter of law that their duty to minimize the damage required them to remain at W., and obtain accommodations there till arrival of such next train. Levan *v.* Atlantic, etc., R. Co., 68 S. E. 770, 86 S. C. 514.

73. Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

74. Proximate cause of injury.—Chicago, etc., R. Co. *v.* Spirk, 70 N. W. 926, 51 Neb. 167.

75. Right to punitive damages.—Short *v.* St. Louis, etc., R. Co., 150 Mo. App. 359, 130 S. W. 488; Norman *v.* Southern R. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809; Maryland, etc., R. Co. *v.* Tucker, 115 Md. 43, 80 Atl. 688.

Illustration.—Where, in an action for ejection of a passenger from a street car for alleged nonpayment of fare, plaintiff's evidence showed that though he offered no resistance to being ejected from the car except by catching hold of the hand rails to prevent himself from being thrown off, and that the conductor used excessive

§ 3290. Whether Plaintiff Was Passenger.—In an action for wrongful ejection the question whether the plaintiff was a passenger is one for the jury to determine where the evidence is conflicting,[76] or where the question depends upon the inference to be drawn from the testimony.[77] If there be no testimony from which the inference can be drawn that the plaintiff was a passenger, then an order of nonsuit would be proper.[78]

force, struck plaintiff, and stamped on his feet, it was proper to submit the question of punitive damages to the jury. Madigan *v.* St. Louis Trans. Co., 93 S. W. 316, 117 Mo. App. 118.

Plaintiff, who was rightfully a passenger on defendant's train, was wrongfully ejected therefrom at night in the country. Plaintiff testified that the conductor and brakeman took hold of him and forcibly ejected him, in the presence of other passengers, and that the conductor was rude, stern, harsh, and humiliating in his demeanor towards plaintiff. Held, that such facts were sufficient to justify the submission of the issue of plaintiff's right to punitive damages. Parrott *v.* Atlantic, etc., R. Co., 53 S. E. 432, 140 N. C. 546.

Where, in an action for wrongful assault in ejecting a passenger from a street car for nonpayment of fare, it appeared the conductor was notified by plaintiff and his companion that he had paid his fare, but the conductor, notwithstanding this fact, made an unnecessary assault on plaintiff, striking him several times in the face, and causing blood to flow from his nose, and bruising and scratching his face, and that defendant ratified the acts of the conductor, the evidence justified the submission of plaintiff's right to recover exemplary damages to the jury. Denison, etc., R. Co. *v.* Randell, 69 S. W. 1013, 29 Tex. Civ. App. 460.

76. Whether plaintiff was passenger.—Hogner *v.* Boston Elev. R. Co., 198 Mass. 260, 84 N. E. 464, 15 L. R. A., N. S., 960; Meyer *v.* Second Ave. R. Co., 21 N. Y. Super. Ct. 305.

77. Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303, citing Littlejohn *v.* Richmond, etc., R. Co., 49 S. C. 12, 26 S. E. 967; Missouri, etc., R. Co. *v.* Brown (Tex. Civ. App.), 156 S. W. 519.

Good faith of plaintiff.—"If plaintiff entered the car in good faith, honestly believing in his ticket, he was a passenger. * * * The question of his good faith, of course, is for the jury." Short *v.* St. Louis, etc., R. Co., 150 Mo. App. 359, 130 S. W. 488. See Powell *v.* St. Louis, etc., R. Co., 229 Mo. 246, 129 S. W. 963.

Where defendant railroad by mistake advertised that round trip tickets would be for sale at a reduced rate at a station upon its line which in fact was merely a flag station, and there was evidence that plaintiff knew these facts, and on boarding a train refused to pay the fare to the next station at which a regular ticket could be procured, tendering to the conductor the round trip rate advertised, it was proper, in an action by plaintiff to recover for being ejected from the train, to submit to the jury the issue of plaintiff's good faith. Cluck *v.* Houston, etc., R. Co., 46 Tex. Civ. App. 112, 101 S. W. 1021.

Nonsuit erroneous.—The refusal of a conductor in charge of a passenger train to accept a ticket offered for passage, and his subsequent refunding of the fare collected in lieu thereof, and accepting and punching the ticket, saying that he had ejected the person offering the ticket from the train as a joke, and the acceptance and retention of it by a second conductor, the only objection made to the ticket being that it was a "scalper's" ticket, furnishes some evidence that the person offering it was entitled to the rights of a passenger, and that objection to the ticket, if any, had been waived, and therefore it was error to nonsuit such person in an action by him for wrongful ejection. Iseman *v.* South Carolina, etc., R. Co., 30 S. E. 488, 52 S. E. 566.

Illustrations.—One having a ticket good on the day of sale only boarded a train shortly after midnight on such day, and, on being told that he could not ride on such ticket, offered to pay the difference between the full fare and the redemption value of his ticket. The conductor refused, in accordance with a rule which the passenger did not know of, and put him off at a way station, which was not lighted, and plaintiff was injured by a train passing on an adjacent track. Held, that the case should have been submitted to the jury to determine whether plaintiff was a passenger or a trespasser, and whether the company was negligent. Arnold *v.* Pennsylvania R. Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542.

Where one having a ticket entitling him to ride as a passenger on a train boarded said train at an unusual time and place, and while it was in motion, and on a portion thereof where passengers were not ordinarily received, but with the intention of becoming a passenger, and, being ordered off by an employee of the railway company, jumped off the train while it was still in motion, and was thereby injured, it was for the jury to say whether he was a trespasser. Martin *v.* Southern R. Co., 28 S. E. 303, 51 S. C. 150.

78. Where nonsuit proper.—Martin *v.* Southern R. Co., 51 S. C. 150, 28 S. E. 303.

§ 3291. Questions as to Carrier's Regulations.—The reasonableness of a given rule or regulation adopted by a carrier of passengers is, in an action for ejection, a question for the court.[79] Thus, it has been held that the reasonableness of regulations requiring passengers to surrender their tickets without receiving a check in return,[80] requiring passengers for way stations to surrender their tickets immediately after leaving the principal or regular stopping place nearest their destination,[81] regulating excess rates and rebate checks,[82] fixing the maximum amount for which change will be made,[83] or forbidding riding on the platform,[84] is for the determination of the court. Where there is no evidence that a regulation requiring extra fare of those riding in a chair car is not lawful, public, uniform, and reasonable, it is not error to refuse to submit to the jury the question whether it possesses those qualities.[85] Whether a regulation of a railroad company which excluded a woman from a car set apart for ladies merely on account of color, the facts being undisputed, was a reasonable one, was a question of law to be determined by the court, and in submitting it as a question of fact to the jury the court committed error.[86]

Application of Regulation to Particular Case.—Where a regulation requires the payment of additional fare for packages too large to be carried on a passenger's lap without incommoding others, a package may be so large as to require the conclusion that it is within the purview of the regulation, and in such case the court might as a matter of law so determine; but when it does not necessarily so appear the question becomes one of fact for the jury to determine.[87] The court should charge, instead of leaving it for the determination of the jury, that a passenger carrying in his hands two rifles, with bayonets attached, besides a valise, may be excluded from a street car by the conductor, he using no unnecessary force, under a rule of the company that passengers shall not be permitted to take into the cars dangerous articles.[88]

§ 3292. Place and Manner of Ejection.—Place of Ejection.—Where the evidence is conflicting as to where a passenger was ejected, the question is for the jury.[89] It is generally a question for the jury as to whether the car-

79. Reasonableness of regulations.—Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 44 So. 960, 13 L. R. A., N. S., 445.

80. Regulations as to surrender of tickets.—Illinois Cent. R. Co. *v.* Whitmore, 43 Ill. 420, 92 Am. Dec. 138, holding that testimony on such regulation is admissible.

81. Vedder *v.* Fellows, 20 N. Y. 126.

82. Excess rates and rebate checks.—Weber *v.* Southern R. Co., 43 S. E. 888, 65 S. C. 356.

83. Regulation as to making change.—Burge *v.* Georgia R., etc., Co., 133 Ga. 423, 65 S. E. 879, 18 Am. & Eng. Ann. Cas. 42.

84. Forbidding riding on platform.—Montgomery *v.* Buffalo R. Co., 165 N. Y. 139, 58 N. E. 770, affirming 48 N. Y. S. 849, 24 App. Div. 454, wherein it was held that a conductor is justified in enforcing the rule against a passenger who stated that he was suffering from nausea, and might have to relieve himself by vomiting; and that it was error to leave the question to the jury.

85. Extra fare for riding in chair car.—Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740.

86. Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

87. Application of regulation to particular case.—Morris *v.* Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097, holding that it is for the jury to determine whether two parcels, twenty by twenty-four inches in size, are within the purview of such a regulation.

88. Dowd *v.* Albany Railway, 62 N. Y. S. 179, 47 App. Div. 202.

89. Place of ejection.—The conductor and trainmen testified that plaintiff was put off the train at a certain junction, and one of plaintiff's witnesses testified that he did not know where plaintiff was put off, but that it was at the first stop, which was usually at the junction; and another that he thought plaintiff was put off at the first stop; that the train stopped at the junction, but that he saw no lights, which was his only reason for thinking that plaintiff was not ejected at the junction. Two other witnesses testified that plaintiff was put off at a street corner some blocks from the junction, and that he came to the place where they were standing near by, and spoke to them. Held, sufficient to make the place where plaintiff was put off a disputed question for the jury. Gaulker *v.* Detroit, etc., R. Co., 90 N. W. 660, 130 Mich. 666.

rier exercised reasonable care in expelling a passenger at a certain place.[90] Where a passenger, who offered an invalid ticket, was permitted to ride past several stations before he was ejected, and he was put off at a place remote from shelter, and in a storm, the jury might consider those facts in determining whether the conductor selected such place intentionally.[91]

Manner of Ejection.—The propriety of the manner of ejection is usually a question for the jury,[92] as whether excessive force was used.[93] Whether the force used was wanton or willful, is also a question for the jury.[94] Where the

90. Whether care exercised in selecting place of ejection.—Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 804.

Illustrations.—Whether a railroad company is liable for ejecting a female passenger, who can not pay fare, on a dark, rainy night, at a point in a swamp several miles from a station where shelter could be obtained, should be left to the jury. Jackson *v.* Alabama, etc., R. Co., 25 So. 353, 76 Miss. 703.

Plaintiff, who was ejected from defendant's train at a station, was directed by the conductor to get down on the side nearest the station, where it was dark, and where he was compelled to cross another track to get to the station. In an action to recover for injuries received by plaintiff being struck by a train, due on the track at the time he was ejected, held, that the question whether defendant exercised due care in ejecting plaintiff was for the jury, notwithstanding plaintiff may have been a trespasser. Arnold *v.* Pennsylvania R. Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542.

The safe character of the place at which a passenger was ejected at night was for the jury, where plaintiff testified that on leaving the car she was compelled to wade through mud and weeds, and the evidence for defendant tended to show that there were sidewalks in the vicinity, which she could have used. Light *v.* Harrisburg, etc., R. Co., 4 Pa. Super. Ct. 427.

In an action to recover for the death of a passenger, expelled from a train at a flag station and on a stormy night, for failure to produce his ticket, where he was afterwards found dead, apparently having been killed by a locomotive, whether the servants of the carrier were guilty of negligence was a question for the jury. Tilburg *v.* Northern Cent. R. Co., 217 Pa. 618, 66 Atl. 846, 12 L. R. A., N. S., 359.

Intoxicated passenger.—Plaintiff's intestate, on a cold night in winter and when badly intoxicated, boarded an interurban car on defendant's electric line. The conductor collected his fare, but afterwards ejected him at a point three-quarters of a mile from any shelter and where the snow was two and one-half feet deep, and he was struck and killed by the returning car. Held, in an action to recover for his death, that, whether or not defendant had the abstract legal right to eject him, it was liable if it failed to exercise reasonable care for his safety in doing so, in view of his known condition, which was a question for the jury. Donovan *v.* Greenfield, etc., St. R. Co., 183 Fed. 526, 106 C. C. A. 72.

Where the proofs would have justified findings that decedent, when ejected from defendant's trolley car, was so drunk as to be unable to stand without assistance, and that he was put off in the nighttime, where the snow was banked on either side, twenty yards from a shelter shed, the question whether reasonable care was exercised is for the jury. McCoy *v.* Millville Tract. Co., 85 Atl. 358, 83 N. J. L. 508.

91. Vankirk *v.* Pennsylvania R. Co., 76 Pa. 66, 18 Am. Rep. 404.

92. Propriety of manner of ejection.—Gulf, etc., R. Co. *v.* Kuenhle, 4 Texas App. Civ. Cas., § 249, 16 S. W. 177.

93. Whether excessive force used.—*Illinois.*—Pennsylvania R. Co. *v.* Connell, 26 Ill. App. 594.

Maryland.—Maryland, etc., R. Co. *v.* Tucker, 115 Md. 43, 80 Atl. 688.

Minnesota.—Willard *v.* St. Paul City R. Co., 116 Minn. 183, 133 N. W. 465.

Missouri.—Randell *v.* Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493; Glover *v.* Atchison, etc., R. Co., 129 Mo. App. 563, 108 S. W. 105.

Virginia.—Virginia, etc., R. Co. *v.* Hill, 54 S. E. 872, 105 Va. 729, 6 L. R. A., N. S., 899.

Where, in an action for the ejection of a passenger from an electric car after he had become a trespasser, there was evidence that more force was used than was necessary, and a willful and unprovoked assault had been committed, the weight of such testimony was for the jury. Mills *v.* Seattle, etc., R. Co., 96 Pac. 520, 50 Wash. 20, 19 L. R. A., N. S., 704.

It is a question of fact for the jury whether blows were struck in the exercise of justifiable force to effect an expulsion and overcome force with which the passenger was resisting it. Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

94. Whether force wanton or wilful.—There was evidence that the conductor told the passenger to pay his fare or he would "bounce" him from the train; that, assisted by the brakeman, he pulled him rather violently to the door of the car, in pushing him through which the arm of the passenger was hurt; that when the

conductor ordered a passenger to leave the car, and put his hand on his arm, and the passenger, with the assistance of the conductor and a friend, left the car, it was a question for the jury whether the conductor's act showed a disposition to use force to remove the passenger by which he was put in fear.[95] In an action for maliciously ejecting the plaintiff from defendant's car, where the evidence is conflicting, the question whether the plaintiff was pushed off the car or dropped off, is one for the jury to determine.[96]

Ejection from Moving Train or Car.—Whether it is negligence to eject a person from a moving train or car, especially where it is moving very slowly, is a question for the jury, to be determined from the rate of speed as well as the other circumstances.[97] But to attempt to eject a person when a train is under full headway would unquestionably be deemed gross carelessness and a court would be fully warranted in so declaring it.[98] The removal of a passenger, for alleged misconduct, from the ladies' car to another, by officers of the train, while the train is moving twenty miles an hour, is not negligent or wrongful per se, but a question to be left to the jury under all the facts of the case.[99]

§§ 3293-3320. Actions for Personal Injuries—§ 3293. In General.—What Constitutes Negligence.—Negligence is a mixed question of law and fact.[1] The court declares what is negligence, and the jury find the facts in the particular case, and report to the court what such facts show upon the question of negligence, viewed in the light of what the court has declared negligence to be.[2] What is and what is not negligence is always a question for the

latter in going down the steps, which were icy, caught hold of the railing, the brakeman broke his hold; and that as a result of such action the passenger received considerable injuries. Held, that a finding of the jury that the force used in ejecting the passenger was wilful or wanton would not be disturbed. Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89.

Defendant had honored a passenger's ticket, which had expired, for a distance of nearly 500 miles, until the train arrived at B., where a change of conductors was made. The conductor refused to accept the ticket, and demanded the passenger's fare, which she was unable to pay. The conductor permitted her to ride past a number of stations, when, without notifying her of his intention, he procured a negro policeman, of extraordinary stature and strength, armed with a club, and directed him to eject the passenger, which he did with violence. Held, that whether such acts were wanton and willful, were for the jury. Randell *v.* Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

95. Watson *v.* Oswego St. R. Co., 7 Misc. Rep. 562, 28 N. Y. S. 84, 58 N. Y. St. Rep. 356.

96. Meyer *v.* Second Ave. R. Co., 21 N. Y. Super. Ct. 305.

97. Ejection from moving train or car.—Southern Kansas R. Co. *v.* Sanford, 45 Kan. 372, 25 Pac. 891, 11 L. R. A. 432; Murphy *v.* Union R. Co., 118 Mass. 228, cited in Healey *v.* City Pass. R. Co., 28 O. St. 23.

In an action for negligence in expelling the plaintiff from the defendant's car, whereby he was run over and injured, it is error in the court to instruct the jury that if they believe the defendant's agent was about to expel the plaintiff he should first have stopped the cars, for such an instruction withdraws the whole question of negligence from the jury. The court can not single out an isolated fact, and instruct that it amounts to negligence as matter of law. Meyer *v.* Pacific R. Co., 40 Mo. 151.

Intoxicated passenger.—Whether it is due care for the conductor of a horse car to attempt to remove an intoxicated passenger while the car is in motion is a question for the jury. Murphy *v.* Union R. Co., 118 Mass. 228.

98. Meyer *v.* Pacific R. Co., 40 Mo. 151.

99. Marquette *v.* Chicago, etc., R. Co., 33 Iowa 562.

1. What constitutes negligence.—McMurtray *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401; Zemp *v.* Wilmington, etc., R. Co. (S. C.), 9 Rich. L. 84, 64 Am. Dec 763.

"Negligence, is not in all cases, a pure question of fact for the jury, but is often mixed up with principles of law, so that negligence becomes a conclusion of law rather than of fact." Derwort *v.* Loomer, 21 Conn. 245.

2. McMurtray *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401; Zemp *v.* Wilmington, etc., R. Co. (S. C.), 9 Rich. L. 84, 64 Am. Dec. 763.

Whether a carrier has exercised the care required of him by law is a question for the jury to decide upon the facts, and an instruction that the carrier owes to a passenger the greatest care to save him from harm, and whether the carrier has exercised the degree of care, depends

jury when the measure of duty is ordinary and reasonable care. In such cases the standard is not fixed but variable. And when the standard shifts with the circumstances of the case, it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with.[3] But when the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court. And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as a matter of law.[4] So it is error, requiring the grant of a new trial, for the court to charge the jury that any given state of facts will constitute negligence, unless such facts are by statute declared to constitute negligence.[5] Whether railroad employees were negligent in not going to the assistance of a passenger whose clothes caught fire from alcohol spilled by a fellow passenger is a question for the jury.[6] And where the conductor of a freight train while riding in a caboose discovers that the car is on fire and announces the fact in an excited manner, whether his conduct was such as naturally to lead the passengers in the caboose to suppose that they were in a place of danger and to seek safety on the platform is for the jury.[7]

Determination of Existence of Negligence.—In an action by a passenger against a carrier for personal injuries, the question of negligence is one of law, for the court, where the facts are such that all reasonable men must draw the same inference from them, and when the conclusion follows, as a matter of law, that no recovery can be had on any view of the evidence.[8] So if there is no evidence that the injury was due to the negligence of the carrier, it is proper to direct a verdict for the defendant,[9] sustain a demurrer to the evidence,[10]

upon the circumstances, and on the jury's conception of what was the highest degree of care, and whether it was exercised, is not erroneous, as leaving the jury to determine for themselves what was in fact care. Carroll *v.* Charleston, etc., R. Co., 43 S. E. 870, 65 S. C. 378.

In an action for injuries received while getting off defendant's street car at a certain building, the conductor not having been notified that plaintiff wished to alight at that point, which was not a regular stopping place, the car having stopped there only for the purpose of throwing a switch, a charge that if the conductor failed to exercise such care as a very cautious, etc., person would have exercised under like circumstances to see that no one attempted to alight from the car when it started, such failure would be negligence, was erroneous, as stating, in effect, that such was the conductor's duty as a cautious person, instead of leaving that question for the jury. Rapid Transit R. Co. *v.* Strong (Tex. Civ. App.), 108 S. W. 394.

It is a question for the jury whether or not it is negligence to lock the door of the privy on a railroad car, leaving no person in attendance to unlock it, and stopping the car over a cut twenty feet in depth without giving notice to the passengers of the danger to which they would be exposed if they attempted to leave the car. Wood *v.* Georgia R., etc., Co., 84 Ga. 363, 10 S. E. 967.

3. **Where measure of duty ordinary care.**—West Chester, etc., R. Co. *v.* McElwee, 67 Pa. 311.

4. **Where measure of duty defined by law.**—West Chester, etc., R. Co. *v.* McElwee, 67 Pa. 311.

5. Central, etc., R. Co. *v.* McKinney, 116 Ga. 13, 42 S. E. 229; Augusta R., etc., Co. *v.* Smith, 121 Ga. 29, 48 S. E. 681; Atlantic, etc., R. Co. *v.* Bryant, 110 Ga. 247, 34 S. E. 350. See Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713, affirming 68 Ill. App. 635.

6. Gulf, etc., R. Co. *v.* Shields, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652.

7. Chicago, etc., R. Co. *v.* James, 105 Pac. 40, 81 Kan. 23.

8. **Determination of existence of negligence.**—Allen *v.* Northern Pac. R. Co., 77 Pac. 204, 35 Wash. 221, 66 L. R. A. 804. See McMurtray *v.* Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401; St. Louis, etc., R. Co. *v.* Watson, 97 Ark. 560, 134 S. W. 949; Farrier *v.* Colorado Springs, etc., R. Co., 42 Colo. 331, 95 Pac. 294; Griffith *v.* Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46.

9. **Directing verdict.**—Providence, etc., Steamship Co. *v.* Clare, 127 U. S. 45, 32 L. Ed. 109, 8 S. Ct. 1094; Rhea *v.* Minne-

10. **Demurrer to evidence.**—Woas *v.* St. Louis Trans. Co., 198 Mo. 664, 96 S. W. 1017, 7 L. R. A., N. S., 231, 8 Am. & Eng. Ann. Cas. 584.

or enter a nonsuit.[11] And a verdict should be directed for the defendant where the evidence is insufficient to justify a verdict against it.[12] Where the evidence is conflicting,[13] or the given state of facts is such that reasonable men may

apolis St. R. Co., 111 Minn. 271, 126 N. W. 823; Serviss *v.* Ann Arbor R. Co., 169 Mich. 564, 135 N. W. 343. See Smaoska *v.* Chicago City R. Co., 150 Ill. App. 599; Levin *v.* Philadelphia, etc., R. Co., 77 Atl. 456, 228 Pa. 266; Lauchtanacher *v.* Boston Elev. R. Co., 100 N. E. 1068, 214 Mass. 103.

"If the evidence, in the most favorable light in which it may be reasonably considered in behalf of the plaintiff, does not show, nor tend to show, the defendant guilty of the negligence causing the injury as alleged in the complaint, then the court may properly grant a nonsuit or direct a verdict in favor of the defendant." Farrier *v.* Colorado Springs, etc., R. Co., 42 Colo. 331, 95 Pac. 294, quoting Lord *v.* Pueblo, etc., Refin. Co., 12 Colo. 390, 21 Pac. 148.

Where plaintiff fails to prove that the negligence of defendant was the proximate cause of the injury, a verdict is properly directed for defendant. Painter *v.* Chicago, etc., R. Co. (Neb.), 140 N. W. 787.

In an action against the owner of a street railway for an injury caused by falling off the front railing of a street car, and being run over, evidence that the driver made an effort to rescue plaintiff as he fell, and stopped his car as soon as he could, shows no negligence on defendant's part, so far as running over plaintiff is concerned, and the question will not be submitted to the jury. Downey *v.* Hendrie, 46 Mich. 498, 9 N. W. 828, 41 Am. Rep. 177.

In an action against the owner of an ocean steamer by a passenger, the complaint alleged that plaintiff, while going from his cabin to the dining saloon, which was then insufficiently lighted, tripped on the sockets fixed in the floor and used to secure the tables, and was thereby injured; but he testified that when he got out of the cabin, and while closing the door, the vessel lurched, and he slipped, and that his toe struck the socket, so that he fell. Held, that the cause of the fall was the action of the sea, and it was error not to withdraw from the consideration of the jury the question of negligence in the lighting of the saloon. Bruswitz *v.* Netherlands, etc., Nav. Co., 64 Hun 262, 19 N. Y. S. 75, 46 N. Y. St. Rep. 623.

11. Nonsuit.—Farrier *v.* Colorado Springs, etc., R. Co., 42 Colo. 331, 95 Pac. 294.

In an action by a passenger against a railroad company for injuries caused by falling over a hand bag in the passageway of a car, a nonsuit was properly entered where the evidence showed that plaintiff did not see the bag before her foot struck it, and there was no proof that the trainmen knew the bag was there, or that it had been there for such a length of time as to charge them with notice. Kantner *v.* Philadelphia, etc., R. Co., 236 Pa. 283, 84 Atl. 774.

The electric controller of a summer car blew out, and, after the car had stopped, a passenger was found lying on the ground some fifteen feet back from the rear end of the car. There was no evidence to show how she came there. Held, in an action by her to recover for injuries received, a nonsuit was properly entered. Green *v.* Pittsburg, etc., St. R. Co., 68 Atl. 675, 219 Pa. 241.

12. Where evidence insufficient to sustain verdict.—Powers *v.* Chicago, etc., R. Co., 108 Minn. 319, 121 N. W. 897.

In an action for injuries to a passenger by a missile coming through a open car window, plaintiff's evidence was that the missile entered through an open window on the side next to a passing freight train, that it was a bolt with a nut on the end of it, and that such bolts were largely used in constructing ordinary freight cars, while, on the other hand, there was evidence that the missile was thrown through an open window on the opposite side of the car by one of several boys who were pelting the train as it went by them. Held, that the evidence as to whether the missile came from a source for which the carrier was responsible was insufficient to justify a verdict against it, and that a verdict should, therefore, have been directed in its favor. Pennsylvania R. Co. *v.* McCaffrey, 149 Fed. 404, 79 C. C. A. 224.

A statement of a person, injured by falling from a platform on to the track in front of an approaching engine, that, "I was going up the platform; it was dark and I either stumbled or was crowded off the platform," was not a sufficient proof as to the cause of the injury to go to the jury. Gebus *v.* Minneapolis, etc., R. Co., 22 N. Dak. 29, 132 N. W. 227.

13. Where evidence conflicting.—*United States.*—Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748; North Jersey St. R. Co. *v.* Purdy, 142 Fed. 955, 74 C. C. A. 125; Norfolk, etc., Terminal Co. *v.* Rotolo, 191 Fed. 4, 112 C. C. A. 583.

Delaware.—Freeman *v.* Wilmington, etc., Tract. Co. (Del.), 80 Atl. 1001.

District of Columbia.—Washington, etc., R. Co. *v.* Grant, 11 App. D. C. 107.

Georgia.—Florida, etc., R. Co. *v.* Rudulph, 38 S. E. 328, 113 Ga. 143.

Massachusetts.—Morse *v.* Newton St. R. Co., 100 N. E. 1007, 213 Mass. 595; Holli-

fairly differ on the question as to whether there was negligence or not,[14] the determination of the matter is for the jury. In the appended note are cited numerous decisions where under the evidence the question of the defendant's negligence was held for the jury.[15] Where the evidence shows causal negligence,[16]

day *v.* Boston Elev. R. Co., 101 N. E. 1073, 214 Mass. 424.

Michigan.—Dorrance *v.* Michigan United R. Co., 175 Mich. 198, 141 N. W. 697.

Minnesota.—Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304.

New York.—Wolfkiel *v.* Sixth Ave. R. Co., 38 N. Y. 49; Goodkind *v.* Metropolitan St. R. Co., 87 N. Y. S. 523, 93 App. Div. 153; McSwyny *v.* Broadway, etc., R. Co., 7 N. Y. S. 456, 54 Hun 637, 27 N. Y. St. Rep. 363, 4 Silvernail 495.

Oregon.—Devroe *v.* Portland R., etc., Co., 64 Ore. 547, 131 Pac. 304.

Virginia.—Chesapeake, etc., R. Co. *v.* Barger, 112 Va. 688, 72 S. E. 693.

West Virginia.—Duty *v.* Chesapeake, etc., R. Co., 70 W. Va. 14, 73 S. E. 331.

Evidence tending to establish some act, neglect, or default upon the part of a carrier's employees, resulting in injury to a passenger, can not be withdrawn from the jury merely because the carrier adduces preponderating contradictory evidence. Western Maryland R. Co. *v.* Shivers, 61 Atl. 618, 101 Md. 391.

Where plaintiff's testimony as to the manner in which he was injured while attempting to board a street car is improbable, and defendant's evidence tends to show that he was injured on a different day and in an entirely different manner, it is error to take the case from the jury. Chicago City R. Co. *v.* Henry, 75 N. E. 758, 218 Ill. 92.

In an action against a railroad company for injuries to a passenger from exposure to cold while awaiting removal of obstruction from the track in order to reach the depot, the question as to unreasonable or unlawful obstruction was, on conflicting evidence, for the jury. Louisville, etc., R. Co. *v.* Daugherty, 108 S. W. 336, 32 Ky. L. Rep. 1392, 15 L. R. A., N. S., 740.

Plaintiff, while a passenger on defendant's horse car, was thrown from the platform by the jar of the car as it crossed a switch, resulting from the misplacement of the tongue. There was evidence that the switch was set by a small boy for the conductor, and that the car was crossing the switch at a high rate of speed, in violation of a rule of defendant; that the rails at the switch were loose; that the tongue was worn down; and that these defects contributed to the accident. This evidence was contradicted. Held, that it was proper to submit the case to the jury. Vail *v.* Broadway R. Co., 6 Misc. Rep. 20, 26 N. Y. S. 59, 31 Abb. N. C. 56, 58 N. Y. St. Rep. 124.

Where, in an action for injuries to a passenger, she claimed that an insufficient amount of drinking water was furnished, but there was evidence that the water tank on the car was full when the train started, and that after it had been consumed by the passengers drinking water was furnished to them from another car, and that there was no reason for plaintiff suffering thirst, whether the carrier performed its duty to furnish water was for the jury. Peck *v.* Atchison, etc., R. Co. (Tex. Civ. App.), 91 S. W. 323.

14. Lincoln Tract. Co. *v.* McCarty, 76 Neb. 819, 107 N. W. 1021; Wolfkiel *v.* Sixth Ave. R. Co., 38 N. Y. 49; Richmond, etc., R. Co. *v.* Powers, 149 U. S. 43, 37 L. Ed. 643, 13 S. Ct. 748; Metropolitan St. R. Co. *v.* Warren, 74 Kan. 244, 86 Pac. 131, affirmed in 89 Pac. 656.

"When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established." Farrier *v.* Colorado Springs, etc., R. Co., 42 Colo. 331, 95 Pac. 294, quoting Denver, etc., R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

In an action for personal injuries by being thrown from a car by defendant's manner of removing an intoxicated person, held that whether defendant used reasonable and ordinary care to avoid needless injury and ill treatment of plaintiff during the removal was for the jury. Thayer *v.* Old Colony St. R. Co., 101 N. E. 368, 214 Mass. 234, 44 L. R. A., N. S., 1125.

In a suit by a passenger for injuries alleged to have resulted from the defective loading of logs on a train, it appeared that such logs were usually loaded from four and one half to six feet high, but that the loads in question were about seven feet high; that the bottom tier was fastened with eighteen-inch stakes, and the top log secured by a block because of a crooked log underneath it; and that the one who loaded the logs thought the loading defective at the time. Held, that the question of negligence as to the loading was for the jury. Keating *v.* Detroit, etc., R. Co., 104 Mich. 418, 62 N. W. 575.

15. Question of negligence held for jury.—*Alabama.*—Carleton *v.* Central, etc., R. Co., 154 Ala. 326, 46 So. 495.

Arkansas.—St. Louis, etc., R. Co. *v.*

16. Where evidence shows casual negligence.—Kansas, etc., R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207.

Jackson, 93 Ark. 119, 124 S. W. 241.

California.—Maxwell *v.* Fresno City R. Co. (Cal. App.), 89 Pac. 367.

Delaware. — MacFeat *v.* Philadelphia, etc., R. Co. (Del.), 5 Pen. 52, 62 Atl. 898.

Florida.—Pensacola Elect. Co. *v.* Alexander, 58 Fla. 337, 50 So. 673.

Georgia.—Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902; Macon R., etc., Co. *v.* Castopulon, 11 Ga. App. 242, 75 S. E. 15.

Illinois.—Chicago Union Tract. Co. *v.* May, 221 Ill. 530, 77 N. E. 933, affirming 125 Ill. App. 144; Wyckoff *v.* Chicago City R. Co., 234 Ill. 613, 85 N. E. 237, affirming 136 Ill. App. 342.

Iowa.—Newman *v.* Chicago, etc., R. Co., 154 Iowa 72, 134 N. W. 585; Dieckmann *v.* Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338, reversing 105 N. W. 526.

Kansas.—Metropolitan St. R. Co. *v.* Warren, 74 Kan. 244, 86 Pac. 131, 89 Pac. 656.

Kentucky.—Chesapeake, etc., R. Co. *v.* Burke, 147 Ky. 694, 145 S. W. 370; Central Kentucky Tract. Co. *v.* May (Ky.), 126 S. W. 1092.

Massachusetts. — Plummer *v.* Boston Elev. R. Co., 198 Mass. 499, 84 N. E. 849; Eldredge *v.* Boston Elev. R. Co., 203 Mass. 582, 89 N. E. 1041; Magee *v.* New York, etc., R. Co., 195 Mass. 111, 80 N. E. 689; Hebblethwaite *v.* Old Colony St. R. Co., 192 Mass. 295, 78 N. E. 477; Black *v.* New York, etc., R. Co., 193 Mass. 448, 79 N. E. 797, 7 L. R. A., N. S., 148, 9 Am. & Eng. Ann. Cas. 485.

Michigan.—Dupuis *v.* Saginaw Valley Tract. Co., 146 Mich. 151, 109 N. W. 413.

Minnesota.—Lacey *v.* Minneapolis St. R. Co., 118 Minn. 301, 136 N. W. 878.

Mississippi. — Troutman *v.* Louisville, etc., R. Co., 95 Miss. 183, 48 So. 515.

Missouri.—Schloemer *v.* St. Louis Trans. Co., 204 Mo. 99, 102 S. W. 565; Vessels *v.* Metropolitan St. R. Co., 129 Mo. App. 708, 108 S. W. 578.

Montana.—Taillon *v.* Mears, 29 Mont. 161, 74 Pac. 421.

Nebraska.—Coffey *v.* Omaha, etc., St. R. Co., 79 Neb. 286, 112 N. W. 589; Chicago, etc., R. Co. *v.* Troyer, 70 Neb. 293, 103 N. W. 680, affirming 70 Neb. 287, 97 N. W. 308.

New Jersey.—Brower *v.* Public Service Corp., 74 N. J. L. 193, 64 Atl. 1052.

New York.—Weiller *v.* New York City R. Co., 100 N. Y. S. 1011, 51 Misc. Rep. 668; Kleffmann *v.* Dry Dock, etc., R. Co., 93 N. Y. S. 741, 104 App. Div. 416, 16 N. Y. Ann. Cas. 334; Berry *v.* Utica, etc., St. R. Co., 78 N. Y. S. 542, 76 App. Div. 490; Brettner *v.* Westchester Elect. R. Co., 98 N. Y. S. 857, 49 Misc. Rep. 508; Friedel *v.* Brooklyn Heights R. Co., 135 N. Y. S. 3, 150 App. Div. 304.

North Carolina.—Cox *v.* High Point, etc., R. Co., 147 N. C. 353, 61 S. E. 183; Smith *v.* North Carolina R. Co., 147 N. C. 448, 61 S. E. 266, 17 L. R. A., N. S., 179; Briggs *v.* Durham Tract. Co., 147 N. C. 389, 61 S. E. 373.

North Dakota.—Hall *v.* Northern Pac. R. Co., 16 N. Dak. 60, 111 N. W. 609, 14 Am. & Eng. Ann. Cas. 960.

Oklahoma.—St. Louis, etc., R. Co. *v.* Walker, 31 Okla. 494, 122 Pac. 492.

Pennsylvania. — Snowden *v.* Philadelphia Rapid Trans. Co., 236 Pa. 52, 84 Atl. 591; Brooks *v.* Philadelphia, etc., R. Co., 218 Pa. 1, 66 Atl. 872; Thomas *v.* Philadelphia Rapid Trans. Co., 218 Pa. 219, 67 Atl. 207; Rhoads *v.* Cornwall, etc., R. Co., 48 Pa. Super. Ct. 310.

South Carolina.—McJimpsey *v.* Southern Railway, 89 S. C. 122, 71 S. E. 42; Dickerson *v.* Columbia, etc., Railroad, 88 S. C. 223, 70 S. E. 728; Ladshaw *v.* Southern Railway, 90 S. C. 462, 73 S. E. 879.

Washington.—Plattor *v.* Seattle Elect. Co., 44 Wash. 408, 87 Pac. 489; Harkins *v.* Seattle Elect. Co., 53 Wash. 184, 101 Pac. 836.

Illustrations.—In an action against a street car company for personal injuries by a crowd at an amusement resort, where the car stopped, rushing in and attempting, to turn the seats while plaintiff was in the car with a child, catching her arm between the seat backs, etc., whether the company's employees were negligent in not protecting plaintiff held a jury question. Glennen *v.* Boston Elev. R. Co., 93 N. E. 700, 207 Mass. 497, 32 L. R. A., N. S., 470.

A male passenger, while the train was in motion, left the day coach for the smoking car to use a closet therein. While on the platform he took hold of the knob of the door of the smoker when a porter took hold of the inside knob to leave the car. The passenger stepped aside, and the porter opened the door and passed out. The porter, though seeing the passenger, who, in order to steady himself, placed his hand on the side of the door, pulled the door shut with a jerk and injured the hand. Held, that the question of the negligence of the porter was for the jury. St. Louis, etc., R. Co. *v.* Neely, 45 Tex. Civ. App. 611, 101 S. W. 481.

Where a passenger, after alighting on a dark night, goes along a narrow elevated unlighted walk close to the track and in some way falls between the wheels of a passing car and is instantly killed without any actual witnesses of the occurrence, the question of negligence of the railroad company is for the jury. Tucker *v.* Pittsburg, etc., R. Co., 75 Atl. 991, 227 Pa. 66.

Where an accident occurs through the breaking apart of a train, and collision of the parts, shortly after an inspection of the cars, and at the time the brakemen of the train are away from their posts, in violation of the rules of the company, there is sufficient evidence of negligence to go to the jury. Delaware, etc., R. Co. *v.* Ashley, 67 Fed. 209, 14 C. C. A. 368.

Leaving a freight car on a side track unsecured.—Webster *v.* Rome, etc., R. Co. (N. Y.), 40 Hun 161.

or makes out a prima facie case of negligence,[17] or where it is reasonably inferable from the facts proven that a passenger was injured through some act or omission of the carrier's servant, which might have been prevented by a high degree of care,[18] the question of the carrier's negligence is for the jury. Also it is for the jury where there is evidence tending to show negligence on the part of defendant, though it is not shown to be the proximate cause of the injury to the passenger on its train.[19] How far the negligence of the carrier is excused by the act of the passenger is a question for the jury.[20]

Whether Presumption of Negligence Rebutted.—Whether the carrier has overcome the presumption of negligence on its part arising from the plaintiff's evidence is a question for the jury.[21]

Question of Gross Negligence or Willfulness or Wantonness.—In an action against a carrier for injuries to a passenger in determining whether exemplary damages should be awarded, the question of gross negligence,[22] or

17. Prima facie case of negligence.—Sanson *v.* Philadelphia Rapid Trans. Co., 239 Pa. 505, 86 Atl. 1069.

18. Gottlob *v.* North Jersey St. R. Co., 62 Atl. 1003, 73 N. J. L. 305.

19. Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130.

20. How far act of passenger excuses negligence of carrier.—In an action to recover for injuries received by plaintiff, who at the time of the accident was standing on the front platform of the rear car, it appeared that in the rear car was a notice that "passengers must not stand on the platform;" that the road was in an unfinished state; that the ties were wide apart, and the rails were not well spiked; that the accident happened from the "breaking of a cleat at the end of one of the rails;" and that none of the passengers inside the car were injured. Held, that the question how far the negligence of the company was excused by the act of plaintiff was for the jury. Zemp *v.* Wilmington, etc., R. Co. (S. C.), 9 Rich. L. 84, 64 Am. Dec. 703.

21. Whether presumption of negligence rebutted.—*Florida.*—Pensacola Elect. Co. *v.* Bissett, 59 Fla. 360, 52 So. 367.

Illinois.—Chicago City R. Co. *v.* Pural, 224 Ill. 324, 79 N. E. 686, affirming judgment, 127 Ill. App. 652.

Nevada.—Sherman *v.* Southern Pac. Co., 33 Nev. 385, 115 Pac. 909, denying rehearing, 111 Pac. 416.

Pennsylvania.—O'Conner *v.* Scranton Tract. Co., 180 Pa. 444, 36 Atl. 866.

Rhode Island.—Simone *v.* Rhode Island Co., 28 R. I. 186, 66 Atl. 202, 9 L. R. A., N. S., 740.

Virginia.—Washington-Virginia R. Co. *v.* Bouknight, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546.

Illustrations.—Whether the presumption of negligence on the part of the carrier arising from the testimony of a passenger on a freight train, riding in the car with his stock, that he was thrown from it while in motion by two persons unknown to him, was overcome by the testimony of the conductor and brakemen on the train that they had nothing to do with his being thrown off, and did not know of it till long after its occurrence, is a question for the jury. Louisville, etc., R. Co. *v.* Board, 90 S. W. 944, 28 Ky. L. Rep. 921.

In an action for damages for the death of a passenger on defendant's steamboat, caused by an explosion, the evidence for defendants proved that it was not an explosion of the boat's boiler or machinery, and tended to show that it was not caused by petroleum or gunpowder, and there was some evidence that just before the accident dynamite had been taken upon the boat by some unknown person. The boat's officers, and others who examined it after the explosion, testified that they did not know what caused it. Held that, although the judge had a right to express his opinion of the character and weight of the evidence, it was error to charge the jury to find for defendants; the extent to which defendants had rebutted the presumption of negligence arising from the happening of the accident being a question of fact for the jury, depending upon the degree of credit to be given to defendant's witnesses. Spear *v.* Philadelphia, etc., R. Co., 119 Pa. 61, 12 Atl. 824.

22. Exemplary damage—Question of gross negligence.—See Yazoo, etc., R. Co. *v.* Humphrey, 36 So. 154, 83 Miss. 721; St. Louis, etc., R. Co. *v.* Fowler (Tex. Civ. App.), 93 S. W. 484; Yancey *v.* Boston Elev. R. Co., 205 Mass. 162, 91 N. E. 202, 26 L. R. A., N. S., 1217.

Evidence that a car was run at an unusual speed and was derailed, causing injuries to a passenger, was sufficient to present a question for the jury as to whether the carrier was guilty of gross negligence, so as to authorize an award of exemplary damages. Louisville St. R. Co. *v.* Brownfield, 96 S. W. 912, 29 Ky. L. Rep. 1097.

Where a passenger on a street car, a girl thirteen years of age, had with her a bundle which was a large one for a girl of her size, and while she was alighting with it and had one foot on the ground

willfulness or wantonness,[23] is usually for the jury. But the question whether defendant was guilty of gross negligence should not be submitted to the jury, where there is no evidence from which it can be inferred.[24] Where defendant's conductor replied profanely to plaintiff's husband, on being remonstrated with, with reference to the jerking of the car as plaintiff was endeavoring to alight, resulting in injuries to her, the court was authorized to submit the issue of punitive damages.[25] If the conductor after being informed that an aged passenger is sick and infirm treats him, in connection with the negligence, with indignity, insult, oppression, or inhumanity, the question of exemplary damages should be submitted to the jury.[26] And where, as shown by her evidence, a sick woman, unable to walk, was placed in a baggage car against her protest, and required to ride on a wooden chair or stool without the comforts provided in a regular passenger coach, the question of punitive damages is for the jury.[27]

Venue.—In an action by a passenger for injuries where the evidence is conflicting, the question as to the locality of the injury should be submitted to the jury in order to determine jurisdiction.[28]

Where Plaintiff Should Ride.—Where a shipper of goods and live stock

and one on the step, the conductor, who was watching her, caused the car to be started, whereby she was injured, it was proper to submit the question of gross negligence to the jury. Louisville R. Co. *v.* Owens, 97 S. W. 356, 29 Ky. L. Rep. 1294.

In an action for injuries to a passenger, caused by the car in which he was seated having been switched by a "kicking switch," it was proper to submit the question of punitive damages, for gross negligence, to the jury. Yazoo, etc., R. Co. *v.* Roberts, 40 So. 481, 88 Miss. 80.

The evidence showed that the train stopped at a station, and that plaintiff used every effort to alight in proper time; that the conductor had gone off, while the brakeman did nothing to warn those in charge of an approaching engine that its collision with the car in which plaintiff was might injure passengers. Held, that the court was justified in submitting the question of gross negligence of defendant's servants to the jury. East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

23. Willfulness or wantonness.—Birmingham R., etc., Co. *v.* Fisher, 173 Ala. 623, 55 So. 995; McKittrick *v.* Greenville Tract. Co., 88 S. C. 91, 70 S. E. 414.

If defendant's motorman saw plaintiff alighting and started the car with a jerk, whereby she was injured, the question whether the starting of the car was wanton was for the jury. Birmingham R., etc., Co. *v.* Moore, 163 Ala. 43, 50 So. 115. See Birmingham R., etc., Co. *v.* Selhorst, 165 Ala. 475, 51 So. 568.

In a passenger's action for injuries caused by his hands being caught in the swinging gates of the car, question of wantonness held to be for the jury, although the motorman testified that before starting the car he looked back and saw no one attempting to alight. Birmingham R., etc., Co. *v.* Taylor, 60 So. 979, 6 Ala. App. 661.

In an action against a railroad company for personal injuries sustained in jumping from a moving train, where plaintiff had tendered his fare to M., a regular scheduled station, and the conductor had orders to stop and to take a siding there if he arrived later than a certain time, as he did, but though plaintiff urged that it be stopped, stating that his child was to be buried that afternoon, the train was not stopped, the plaintiff had the right to have the train stopped at M., and the extraordinary and unfeeling conduct of the conductor was some evidence of a willful, wanton, and reckless disregard of plaintiff's rights sufficient to be submitted to the jury on the question of punitive damages. Owens *v.* Atlantic, etc., R. Co., 67 S. E. 993, 152 N. C. 439.

In an action for injuries to a passenger, where the evidence showed that the conductor promised a young girl that he would assist her when her station was called, that at her station her father asked the conductor if any passengers were aboard for that station, and that he said he did not know, and that the train was not stopped at the usual stopping place and passengers were not instructed to get out, it is sufficient to carry the case to the jury on the question of wantonness. Martin *v.* Southern Railway, 58 S. E. 3, 77 S. C. 370.

24. Lanci *v.* Boston Elev. R. Co., 197 Mass. 32, 83 N. E. 1.

25. Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

26. Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 731.

27. Nashville, etc., Railway *v.* Blackmon, 7 Ala. App. 530, 61 So. 468.

28. Venue.—Louisville, etc., R. Co. *v.* Grimes, 150 Ky. 219, 150 S. W. 346.

accompanied them and was entitled to ride as a passenger, the question as to whether he should ride in the freight car or in the caboose, in the absence of a contract provision, is for the jury.[29]

Whether Engineer Properly Construed Orders.—Where orders given to the engineer of a train, when read in connection with the rules and usages of the company, were ambiguous, the question whether the engineer placed a proper construction upon them was one of fact in an action for injuries to a passenger.[30]

§ 3294. Existence of Relation of Carrier and Passenger.—Where the facts are uncontroverted, the existence of the relation of carrier and passenger is a question of law.[31] It is not error to fail to submit to the jury a question upon which there is no evidence.[32] Where, in an action against a carrier to recover for the death of a railway mail clerk, the evidence conclusively shows that decedent at the time of his death was rightfully on defendant's train, the direction of a verdict in favor of plaintiff on the issue as to whether or not he was a trespasser on the train is warranted.[33] The determination of the question whether the relation existed in a particular case is for the jury where the evidence is conflicting,[34] or such that reasonable minds might draw different conclusions therefrom.[35] In the appended note will be found numerous instances where the question was held for the jury.[36] Usually it is a question

29. Where plaintiff should ride.—Pittsburgh, etc., R. Co. *v.* Brown, 178 Ind. 11, 97 N. E. 145.

30. Whether orders properly construed.—Willard *v.* Iowa Cent. R. Co., 108 Minn. 304, 122 N. W. 169.

31. Existence of relation of carrier and passenger.—O'Donnell *v.* Chicago, etc., R. Co., 106 Ill. App. 287. See McBride *v.* Milwaukee Elect. R., etc., Co., 148 Wis. 17, 133 N. W. 1111.

32. Where plaintiff's decedent, an employee of defendant carrier, having a free pass, entered defendant's train, and was received as a passenger and permitted to ride, and there was no evidence that the employees of the train did not know that decedent was riding on a free pass, or that they were deceived as to his status on the train, it was not error to fail to submit to the jury the question as to whether defendant's trainmen know that decedent was riding on a free pass while not on duty. Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458, 1025.

33. Schuyler *v.* Southern Pac. Co., 37 Utah 581, 109 Pac. 458, rehearing denied in 109 Pac. 1025.

34. Where evidence conflicting.—Texas, etc., R. Co. *v.* Scott, 64 Tex. 549; Gaffney *v.* St. Paul City R. Co., 81 Minn. 459, 84 N. W. 304.

Illustrations.—Whether a passenger alighting in the usual place near a station, and who was struck by the train while on the only practicable route to the station, was a passenger or merely a trespasser, is a question for the jury, where the evidence was conflicting as to whether he was going to the station for the purpose of receiving a telegram, or was merely loitering on the tracks. Alabama, etc., R. Co. *v.* Coggins, 88 Fed. 455, 32 C. C. A. 1.

Where a car had come to a stop at a usual stopping place in response to plaintiff's signal, and he was in the act of entering it, with his foot on the step, without any objection or warning from the conductor, who was standing in the doorway, when he was injured by the motorman suddenly opening the door further, while defendant claimed that plaintiff attempted to board the car before it came to a full stop and before the conductor had an opportunity to warn him, whether plaintiff had become a passenger at the time he was injured was for the jury. Carter *v.* Boston, etc., St. R. Co., 91 N. E. 142, 205 Mass. 21.

Whether a passenger on a street car, which reached a trestle that it could not cross by reason of a washout, was a trespasser in walking across, depending on whether she was invited there by the conductor, or told to wait for a car, and not go on the trestle, as to which the evidence was conflicting, was a question for the jury. Bugge *v.* Seattle Elect. Co., 103 Pac. 824, 54 Wash. 483.

35. St. Louis, etc., R. Co. *v.* Fowler (Tex. Civ. App.), 93 S. W. 484.

36. Instances where question of existence of relationship held for jury.—Where plaintiff, having tried to purchase a ticket to ride on defendant's freight train, and being directed by the agent to pay on the train, climbed onto one of the freight cars, the platform of the caboose being crowded, the question as to whether plaintiff was a passenger should have been submitted to the jury. Ramm *v.* Minneapolis, etc., R. Co., 94 Iowa 296, 62 N. W. 751.

Where the evidence showed that decedent and another got upon the platform of a passenger train about ten o'clock at night, attempting to ride to a certain junction one mile distant, the fare for which

for the jury whether under all the circumstances a person went to the station a reasonable time before train time so as to be entitled to the rights of a pas-

was five cents, that the conductor did not see them on the platform, and that they did not offer to pay fares, though the person with decedent testified that they were ready and willing to pay the fare, and expected to do so when the conductor should ask for it, whether decedent was a passenger was a question for the jury. St. Louis, etc., R. Co. *v.* Sanderson, 99 Miss. 148, 54 So. 885.

In an action to recover for the death of plaintiff's husband, who after securing an appointment of locomotive engineer, was traveling on a locomotive for the purpose of informing himself more particularly as to the character of the road, and was killed by the train leaving the tracks, owing to the negligence of the engineer in charge, whether deceased was or was not a passenger was for the jury. Wilkes *v.* Buffalo, etc., R. Co., 65 Atl. 787, 216 Pa. 355.

Person intending to take passage.—Proof that plaintiff, with a bona fide intention of becoming a passenger, went to the flag station of decedent railroad company, makes it a question for the jury whether that relation arises. Louisville, etc., R. Co. *v.* Glasgow (Ala.), 60 So. 103.

Where it appeared that plaintiff's intestate went to the city, daily, and that he had stepped on the platform of defendant's train after stating that he intended to take the train for the city, when he was killed by a collision, it was a question for the jury whether he was a passenger, although there was no proof that he had a ticket or the money to pay for one. Inness *v.* Boston, etc., R. Co., 47 N. E. 193, 168 Mass. 433.

One who presented himself on the platform of a street car, and was approaching the entrance of the car, or had put his hands upon the handholds and raised his foot with the purpose of entering, all of which the conductor knew, did not, as a matter of law, become a passenger. Alabama, etc., R. Co. *v.* Bates, 154 Ala. 347, 46 So. 776.

Person leaving carrier's premises.—Plaintiff, who was a passenger on defendant's railroad, alighted at a station from which it was necessary to cross the tracks to reach the street leading to the town. She passed behind the train, and started diagonally across the tracks at a place which the evidence tended to show was customarily used for that purpose, and when upon the adjoining track was struck by a freight train approaching from the opposite direction, and injured. Held, that the question whether plaintiff was still constructively a passenger when she was injured, was properly submitted to the jury. Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102.

Whether a person who has alighted from a standing train at a station and is crossing the tracks by a planked way provided by the company after the train from which he alighted has moved out is still a passenger entitled to cross without looking or listening is a question of fact for the jury, where reasonable men may differ as to whether he was proceeding to a place of safety within a reasonable time after he had alighted from the train. Atlantic City R. Co. *v.* Kiefer, 66 Atl. 930, 75 N. J. L. 54.

Person alighting from street car.—In an action to recover for injuries, where there was testimony that when the car on which plaintiff was riding stopped he put one foot on the ground and with the other on the footboard attempted to lift his little girl off the car, when it started suddenly, injuring him, the question as to whether he was a passenger was for the jury. Chicago Union Tract. Co. *v.* Rosenthal, 75 N. E. 578, 217 Ill. 458, affirming judgment 118 Ill. App. 278.

Person crossing trestle to reach train.—Whether plaintiff, in passing over a trestle in order to reach a train on which he intended to take passage, after advice by the conductor to use such trestle, was a trespasser thereon, was a question of fact for the jury, and not of law for the court. Chicago, etc., Transfer Co. *v.* Kotoski, 65 N. E. 350, 199 Ill. 383, affirming 101 Ill. App. 300.

Where a large number of passengers on an excursion train, including plaintiff, walked across a railroad bridge on which plaintiff was injured by being struck by a train, and returned the same way, whether plaintiff was on the track by the implied permission of the railroad company or was a trespasser was a question for the jury. Chicago, etc., R. Co. *v.* Gruss, 65 N. E. 693, 200 Ill. 195, affirming 102 Ill. App. 439.

Person on elevator.—In an action by the employee of a tenant against the landlord for injuries sustained through a defective freight elevator in operation in the rented building, the question whether plaintiff was rightfully on the elevator in the discharge of his duties is one of fact for the jury. Springer *v.* Ford, 59 N. E. 953, 189 Ill. 430, 52 L. R. A. 930, 82 Am. St. Rep. 464, affirming 88 Ill. App. 529. See Stewart *v.* Harvard College (Mass.), 12 Allen 58.

Remaining on train after reaching destination named in ticket.—Where, in an action against a railroad for wrongful death, it appeared that deceased, after reaching the point on defendant's line to which he had purchased a ticket, remained

senger;[37] as is also the question whether he has failed to depart from the carrier's premises within a reasonable time, so as to terminate the relation of carrier and passenger.[38] The question whether a person traveling on a ticket issued to a third person, and providing that any "visitor" to his family might travel on it, was such visitor, so as to be entitled to recover for personal injuries caused by the negligent operation of the train, should be submitted to the jury since it involves the question of good faith in using the ticket.[39] Whether a passenger, proceeding to leave the premises of the carrier, returned thereto in good faith, and the purpose of his return as bearing upon the question as to whether the relation of carrier and passenger had terminated, are questions of fact for the jury, in an action by the passenger against the carrier for an assault upon him upon his return to the premises by an agent of the carrier.[40] Where there is sufficient evidence, prima facie, at least, to warrant a jury in finding that the defendant company was operating the car on which the plaintiff received the injury complained of, a motion to direct a verdict for the defendant for want of such proof is properly denied.[41]

in the coach; that the residence of himself and family was at a station further along the road; and that, at the time of the collision causing his death, defendant's train had started—it was not essential, in order to authorize the submission of the case to the jury, to show by positive or direct evidence that deceased was a passenger at the time of the collision or that it was his purpose to continue his journey. Anderson *v.* Missouri Pac. R. Co., 93 S. W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on a coal car, in an action for personal injuries, whether plaintiff acquired that relation should be submitted to the jury. Missouri, etc., R. Co. *v.* Huff, 98 Tex. 110, 81 S. W. 525, reversing 78 S. W. 249.

A car inspector, after finishing his work at the point to which he had been sent, took a freight train home. A passenger train ran into the caboose in which decedent was, and he was killed. There was evidence that when decedent had finished his work he approached a conductor of a passenger train which was about to leave in the direction of his home, took a paper from his pocket, and showed it to the conductor, but he did not return by that train. Later he showed a paper to the conductor of the freight train he was on when killed, and the conductor looked at the paper and said, "All right." Decedent (as was the custom when sent out) had often ridden on freight trains, on permits given him by the company. There was evidence that the paper, which was alleged to be a permit, was destroyed before the trial. Held, in an action for damages, that, notwithstanding the absence of direct proof, the evidence was sufficient to submit the question whether decedent was rightfully riding on the freight train to the jury, and a nonsuit was error. West *v.* New York, etc., R. Co., 67 N. Y. S. 104, 55 App. Div. 464.

Whether a person, refused a railroad ticket under a rule of the carrier forbidding sales more than thirty minutes before train time, and refused admission to the waiting room was a passenger, within Kirby's Dig., § 6634, requiring railroad waiting rooms to be kept open for the accommodation of passengers, was a question for the jury under proper instructions. St. Louis, etc., R. Co. *v.* Lawrence (Ark.), 153 S. W. 799.

Policeman rendering service to carrier.—A borough policeman, not paid by the borough, but by persons needing police protection, rendered service to a traction company in preserving order on its cars, and was paid a small sum, with the right of free transportation. He was asked by a conductor to board a car on an outward trip, and, there being no disorder on the return trip, the conductor asked the policeman to go on the front platform with the motorman, where he was injured by the car leaving the track. Held, that the question whether the policeman was a passenger at the time of the accident was for the jury. Goehring *v.* Beaver Valley Tract. Co., 72 Atl. 259, 222 Pa. 600.

37. Northern Pac. R. Co. *v.* Marinovich, 111 C. C. A. 60, 189 Fed. 328, wherein it appeared that plaintiff, desiring to take a train at a flag station where the defendant maintained no agent, inquired at a store when the next train would arrive, and on being told that it would come along some time, went to the waiting room four hours and forty-five minutes before the train was due to leave.

38. Layne *v.* Chesapeake, etc., R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414.

39. Odell *v.* New York, etc., R. Co., 57 N. E. 1119, 162 N. Y. 625, affirming 45 N. Y. S. 464, 18 App. Div. 12.

40. Layne *v.* Chesapeake, etc., R. Co., 69 S. E. 700, 68 W. Va. 213, 31 L. R. A., N. S., 414.

41. Berry *v.* Atlantic Railway, 109 Me. 330, 84 Atl. 740.

Whether Passenger for Hire.—Where the evidence as to whether plaintiff was riding on a pass or was a passenger for hire is conflicting, the question is for the jury.[42]

Whether Reasonable Opportunity Given to Obtain Ticket.—Where a carrier has established a regulation requiring passengers to procure tickets before entering its trains, in an action by a passenger, who had not procured a ticket, to recover for injuries sustained in attempting to board a moving train, evidence that he went to the ticket office to secure a ticket shortly before the train started, and saw no one in the office, and afterwards went again to the office, finding the agent out, and that the agent attended to mail and express, and was in his office except when he left to attend to a previous train, presents a question for the jury—whether the carrier failed to allow the passenger an opportunity to get a ticket, giving him the right to enter such train without a ticket.[43]

§ 3295. Care as to Passengers under Disability.—Usually it is a question for the jury whether a carrier has exercised proper care toward a sick,[44] blind,[45] crippled,[46] or intoxicated passenger,[47] or one of tender

42. Whether passenger for hire.—Conner *v.* Seattle, etc., R. Co., 56 Wash. 310, 105 Pac. 634, 25 L. R. A., N. S., 930.

Whether or not a pass held by a street railway employee was a gratuity or was issued as one of the terms of his employment, thereby making him a passenger for hire, is held to be a question for the jury. Dugan *v.* Blue Hill St. R. Co., 79 N. E. 748, 193 Mass. 431.

43. Whether reasonable opportunity given to obtain ticket.—Mills *v.* Missouri, etc., R. Co., 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, reversing 57 S. W. 291.

44. Sick passenger.—Atchison, etc., R. Co. *v.* Parry, 67 Kan. 515, 73 Pac. 105.

Where a sick passenger fell from the platform of a moving car, the question of whether the train officers, knowing of his condition, should have safeguarded him, held for the jury. Brice *v.* Southern Railway, 85 S. C. 216, 67 S. E. 243, 27 L. R. A., N. S., 768.

45. Blind passenger.—Denver, etc., R. Co. *v.* Derry, 47 Colo. 584, 108 Pac. 172, 27 L. R. A., N. S., 761.

It appeared that a certain passenger train had reversible seats; that plaintiff, who was blind, entered such train, and, when preparing to take his seat, placed his hand on the iron bar of the seat, next to the aisle; that the bar was slightly raised at the time; and it fell, and mashed one of his fingers; and that it was the duty of the brakeman, before the train started, to go through the cars and turn all the seats in the direction the train would go. Held, that whether defendant was negligent was a question for the jury. Missouri, etc., R. Co. *v.* Dill (Tex. Civ. App.), 40 S. W. 347.

46. Crippled passenger—Failure to assist to alight.—In an action against a street car company for injuries from the sudden starting of the car while plaintiff, a crippled passenger, was alighting, evidence held to make it a jury question whether defendant was negligent because the conductor did not assist plaintiff to alight, knowing her crippled condition. Mitchell *v.* Des Moines City R. Co. (Iowa), 141 N. W. 43.

Simple and gross negligence.—Evidence from which it could be found that plaintiff, a woman on crutches, with intention of taking passage on defendant's street car, got on the step leading to the rear vestibule from the left hand side of the car, in ignorance of defendant's rule by which the door at that side was kept locked, and entrance could be had only by the door at the right hand side, and there stood with both hands on the grab iron, holding her crutches, and rapping on the door, and asking for admission, and that the conductor shook his head and at the same time signaled for the car to start, with full knowledge of her situation, though perhaps not fully appreciating her bodily condition, makes the matters of simple negligence and of gross negligence of the conductor questions for the jury. Yancey *v.* Boston Elev. R. Co., 91 N. E. 202, 205 Mass. 162, 26 L. R. A., N. S., 1217.

47. Intoxicated passenger.—Benson *v.* Tacoma R., etc., Co., 51 Wash. 216, 98 Pac. 605.

In an action against a railroad company for the death of a drunken passenger who, it was alleged, was placed in charge of defendant's conductor, and was by him negligently permitted to go onto the platform and fall from the train, evidence held to justify submission to the jury of the issues of defendant's negligence. Price *v.* St. Louis, etc., R. Co., 88 S. W. 575, 75 Ark. 479, 112 Am. St. Rep. 79.

In an action against a street car company for wrongful death resulting from defendant's alleged negligence in setting down decedent from its train while in-

years.[48] The driver of a street car is bound to take more care of an old person than of one in full vigor, and whether starting a car in the usual and ordinary manner after an old woman has entered it, is negligence, is a question for the jury.[49] The question whether a passenger's drunkenness so affected him as to render him incapable of appreciating his danger or caring for himself, though he was able to sing, talk, and dance about, is one of fact;[50] as is also the question whether his intoxicated condition was known to the conductor so as to require the rendition of special assistance.[51]

§ 3296. Acts of Carrier's Employees.—Whether an assault upon a passenger was committed by an agent of the carrier acting within the scope of his employment is a question for the jury, where the evidence upon such question is conflicting or such that different inferences may reasonably be drawn therefrom.[52] So the question whether persons assaulting a passenger were acting as public officers or as officers of the carrier is upon conflicting testimony, for the jury.[53] And whether an engineer was acting in the line of his duty on the occasion of an accident resulting in injuries to a passenger is a question to be determined by the jury from the facts proven, and not from the opinion of witnesses given on a supposable state of facts.[54] In an action against a street railway company for injuries to a passenger, the question whether the conductor of the car had authority to permit a passenger to stand on the running board was for the jury.[55] Where in an action for assaulting a passenger the evidence is conflicting as to whether the employee was justified in making the assault, the question is for the jury.[56] Where a street car passenger testifies that he was struck in the face by the conductor, and the conductor, who is not contradicted, testifies that his act was wholly unintentional and accidental, the question of negligence or mere accident is for the jury.[57] Where a street railway conductor, in an altercation with a passenger, used insulting language and,

toxicated at an unsafe place, it was for the jury to determine whether it was negligent to leave him at the place at which defendant discharged him. Sullivan *v.* Seattle Elect. Co., 86 Pac. 786, 44 Wash. 53.

48. Passenger of tender years.—Whether a street railroad was negligent in using, for the transportation of small children, an open car, the seats of which projected beyond the floor, so as to leave an opening or pitfall through which a child might fall to the street, is a question of fact. Northern Texas Tract. Co. *v.* Roye, 38 Tex. Civ. App. 601, 86 S. W. 621.

Though it might not be negligence for a railroad company not to have gates to the platforms of its cars so as to convert the platforms into a vestibule between cars, and thereby guard against accident to passengers from falling or being thrown from the platforms, yet where the cars of a particular train were equipped with such gates, whether the failure to close them was negligence as to a child of tender years, who was a passenger, and had gone upon the platform and fallen off, was a question for the jury. Western, etc., R. Co. *v.* Deitch, 136 Ga. 46, 70 S. E. 798.

Evidence in an action for injuries to a boy seven years and eight months old, on a street car, considered, and held a question for the jury whether the motorman was negligent in permitting the boy to ride on the front platform. Parker *v.* Washington, etc., R. Co., 56 Atl. 1001, 207 Pa. 438.

49. Aged passenger.—Holmes *v.* Allegheny Tract. Co., 153 Pa. 152, 25 Atl. 640. See post, "Starting or Moving Car While Passenger Is Boarding Same," § 3301.

50. Whether drunkenness disabled passenger.—Wheeler *v.* Grand Trunk R. Co., 5 Atl. 103, 70 N. H. 607, 54 L. R. A. 955.

51. Whether condition known to conductor.—Benson *v.* Tacoma R., etc., Co., 51 Wash. 216, 98 Pac. 605.

52. Scope of employment.—Tolchester Beach Imp. Co. *v.* Scharnagl, 105 Md. 199, 65 Atl. 916; Goodwin *v.* Cincinnati Tract. Co., 175 Fed. 61.

53. Whether acting as public officers.—Rand *v.* Butte Elect. R. Co., 107 Pac. 87, 40 Mont. 398.

54. Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234, 20 N. E. 135.

55. Authority of employee.—Ft. Wayne Tract. Co. *v.* Hardendorf, 164 Ind. 403, 72 N. E. 593.

56. Assault on passenger.—Brown *v.* Atlantic, etc., R. Co., 161 N. C. 573, 77 S. E. 777; Dallas Consol. Elect. St. R. Co. *v.* Pettit, 47 Tex. Civ. App. 354, 105 S. W. 42; Johnson *v.* Washington Water Power Co., 62 Wash. 619, 114 Pac. 453.

57. Kohner *v.* Capital Tract. Co., 22 App. D. C. 181, 62 L. R. A. 875.

after the passenger had left the car, the conductor and motorman committed a battery on him, it is for the jury whether there existed between the battery and the passion aroused by the altercation the relation of cause and effect, and whether the battery was but a continuation of the wrongful conduct begun on the car by the use of the insulting language.[58]

Repelling Assault by Passenger.—Where it plainly appeared from the evidence that the carrier's employee used more force than was necessary to repel an assault on him, it was not prejudicial to leave to the jury to decide whether or not such conductor used more force than was necessary to protect himself in repelling such assault.[59] Whether the circumstances warranted the force and violence used by the employee on the ground of real or apparent danger of death or great bodily harm is a question for the ultimate determination of the jury, viewing the situation from the standpoint of the employee, though he must decide it in the first instance at the peril of himself and his master.[60]

Abusive and Insulting Language.—It is a question for the jury whether language used by a conductor to a passenger was abusive or insulting, considering his tone and manner.[61] Where the evidence in an action against a carrier for the use of abusive and threatening language by one of its employees to a passenger is conflicting as to whether the employee or the passenger was the aggressor, the question should be submitted to the jury.[62] Whether plaintiff, a female passenger, suffered mental distress in consequence of offensive language by defendant's conductor, is to be determined by the jury from the nature of the language used and the circumstances of the case.[63]

Identity.—In an action by a passenger to recover damages for injuries received by jumping from a moving train under direction of the brakeman, where plaintiff and two witnesses testified that the brakeman was stationed at the brake in the car, though his back was turned toward them, and though they are contradicted by the brakeman himself and three witnesses for defendant, who were in full view of the face of the man at the brake and whose testimony is corroborated by other circumstances, the identity of the man at the brake is for the jury.[64]

Question Admitted.—Where, in an action against a carrier for an assault alleged to have been committed by defendant's brakeman, it was admitted that the person charged with the assault was in defendant's employ as a brakeman at the time of the assault, it was error for the court to submit such question to the jury.[65]

§ 3297. Number and Efficiency of Employees.—Whether the failure of a carrier of passengers to employ extremely cautious men is a breach of the carrier's duty to exercise the utmost care is prima facie a question for the court, and not for the jury,[66] but the question whether such care has in fact been exercised is for the jury.[67] The competency of the carrier's employee is us-

58. Savannah Elect. Co. *v.* McCants, 130 Ga. 741, 61 S. E. 713.

59. Repelling assault.—St. Louis, etc., R. Co. *v.* Berger, 64 Ark. 613, 44 S. W. 809, 39 L. R. A. 784.

60. Teel *v.* Coal, etc., R. Co., 66 W. Va. 315, 66 S. E. 470.

61. Abusive and insulting language.—Lamson *v.* Great Northern R. Co., 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914C, 15.

Whether a conductor intended to insult an invalid female passenger when he told her that she should have gone to the other side of the car, where men were employed "to assist such as you," and at a later occasion, when he directed that she be placed in the mail and express car, that, "This is the place for such as you," was for the jury. Caldwell *v.* Northern Pac. R. Co., 105 Pac. 625, 56 Wash. 223.

62. Illinois Cent. R. Co. *v.* Winslow, 119 Ky. 877, 27 Ky. L. Rep. 329, 84 S. W. 1175.

63. Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

64. Identity.—McPeak *v.* Missouri Pac. R. Co., 128 Mo. 617, 30 S. W. 170.

65. Question admitted.—Garvik *v.* Burlington, etc., R. Co., 124 Iowa 691, 100 N. W. 498.

66. Failure to employ extremely cautious men.—Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

67. Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682. See Belvidere Bldg. Co. *v.* Bryan, 103 Md. 514, 64 Atl. 44.

In an action for personal injuries while

ually a question for the jury.[68] But where there is no evidence that the employee is wanting in skill or care, it is error to submit the question to the jury.[69]

Number of Employees.—Where the crowding of the platforms and cars of a carrier at certain hours of the day was unavoidable in carrying on its business, the questions whether the carrier was bound to employ an increased number of men to prevent such crowding as involved danger to passengers, and whether it was reasonable to require such precaution, are for the jury.[70] Where there was nothing in the record to show that the train was improperly operated on account of a lack of brakemen, it was error for the court to submit to the jury, on the question of negligence in operating the train, the fact that there were but two brakemen on it.[71]

Operation of Street Car without Conductor.—Whether the operation by a street-railroad company of its cars without a conductor constitutes negligence is a question for the jury.[72] So where a street car passenger was injured while

leaving an elevator, where it appeared that the elevator boy in charge was twenty years of age, and had had more than two months experience, and had, according to his own evidence, been in the habit of starting the car before closing the door, the question of negligence in failing to have a compatent operator in charge of the car was for the jury. Cubbage *v.* Youngerman, 155 Iowa 39, 134 N. W. 1074.

Defendant maintained in its building an elevator, which, when in operation, had an excessive lateral vibration. It had no door on the cage, but the exits from the car were through vestibules cut through the wall of the elevator shaft, which was about sixteen inches deep, with a door on the outside, so that a passenger losing his balance might fall from the car into the vestibule, and roll from there into the elevator shaft. The elevator, on the night plaintiff's son was killed, was operated by a boy about fifteen years old. He told decedent, when the car was at the third floor, that it was at the fourth floor, and the decedent knowing that the car stopped automatically at the fifth floor, and thinking that the car, when actually at the fourth floor, was at the fifth floor, may have stepped into the vestibule while the car was in motion, from whence he fell into the elevator shaft, and was killed. The evidence was indefinite as to how the accident occurred. Held to require submission to the jury of the question whether the defendant was negligent in employing an incompetent operator. Lee *v.* Publishers, etc., Co., 56 S. W. 458, 155 Mo. 610.

Operation of elevator by child employed in violation of law.—Jones *v.* Co-Operative Ass'n, 84 Atl. 985, 109 Me. 418.

68. Competency of employee.—Belvidere Bldg. Co. *v.* Bryan, 103 Md. 514, 64 Atl. 44. (Operator of elevator.)

Illustrations.—In an action against a street railway for injuries to a passenger, where there was testimony that the motorman did not know that he could stop the car by reversing the motor, and that his tutelage had been brief, although there was proof of the opposite, and that he did not turn off the current and lost his judgment, the question of his competency and the character of his conduct was for the jury. Howell *v.* Lansing City Elect. R. Co., 99 N. W. 406, 136 Mich. 432.

A motorman, while running a car with no defect in its appliances, and while the track was in good condition, collided with a car ahead that had stopped. He knew nothing of his duties forty-one days prior to the accident, and had spent only nine days in learning. He had read the book of instructions only once, and did not know whether, at the time of the accident, he knew he was bound to keep 200 feet from the car ahead. Held proper to submit the question to the jury as to whether he was inexperienced and incompetent Holman *v.* Union St. R. Co., 72 N. W. 202, 114 Mich. 208.

The question whether the habitual failure of an engineer to stop his train at a railroad crossing proved him to be a reckless and incompetent employee is for the jury. Ft. Worth, etc., R. Co. *v.* Enos (Tex. Civ. App.), 50 S. W. 595, modified in Missouri, etc., R. Co. *v.* Enos, 50 S. W. 928, 92 Tex. 577.

69. Wynn *v.* Central Park, etc., R. Co., 133 N. Y. 575, 30 N. E. 721, 4 Silvernail Ct. App. 214, reversing 14 N. Y. S. 172.

70. Number of employees.—Kuhlen *v.* Boston, etc., R. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A., N. S., 729. See Reschke *v.* Syracuse, etc., R. Co., 139 N. Y. S. 555, 155 App. Div. 48.

71. Worthington *v.* Central Vermont R. Co., 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 326.

72. Operation of street car without conductor.—Armstrong *v.* Montgomery St. R. Co., 133 Ala. 233, 26 So. 349. See Lamline *v.* Houston, etc., R. Co., 14 Daly 144, 6 N. Y. St. Rep. 248, wherein it was held error for the court to decline to charge that the absence of a conductor on a one horse car does not constitute

attempting to alight by the sudden starting of the car, and complained that the carrier negligently failed to employ a conductor to regulate the movement of the car, the court did not err in submitting the carrier's negligence in failing to provide a conductor to the jury.[73]

§ 3298. Acts of Fellow Passengers or Other Third Persons.—It is usually a question for the jury as to whether the carrier has exercised the proper care to protect a passenger from injuries caused by fellow passengers and others.[74] Thus, it is held the province of the jury to decide whether the

neligence and to state that the jury were to say from all the facts in the case whether a conductor was necessary or not.

73. Citizens' R. Co. *v.* Hall (Tex. Civ. App.), 138 S. W. 434.

74 Acts of fellow passengers or other third persons.—Tate *v.* Illinois Cent. R. Co., 26 Ky. L. Rep. 309, 81 S. W. 256; Nute *v.* Boston, etc., Railroad, 214 Mass. 184, 100 N. E. 1099; Stanley *v.* Southern R. Co., 160 N. C. 323, 76 S. E. 221; Texas, etc., R. Co. *v.* Bratcher (Tex. Civ. App.), 78 S. W. 531.

Illustrations.—In an action for injury to a street railway passenger due to another passenger so carrying a hoe that its handle caught under the hood of the forward car as it rocked up and down, and broke, hurling a piece back into the car, and striking him, whether the conductor's failure to cause the passenger to place his hoe on the floor of the car or to carry it in some other position was negligence held for the jury. Farrier *v.* Colorado Springs, etc., R. Co., 95 Pac. 294, 42 Colo. 331.

Plaintiff, her two children, and their nurse boarded defendant's train, and, there being no vacant seats in the day coach entered the sleeper. Subsequently the sleeping car conductor ordered them to the day coach, and at his direction the porter carried the oldest child out; plaintiff following with the nurse and other child. The door of the day coach was locked, and the porter, stating that he would get a key, left them on the platform. Three drunken men got on the platform when the train stopped at a station, and greatly frightened plaintiff; one of them seizing her by the arm. To escape them, she entered the smoking room of the sleeper; remaining there until reaching her destination. Held, that the question whether defendant used proper care for the protection of its passengers was for the jury Cincinnati, etc., R. Co. *v.* Taylor, 85 S. W. 168, 27 Ky. L. Rep. 351.

In an action against a carrier for injuries to a passenger, where it appeared that defendant exercised complete control over the platform from which a passenger entered its car through a window thereof, thereby inflicting injuries on plaintiff, by kicking him in the face, when no reason appeared why the defendant could not have compelled its passengers, who had congregated on the platform with the purpose of taking passage on the train in which plaintiff sat, to enter the cars through the doors, the question of defendant's negligence was for the jury. Grogan *v.* Brooklyn Heights R. Co., 89 N. Y. S. 1027, 97 App. Div. 413.

In an action against a carrier, the dismissal of the complaint at the close of plaintiff's case was error, where there was uncontradicted evidence of more than one attack on plaintiff by fellow passengers, and of notice to the conductor in charge of defendant's car, as it was bound, as far as practicable, to protect passengers from violence committed by copassengers. Stutsky *v.* Brooklyn Heights R. Co., 94 N. Y. S. 433.

Plaintiff's evidence, if credible, established the facts that, while a passenger on defendant's railroad train, other passengers, without provocation, began to insult and revile him and his companion, who were talking in the German language. They took hold of plaintiff's hat, and hustled him, and, on the conductor being asked to interfere, he said "he could do nothing; that if he asked them to stop they wouldn't do it." Afterward the conductor did ask them to "stop that fooling," at which they merely laughed, and he walked out of the car, when they resumed their boisterous conduct and insults. Just before a station was reached the other passengers threw plaintiff's hat on the floor, struck him, and when he rose to regain his hat threw him to the floor, and then walked over him out of the car to the station. Held, that it was error to dismiss plaintiff's case for damages at the close of such evidence. Koch *v.* Brooklyn Heights R. Co., 78 N. Y. S. 99, 75 App. Div. 282.

Plaintiff, attempting to alight from defendant's train, had reached the second step of the platform, when a heavy man caught hold of the car rail, swung himself up on the step, his valise striking plaintiff on the knee and injuring her. The conductor of the train and plaintiff's father were both standing near by. Plaintiff testified it could not reasonably have been anticipated the man was going to hit her. The conductor could have seen the man coming if he had been attending to his business. The rules of the company required conductors to give particular attention to women and children, etc. Held, that a motion for a nonsuit was properly

carrier could have foreseen that an intoxicated passenger might do injury to other passengers,[75] or whether the circumstances required it to anticipate such an act as injured the plaintiff[76] or required it to keep a certain passenger under surveillance, so as to prevent him injuring a fellow passenger.[77] The question whether the conduct of cabmen at a railroad station, whereby a passenger was injured, was so notorious that the company had, or should have had, knowledge thereof, was for the jury.[78] Where the evidence in an action by a passenger, who was at a railway station waiting for a train, against the railroad company, for permitting, countenancing, and participating in an assault on him, was conflicting, the refusal of a nonsuit was proper.[79] But where the evidence is insufficient to justify a verdict against the carrier, it is proper to sustain a demurrer to the evidence.[80]

§ 3299. Condition and Use of Carrier's Premises.—It is usually a question for the jury to determine from the facts of each particular case whether the carrier has been negligent as to the condition and use of its station and premises.[81] Where there is a conflict in the evidence as to material facts, it

granted. Fritz *v.* Southern R. Co., 44 S. E. 613, 132 N. C. 829.

Rev. St. 1895, art. 4509, requiring railroad companies to furnish separate coaches for white and negro passengers, does not make it negligence per se for a railroad company to permit a negro to enter a coach reserved for white passengers, and there assault a white passenger. Segal *v.* St. Louis, etc., R. Co., 80 S. W. 233, 35 Tex. Civ. App. 517.

Injuries caused by rush of other passengers—Where a passenger on a railway, in attempting to get off at his destination, is knocked off the car platform by other passengers boarding the train, and injured, no precaution being shown on the part of the guard to prevent interference between passengers getting on and off, it is a question for the jury whether any neccessary precaution has been omitted, and it is error to direct a nonsuit. Buck *v.* Manhattan R. Co., 2 N. Y. S. 718, 9 N. Y. St. Rep. 908, 15 Daly 48.

75. Montgomery Tract. Co. *v.* Whatley, 152 Ala. 101, 44 So. 538.

76. Whether the carrier should have apprehended, in the exercise of ordinary care, that an intoxicated passenger who was armed with a pistol, and who had been shooting it while on the train, would jump from the train at a station and fire the pistol into the coach, injuring another passenger, is a question for the jury and not for the court on demurrer. Grimsley *v.* Atlantic, etc., R. Co., 57 S. E. 943, 1 Ga. App. 557.

Where the air brakes on the rear passenger coach of a train are in such a condition that the passengers are not endangered as long as the coach is attached to the train, the fact that the brakes are not in such a high degree of efficiency as to stop such coach before the forward section of the train is stopped, on the brakes being automatically set by the act of a drunken passenger in uncoupling the rear coach while the train is in motion, is not sufficient, as a matter of law to render the company liable to a passenger injured in a collision of the coach with the forward section, as the company is not bound, as a matter of law, to anticipate such unauthorized acts by passengers, but the question whether the circumstances require it to anticipate such act is for the jury. Texas, etc., R. Co. *v.* Storey, 68 S. W. 534, 29 Tex. Civ. App. 483.

77. McWilliams *v.* Lake Shore, etc., R. Co., 146 Mich. 216, 109 N. W. 272.

78. Exton *v.* Central R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508, affirming 42 Atl. 486, 62 N. J. L. 7.

79. Refusal of nonsuit.—Seawell *v.* Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610, rehearing denied in 133 N. C. 515, 45 S. E. 850.

80. Demurrer to evidence.—In an action against a street railway by a passenger for injuries received by being struck by a missile thrown by a bystander, plaintiff testified that he was seated near the front of the car, and that as the car approached the corner, where by ordinance it was required to stop, he saw a man standing between the tracks, making violent motions with something in his hands. His next recollection was of transactions after the injury. Another witness testified to seeing some one throw a missile through the front vestibule of the car. Held proper to sustain a demurrer to the evidence. Woas *v.* St. Louis Trans. Co., 198 Mo. 664, 96 S. W. 1017, 7 L. R. A., N. S., 231, 8 Am. & Eng. Ann. Cas. 584.

81. Condition and use of carrier's premises.—Pennsylvania R. Co. *v.* Green, 140 U. S. 49, 35 L. Ed. 339, 11 S. Ct. 650.

In an action for injuries to plaintiff, who had left a car to pass an obstruction and take a car on the other side, and who fell over an impediment in the path furnished by the company for the purpose of passing the obstruction, whether the company made reasonable provisions for the safety of the plaintiff while passing

is error to direct a verdict for defendant.[82] It is for the jury to determine whether a railroad company has been guilty of negligence in failing to keep the steps leading to its depot clear of ice and snow,[83] in maintaining walks of loose gravel and stone,[84] or in permitting a person to work in the narrow passage leading to its ticket office.[85] Where there was evidence to sustain a finding that a railroad passenger took the cold resulting in her death from the company's negligent failure to keep the waiting room in a proper condition, the question was properly submitted to the jury.[86] And where plaintiff was injured by reason of a defective chair in the waiting room and there was evidence tending to show that the chair had been defective for some time, and that defendant's agent had been notified of the fact, the question of defendant's negligence in not repairing or removing it was one for the jury.[87]

As to Warnings.—Whether sufficient warning was given before closing the space left for the passage of persons between cars at a station[88] and whether the carrier was negligent in failing to warn passengers of danger in passing from the car to the platform on account of the space between them,[89] or in failing to

over the path held for the jury. Powers *v.* Old Colony St. R. Co., 87 N. E. 192, 201 Mass. 66.

Whether depot steps muddy and slippery.—MacLaren *v.* Boston Elev. R. Co., 197 Mass. 490, 83 N. E. 1088.

Passenger falling into drain box.—Philadelphia, etc., R. Co. *v.* McGugan, 102 Md. 270, 62 Atl. 752.

Turnstile improperly constructed.—Proof that a turnstile maintained as a passenger exit was so constructed that the lower arm was at least eight and a half inches above the floor, and that a passenger was injured by catching her foot between the lowest revolving arm of the turnstile and the floor, tended to sustain the allegation that the turnstile was improperly constructed, and whether the carrier should have foreseen such an accident was for the jury. Gascoigne *v.* Metropolitan, etc., R. Co., 87 N. E. 883, 239 Ill. 18, 16 Am. & Eng. Ann. Cas. 115, affirming judgment 143 Ill. App. 547.

Negligence in maintaining incline.—There being evidence that, though it was necessary to maintain the incline where it was, yet it might have been movable, and away when not in use, or that one might have been built in the freight room itself that would have answered the purpose, it was not error to refuse direction of verdict for defendant, since such evidence, together with plaintiff's testimony that it was dark there, made the question of defendant's negligence one for the jury. Sullivan *v.* Delaware, etc., Canal Co., 47 Atl. 1084, 72 Vt. 353.

Defects in baggage room.—Where the owner of baggage enters a baggage room at a railway station at the invitation of the baggage master, for the purpose of pointing out the baggage wanted, and is injured by the falling of a defective door in an attempt to open it for the purpose of asking a street car motorman to wait, the question of negligence is for the jury; there being testimony tending to show defendant's knowledge of the defect. Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

In an action against a railroad for injuries to a passenger through stepping into the space between a baggage truck and the wall of a depression in the floor of the room, made to bring the top of the truck on a level with the floor, to facilitate the loading and unloading of baggage, whether the room, as so constructed, was reasonably safe for the use of passengers identifying baggage therein, held, under the evidence, for the jury. Bates *v.* Chicago, etc., R. Co., 122 N. W. 745, 140 Wis. 235.

82. Erroneous direction of verdict.—Plaintiff's evidence tended to show that as he stepped from defendant's train at a station in the night, where it was too dark for him to see well, he was tripped by a hose that was being drawn along the platform by employees of defendant, close to the steps of the car, and fell, and was injured. Defendant's evidence was to the effect that the hose was lying still on the platform, not less than two and a half feet from the car steps, and that the place was well lighted. Held that, it was error to direct a verdict for defendant. Baker *v.* Clark, 99 Fed. 911, 40 C. C. A. 174.

83. Illinois Cent. R. Co *v.* Keegan, 112 Ill. App. 28, affirmed in 210 Ill. 150, 71 N. E. 321.

84. Johnson *v.* Texas Cent. R. Co., 42 Tex. Civ. App. 604, 93 S. W. 433.

85. Lycett *v.* Manhattan R. Co., 42 N. Y. S. 431, 12 App. Div. 326.

86. Crawford *v.* Maine Cent. Railroad, 76 N. H. 29, 78 Atl. 1078. See Neal *v.* Southern Railway, 92 S. C. 197, 75 S. E. 405.

87. Texas, etc., R. Co. *v.* Humble, 97 Fed. 837, 38 C. C. A. 502, affirmed in 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

88. As to warnings.—Louisville, etc., R. Co. *v.* Smith, 135 Ky. 462, 122 S. W. 806.

89. Duty to warn passenger of danger.—Langin *v.* New York, 42 N. Y. S. 353, 10 App. Div. 529; Windels *v.* Interborough Rapid Trans. Co., 98 N. Y. S. 854, 49 Misc. Rep. 646.

call attention of passengers to a change in level of the platform,[90] are questions for the jury.

Lighting Station and Premises.—Whether the carrier has been negligent as to the lighting of its station and premises is ordinarily a question for the jury under proper instructions.[91] Whether a period of time prior to the arrival of a night passenger train was a reasonable one during which the railroad should have kept its platform lighted for the accommodation of passengers is a question for the jury.[92]

Platforms and Approaches.—Whether the approach to the platform of a railway station was so constructed as to be reasonably safe is a question for the jury.[93] It is generally for the jury to decide whether the carrier has been guilty of negligence in failing to provide a proper platform,[94] or in failing to

90. Fisher *v.* Boston, etc., Railroad, 75 N. H. 184, 72 Atl. 212.

91. Lighting station and premises.—*United States.*—Texas, etc., R. Co. *v.* Mayer, 183 Fed. 575, 105 C. C. A. 646; Pittsburgh, etc., R. Co. *v.* Wiegel, 191 Fed. 577.

Alabama.—Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

Illinois.—Chadbourne *v.* Illinois Cent. R. Co., 104 Ill. App. 333.

Indiana.—Pere Marquetto R. Co. *v.* Strange, 171 Ind. 160, 84 N. E. 819, 20 L. R. A., N. S., 1041, rehearing denied in 85 N. W. 1026.

Iowa.—Drummy *v.* Minneapolis, etc., R. Co., 153 Iowa 479, 133 N. W. 655; Merryman *v.* Chicago, etc., R. Co., 135 Iowa 591, 113 N. W. 357.

Massachusetts.—Keefe *v.* Boston, etc., Railroad, 142 Mass. 251, 7 N. E. 874.

New Jersey.—Vosler *v.* Delaware, etc., R. Co., 77 N. J. L. 727, 73 Atl. 483.

New York.—Groll *v.* Prospect Park, etc., R. Co., 51 Hun 643, 4 N. Y. S. 80, 22 N. Y. St. Rep. 656; Flagg *v.* Manhattan R Co., 49 N. Y. Super. Ct. 251; Green *v.* Middlesex Valley R. Co., 53 N. Y. S. 500, 31 App. Div. 412, 28 Civ. Proc. R. 152, 6 N. Y. Ann. Cas. 107.

South Carolina.—Williford *v.* Southern Railway, 85 S. C. 301, 67 S. E. 302.

Texas.—Gulf, etc., R. Co. *v.* Barnett, 19 Tex. Civ. App. 626, 47 S. W. 1039; Texas Cent. R. Co. *v.* Wheeler, 52 Tex. Civ. App. 603, 116 S. W. 83; San Antonio, etc., R. Co. *v.* Turney, 33 Tex. Civ. App. 626, 78 S. W. 256.

Wisconsin.—Bates *v.* Chicago, etc., R. Co., 140 Wis. 235, 122 N. W. 745.

In an action against a railroad company for injuries received by plaintiff's wife in alighting from a train, where several witnesses testified that she was injured through being compelled to jump from the car steps to the platform in the dark while the train was moving, it was not error for the court to submit to the jury, as a possible ground for recovery, the question whether defendant was negligent in failing to provide sufficient lights, though no witness testified that the accident would not have occurred if the platform had been properly lighted. Eddy *v.* Still, 3 Tex. Civ. App. 346, 22 S. W. 525.

While plaintiff was waiting for a train in a station on defendant's railroad in the evening, she had occasion to visit the water closet, which was 150 feet from the station and reached over a platform extending along the track and beyond the building. Having been shown the way by another passenger, plaintiff was passing along such platform, when she fell off and was injured. Held, that evidence that the night was very dark, and that the platform was inadequately lighted, if at all, was sufficient to require the submission to the jury of the question of defendant's negligence and breach of duty, especially in view of a state regulation requiring such places to be well lighted, where required by the convenience of passengers. O'Field *v.* St. Louis, etc., R. Co., 189 Fed. 721, 111 C. C. A. 259.

92 Abbott *v.* Oregon R. Co., 46 Ore. 549, 80 Pac. 1012, 114 Am. St. Rep. 885, 1 L. R. A., N. S., 851.

93. Approach to platform.—Union Pac. R. Co. *v.* Evans, 52 Neb. 50, 71 N. W. 1062.

94. Failure to provide proper platform.—Whether a station platform built level with the track so that an ordinary passenger car would project over the platform for a distance equal to the space between the inner rail and the outer side of the car is reasonably safe for the use of passengers is a question for the jury, in view of the amount and frequency of travel. Savageau *v.* Boston, etc., Railroad, 96 N. E. 67, 210 Mass. 164.

Where, in an action for injuries sustained by plaintiff's wife in attempting to board defendant's train, she testified that it was "quite a high step" from the platform to the steps of the coach, and defendant's employees testified that the distance was twelve or fourteen inches, the question of defendant's negligence in not providing a better platform was for the jury. Ft. Worth, etc., R. Co. *v.* Work (Tex. Civ. App.), 100 S. W. 962.

In an action for the wrongful killing of a passenger as he had just reached a narrow platform provided for passengers to board trains, the cars of which overlapped the platform between thirteen and

keep it in a reasonably safe condition.[95] Where the evidence is conflicting as to whether a station platform was greasy,[96] or as to the existence of a hole therein and its exact location,[97] the question is for the jury. Where a passenger on a dark night stepped into an unguarded hole between two cars and the platform of an elevated railroad station, believing it to be the platform of the car she was about to board, and it was shown that the space between the cars was usually protected by a trellis gate, which at the time of the accident had been removed, the question of the carrier's negligence was for the jury.[98] Where there is no evidence tending to prove negligence on the part of the carrier in failing to have guard railings on a platform, the question should not be submitted to the jury.[99] And where a passenger, while attempting to board a train, was injured by stepping off a platform, the end of which he could not see because of darkness, the sufficiency of the platform was not involved, and the submission of that issue to the jury was error.[1]

Crowding Platform.—Negligence is a question for the jury, where the carrier permitted its station platform to become overcrowded with persons waiting for trains, so that one of them was pushed off the platform, and injured.[2] And whether the carrier has been negligent in failing to have adequate arrangements to control a crowd on its station platform and protect passengers from injury is generally a question for the jury.[3] In an action against a street railway for

fourteen inches, by reason of its being constructed on a curve close to the rail, evidence held to justify the court in submitting to the jury the question whether defendant was guilty of negligence in providing an unsafe platform. Lehigh Valley R. Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478.

In an action for death by wrongful act, it appeared that: First, defendant suddenly started its car, which deceased was about to enter, at an elevated station, causing deceased to fall off or requiring him to step off on the station platform; second, that the railing at the end of the platform did not reach the edge, and that there was left a space of twenty-six inches, through which deceased was carried by the momentum, and that he fell to the street below. No passengers were allowed to ride on the car steps, and no necessity was shown for leaving so wide a space. The petition declared on the two acts of alleged negligence. Held, that the question of defendant's negligence, in not extending the railroad nearer to the edge of the platform, was for the jury. Barth *v.* Kansas, etc., R. Co., 44 S. W. 778, 142 Mo. 535.

95. Failure to keep platform in reasonably safe condition.—Haselton *v.* Portsmouth, etc., Railway, 71 N. H. 589, 53 Atl. 1016; Arkansas Mid. R. Co. *v.* Robinson, 96 Ark. 32, 130 S. W. 536.

Whether the carrier exercised reasonable care in the method of attaching a ladder to a semaphone sign post in the depot platform contiguous to the office window. Vance *v.* Great Northern R. Co., 106 Minn. 172, 118 N. W. 674.

Rotten timber in platform.—Wood *v.* Metropolitan St. R. Co., 181 Mo. 433, 81 S. W. 152; S. C., 107 Mo. App. 372, 81 S. W. 1273.

Icy platform.—McGuire *v.* Interborough Rapid Trans. Co., 93 N. Y. S. 316, 104 App. Div. 105.

Railroad ties on platform.—Moriarty *v.* Boston, etc., Railroad, 202 Mass. 166, 88 N. E. 585.

Leaving trucks on platform.—Plaintiff, in an action against a carrier for personal injuries received while alighting from a train at night, at the direction of the conductor, to purchase a ticket, testified that he fell over some skids and trucks that were lying on the platform of the depot. The only evidence to contradict plaintiff was the testimony of a single witness that the skids and trucks were kept against the wall of the depot. Held, that it was a question for the jury whether the leaving of the skids and trucks where they were when plaintiff stumbled over them was negligence. Chicago, etc., R. Co. *v.* Barrett, 80 S. W. 660, 35 Tex. Civ. App. 366.

96. Whether platform greasy.—Newcomb *v.* New York, etc., R. Co., 169 Mo. 409, 69 S. W. 348.

97. Hole in platform.—Robertson *v.* Wabash R. Co., 53 S. W. 1082, 152 Mo. 382.

98. Lake St. Elev. R. Co. *v.* Burgess, 66 N. E. 215, 200 Ill. 628, affirming 99 Ill. App. 499.

99. Where there is no evidence of negligence.—Moeller *v.* United R. Co., 242 Mo. 721, 147 S. W. 1009.

1. Submitting issue not involved.—Gulf, etc., R. Co. *v.* Barnett, 47 S. W. 1039, 19 Tex. Civ. App. 626.

2. Crowding platform.—McGearty *v.* Manhattan R. Co., 43 N. Y. S. 1086, 15 App. Div. 2.

3. Pennsylvania R. Co. *v.* Stockton, 184 Fed. 422, 106 C. C. A. 433; Reschke *v.*

injuries received through being pushed off a station platform, which defendant was alleged to have permitted to become overcrowded, plaintiff had a right to go to the jury on the grounds that the platform in question was too small to take care of the passengers who landed on it and that the guard who should have been on the platform was not there.[4]

§§ 3300-3301. Taking Up Passengers—§ 3300. In General.—In an action for injuries to a passenger while attempting to board a car the question of the carrier's negligence is ordinarily for the jury.[5] And where the plaintiff's evidence is sufficient to sustain a recovery, it is proper to refuse a nonsuit.[6] But where the jury are not justified in finding defendant negligent, a verdict should be directed in its favor.[7] It is a question for the jury to determine whether the carrier under the circumstances of a particular case should have provided an employee to assist passengers boarding its cars.[8] Where there is

Syracuse, etc., R. Co., 139 N. Y. S. 555, 155 App. Div. 48; Dixon *v.* Great Falls, etc., R. Co., 38 App. D. C. 591, 598, Ann. Cas. 1913C, 571. See Muhlhause *v.* Monongahela St. R. Co., 201 Pa. 237, 50 Atl. 937.

Illustrations.—Plaintiff's intestate was killed when attempting to board a train on defendant's railroad at Newark, N. J., by being pushed against or under the moving cars by the crowd which was waiting for the train. It was Saturday afternoon at the height of the season for week-end summer travel to the seaside, where the train was bound, and there were 800 or 900 persons on the platform and nearly 200 who sought to board this particular train, which was ten minutes late. Such crowd, however, was not exceptional for the time, day, and season. There were no gates, and there was testimony that there was no one representing defendant on the platform when the train came in. Held, that the question of defendant's negligence was properly submitted to the jury. Pennsylvania R. Co. *v.* Stockton, 184 Fed. 422, 106 C. C. A. 433.

Whether a street railway company which conducted an amusement park, at which after the close of the entertainment one, who had taken her place in the front rank of the 7,000 persons waiting for cars, was pushed under a car, was guilty of negligence in not making adequate provision by way of railings, barriers, and policemen to furnish protection from the dangers incident to such a crowd, is a question for the jury. Cousineau *v.* Muskegon Tract., etc., Co., 108 N. W. 720, 145 Mich. 314.

4. Beverley *v.* Boston Elev. R. Co., 194 Mass. 450, 80 N. E. 507.

5. Taking up passengers.—Blades *v.* Des Moines City R. Co. (Iowa), 113 N. W. 922; Sandquist *v.* Fort Dodge, etc., R. Co. (Iowa), 140 N. W. 394; Joyce *v.* Metropolitan St. R. Co., 118 S. W. 21, 219 Mo. 344; Wellman *v.* Metropolitan St. R. Co., 118 S. W. 31, 219 Mo. 126; Benjamin *v.* Metropolitan St. R. Co., 84 N. Y. S. 458; Redington *v.* Harrisburg Tract. Co., 210 Pa. 648, 60 Atl. 305.

In an action against an elevated railroad company for injuries to a person attempting to board a train, whether or not the defendant was guilty of negligence in opening a side door of its train for the reception of passengers before the train was properly adjusted to a movable platform provided by the defendant, without having some one at the place to warn persons attempting to board the car of the open space, held, under the evidence, a question for the jury. Plummer *v.* Boston Elev. R. Co., 84 N. E. 849, 198 Mass. 499.

6. Refusal of nonsuit.—Central, etc., R. Co. *v.* Goodman, 119 Ga. 234, 45 S. E. 969.

7. Direction of verdict.—Plaintiff, attempting to get on a moving street car, seized the hand rail and placed one foot on the step, and with the other on the ground was dragged along until he came in contact with some railroad ties near the track in the middle of an intersecting street, when he lost his hold and was severely injured. The evidence as to whether the speed of the car was increased after plaintiff took hold was conflicting. No proof was offered that the motorman in any way indicated that he meant to stop at the upper corner of the street where plaintiff stood, and he stated that he did not notice any one there. Held, that a verdict should have been directed for defendant. Schmidt *v.* North Jersey St. R. Co., 49 Atl. 438, 66 N. J. L. 424.

8. Assisting passengers to board cars.—Ft. Worth, etc., R. Co. *v.* Work (Tex. Civ. App.), 100 S. W. 962; Richardson *v.* Augusta, etc., R. Co., 79 S. C. 535, 61 S. E. 83.

Where, in an action for injuries to plaintiff's wife, sustained while boarding defendant's train, it was alleged that, defendant having failed to provide a suitable platform, and having failed to have its depot grounds properly lighted, and having permitted the steps leading to the platform of its coaches to be covered with

evidence to the effect that the trainmen, instead of warning a passenger not to get on a moving train, directed him to get on, it was for the jury, and not the court, to say what directions he received from the trainmen.[9] Evidence that plaintiff and a companion hailed a horse car, and immediately thereafter the car was slowed down, requires the submission to the jury of the question whether the driver knew, or should have known, that both persons intended to become passengers.[10]

As to Statements of Employers.—Though ordinarily the bald statement of an employee of a railroad telling passengers to "Step lively" is not negligence, still, where a dangerous place, not existing with trains and platforms in their normal condition, existed between the station platform and the car entrance by reason of the act of the employee who called to passengers to step lively, it can not be said as a matter of law that the request was not negligence.[11] Whether the statement of a conductor to plaintiff, desiring to board a train, that "I am going; you had better get on the train," was a warning or an invitation to get on, was a question of fact for the jury, and not to be determined by the court on demurrer.[12]

Effect of Custom.—Where railroad trains for several years have been accustomed to stop at a certain point, where there was no platform or other provisions for passengers, before crossing another railroad track, and employees of various establishments in the neighborhood were in the habit of there taking the trains, no objection ever having been made to their doing so, and the railroad employees sometimes assisting them, and fare being always collected from those who thus boarded the trains, the question whether the company had induced the public to believe they were invited to board the trains at that place was for the jury.[13]

§ 3301. Starting or Moving Car While Passenger Is Boarding Same.—When a passenger is injured by a sudden movement or jerk of the carrier's conveyance while he is attempting to board it, the question of the carrier's negligence is for the jury, where it depends on conflicting evidence or on inferences to be deduced from circumstances in regard to which there is room for fair difference of opinion among intelligent men.[14] Where the evidence in an action

ice, it was negligent for defendant to fail to have some person present to assist plaintiff's wife to board, whether defendant owed her a duty to assist her to board was for the jury. Ft. Worth, etc., R. Co. *v.* Work (Tex. Civ. App.), 100 S. W. 962.

9. Fulks *v.* St. Louis, etc., R. Co., 111 Mo. 335, 19 S. W. 818.

10. Sexton *v.* Metropolitan St. R. Co., 57 N. Y. S. 577, 40 App. Div. 26.

11 Statement of employee.—Plummer *v.* Boston Elev. R. Co., 198 Mass. 499, 84 N. E. 849.

12. Talbert *v.* Charleston, etc., R. Co., 72 S. C. 137, 51 S. E. 564.

13. Effect of custom.—Chicago, etc., R. Co. *v.* Doan, 195 Ill. 168, 62 N. E. 826, affirming 93 Ill. App. 247.

14. Starting or moving car while passenger is boarding same.—*United States.*—St. Louis, etc., R. Co *v.* Wainwright, 152 Fed. 624, 82 C. C. A. 16.

Arkansas.—Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

District of Columbia.—Anacostia, etc., R. Co. *v.* Klein, 8 App. D. C. 75.

Iowa.—Jaques *v.* Sioux City Tract. Co., 124 Iowa 257, 99 N. W. 1069; Burger *v.* Omaha, etc., St. R. Co., 139 Iowa 645, 117 N. W. 35.

Kentucky.—Samuels *v.* Louisville R. Co., 151 Ky. 90, 151 S. W. 37.

Maryland.—Baltimore City Pass. R. Co. *v.* Baer, 44 Atl. 992, 90 Md. 97.

Massachusetts. — Hamilton *v.* Boston Elev. R. Co., 213 Mass. 420, 100 N. E. 604.

Missouri.—Berry *v.* St. Louis Trans. Co., 211 Mo. 88, 109 S. W. 661.

New York.—Michelson *v.* Metropolitan St. R. Co., 87 N. Y. S. 501; Ward *v.* Metropolitan St. R. Co., 90 N. Y. S. 897, 99 App. Div. 126; De Rozas *v.* Metropolitan St. R. Co., 43 N. Y. S. 27, 13 App. Div. 296; Daley *v.* Port Jervis, etc., R. Co., 80 Hun 174, 29 N. Y. S. 1011, 61 N. Y. St. Rep. 632; McGlynn *v.* Nassau Elect. R. Co., 113 N. Y. S. 119, 128 App. Div. 866, affirmed in 92 N. E. 1091, 198 N. Y. 522.

North Carolina.—Roberts *v.* Atlantic, etc., R. Co., 155 N. C. 79, 70 S. E. 1080.

Pennsylvania.—Thomas *v.* Altoona, etc., Elect Co., 236 Pa. 365, 84 Atl. 846.

Virginia.—Blue Ridge Light, etc., Co. *v.* Price, 108 Va. 652, 62 S. E. 938.

Washington.—Gilcher *v.* Seattle Elect. Co., 69 Wash. 78, 124 Pac. 218.

Illustrations.—Negligence is a question

against a street railway company for injuries to a passenger showed that the car was started before the passenger had been given a reasonable opportunity to get on, and there was no evidence of contributory negligence, it was error to dismiss at the close of plaintiff's case.[15] But where, in an action against a street railway company for injury to a passenger who was thrown down by the sudden starting of the car as he was getting on, there was no evidence relating to the conductor, except that plaintiff did not see him, it was error to leave the question of the conductor's negligence to the jury.[16] Whether plaintiff was given a reasonable time to board a street car before it was started is ordinarily a question for

for the jury, where a car was started suddenly, and without warning, while a passenger had his foot on the step, and before he had time to get on the car. Schalscha *v.* Third Ave. R. Co., 43 N. Y. S. 251, 19 Misc. Rep. 141; Miller *v.* St. Paul City R. Co., 66 Minn. 192, 68 N. W. 862; Barth *v.* Kansas, etc., R. Co., 142 Mo. 535, 44 S. W. 778; McKenna *v.* North Hudson County R. Co., 64 N. J. L. 106, 45 Atl. 776.

Where there was evidence that plaintiff after assisting her sister to a seat, got up on the running board and attempted to raise the curtain so that she could enter the car, and although she requested the conductor to raise it for her he failed to do so, but started the vehicle, the conductor's negligence was for the jury. Martin *v.* Boston Elev. R. Co., 101 N. E. 1089, 214 Mass. 456.

Where the evidence showed that a passenger attempting to get on the front platform of a street car was told to get off, and went along the running board of the car, the car gave a jerk, and the passenger fell to the ground, it was for the jury to say whether defendant was negligent. Budner *v.* Public Service Corp., 65 Atl. 893, 74 N. J. L. 298.

Where the conductor of a crowded car, while in the front end, knew that it had stopped to take on passengers, and started it without any effort to ascertain what or how many passengers were trying to get aboard, or whether they had actually gotten aboard, the question of his negligence was for the jury. Pickford *v.* Boston Elev. R. Co., 100 N. E. 548, 213 Mass. 507; Ryan *v.* Pittsfield Elect. St. R. Co, 203 Mass. 283, 89 N. E. 527.

The question of a conductor's negligence in starting a car upon assurance from passengers on the rear platform that it was "all right," held, in view of all the circumstances, for the jury. Pickford *v.* Boston Elev. R. Co., 100 N. E. 548, 213 Mass. 507.

The question of negligence is for the jury where plaintiff and friend hailed a street car, and it stopped, and there was evidence tending to show that the car was standing still when plaintiff attempted to get on, and that it started after he had got partly up, and that the driver, feeling the jar of the car, said, "Was that a friend of yours with you?" although the driver testified he did not hear any one hail the car, and there was evidence tending to show that plaintiff attempted to get on the car after it had started. Wolfkiel *v.* Sixth Ave. R. Co., 38 N. Y. 49.

Where plaintiff showed that he stepped onto the running board of a street car when the car was moving very slowly and almost at a standstill, taking hold of a stanchion and got both feet on the running board, and was about to step inside the car, when the car started, his foot slipped, and he fell and was injured, it was a question for the jury whether the starting was negligence. Hirschberg *v.* Brooklyn, etc., R. Co., 119 N. Y. S. 492, 134 App. Div. 629.

Where the testimony of a passenger in a suit against a railroad tends to show that he proceeded to board a train, and that when he was on the second step of the car his further progress was barred by persons on the platform; that the train was then started, and was suddenly stopped with a jerk, when a man on the platform fell against plaintiff, who was thrown off and injured and his testimony was corroborated, it was a question for the jury, though contradicted by defendant. Giovanelli *v.* Erie R. Co., 76 Atl. 424, 228 Pa. 33. See Kulman *v.* Erie R. Co., 47 Atl. 497, 65 N. J. L. 241.

15. Silber *v.* New York City R. Co., 99 N. Y. S. 837. See Baltimore City Pass. R. Co. *v.* Baer, 90 Md. 97, 44 Atl. 992.

Plaintiff was given a transfer from one of defendant's street cars to another, and crossed to the point where he should board the car. As the car came to a stop, he took hold of the upright rail to board it, when people in front of him had got aboard, and as he was about to step on the car gave a sudden jerk, by which plaintiff was caused to fall in a hole, by which he was injured, he being compelled finally to let go his hold of the rail. Held that, as such evidence would have justified the finding that defendant was negligent in failing to give plaintiff a reasonable time to board the car, it was error to dismiss plaintiff's complaint. Fay *v.* Metropolitan St. R. Co., 70 N. Y. S. 763, 62 App. Div. 51.

16. Where no evidence of conductor's negligence.—Monroe *v.* Metropolitan St. R. Co., 80 N. Y. S. 177, 79 App. Div. 587.

the jury.[17] It is not negligence per se to start a street car while passengers are standing either in the car or on the platform or in the vestibule.[18] And whether it is negligent to start a car before a passenger has taken his seat is a question of fact for the jury.[19] A carrier is not required, as a matter of law, to keep a train standing until a passenger has had a reasonable opportunity to reach a seat after boarding the train.[20]

§ 3302. Operation of Trains at Places Where Passengers Are Being Received or Discharged.—Ordinarily it is a question for the jury whether the carrier has been negligent in the operation of trains or cars at a place where passengers are being received or discharged.[21] So it is a question for the jury

17. Reasonable time.—Rand *v.* Boston Elev. R. Co., 198 Mass. 569, 84 N. E. 841.

18. Starting car while passenger standing.—Benjamin *v.* Metropolitan St. R. Co., 245 Mo. 598, 151 S. W. 91.

19. Benjamin *v.* Metropolitan St. R. Co., 245 Mo. 598, 151 S. W. 91.

Woman passenger.—McGlynn *v.* Nassau Elect. R. Co., 113 N. Y. S. 119, 128 App. Div. 866.

Whether defendant was negligent in starting its car, so as to injure plaintiff, a woman of fifty-seven years, weighing nearly 200 pounds, as she was making her way toward a seat, was for the jury. Benjamin *v.* Metropolitan St. R. Co., 245 Mo. 598, 151 S. W. 91.

Where it was shown that plaintiff, a woman seventy-seven years old, after taking a street car, was thrown, without stumbling, but purely by the motion of the car in starting before she could reach a place of safety, to the floor, and injured, the question of the negligence of defendant's servants in so operating the car was properly for the jury. Morrow *v.* Brooklyn Heights R. Co., 103 N. Y. S. 998, 119 App. Div. 22.

Woman passenger accompanying child.—Louisville R. Co. *v.* Wilder, 143 Ky. 436, 136 S. W. 892.

Evidence that a woman with a child in her care boarded a street car, and while she was still standing, facing partly forward and partly sideways, and helping the child to move over from the end of the seat, the car, which was standing at the beginning of the curve, started with a sudden jerk, causing her to fall, did not show, as a matter of law, that there was no negligence on the part of the conductor in starting the car when he did. Hamilton *v.* Boston, etc., St. R. Co., 79 N. E. 734, 193 Mass. 324.

20. Louisville, etc., R. Co. *v.* Gaines, 152 Ky. 255, 153 S. W. 216; St. Louis, etc., R. Co. *v.* Wright, 105 Ark. 269, 150 S. W. 706.

In an action against a common carrier of passengers to recover for injuries resulting from falling from the coach, there was evidence tending to show that the driver stopped the coach to receive plaintiff as a passenger; that the coach was crowded, and all the seats occupied; and that, immediately after she had gotten in, and while she was still standing within the door, the coach violently started, throwing her out. Held, that the evidence was sufficient to go to the jury. Geddes *v.* Metropolitan R. Co., 103 Mass. 391.

21. Operation of trains at places where passengers are being received or discharged.—*United States.* — Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102; Harmon *v.* Flintham, 196 Fed. 635, 116 C. C. A. 309; Atlantic City R. Co. *v.* Clegg, 183 Fed. 216, 105 C. C. A. 478.

District of Columbia.—Chunn *v.* City, etc., Railway, 23 App. D. C. 551, reversed on another point in 28 S. Ct. 63, 207 U. S. 302.

Kentucky.—Illinois Cent. R. Co. *v.* Proctor, 122 Ky. 92, 28 Ky. L. Rep. 598, 89 S. W. 714; Louisville R. Co. *v.* Mitchell, 138 Ky. 190, 127 S. W. 770.

Massachusetts.—Sonier *v.* Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84; Renaud *v.* New York, etc., R. Co., 206 Mass. 557, 92 N. E. 710.

Minnesota.—Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

New Jersey.—Walger *v.* Jersey, etc., St. R. Co., 71 N. J. L. 356, 59 Atl. 14.

New York.—Allenza *v.* Erie R. Co., 138 N. Y. S. 1024, 78 Misc. Rep. 659; Craven *v.* International R. Co., 91 N. Y. S. 625, 100 App. Div. 157.

Pennsylvania.—Muhlhause *v.* Monongahela St. R. Co., 201 Pa. 237, 50 Atl. 937.

Illustrations.—Plaintiff's intestate went to a station on defendant's railroad at night for the purpose of taking a train, and while attempting to cross the tracks to a closet on the opposite side from the station, was struck and killed by cars which were being pushed along the track by an engine. The night was dark, the place was not lighted, and there was no light on the front end of the moving cars, nor any person stationed thereon. The cars made but little noise, and whether the bell on the engine was being rung was in dispute. There was evidence that the place where deceased was struck was a public crossing, and known to be such by defendant. Whether or not deceased was at the time under the influence of liquor was also in dispute. Held,

whether defendant is liable for negligence, when its train, passing slowly through depot grounds, strikes a passenger on a track; he supposing the train was about to stop, when it was not designed that it should.[22] And where it was customary for passengers to alight on the side of the train where the company operated a parallel track, the question whether the company was negligent in allowing another train to move on such track when passengers were alighting is solely for the jury.[23]

that the questions of defendant's negligence and the negligence of the deceased, involving the question of his intoxication, were all properly submitted to the jury. Texas, etc., R. Co. *v.* Wagley, 91 Fed. 860, 34 C. C. A. 114.

There were two tracks in front of the station building, and defendant's train passed on the farther one. A street crossed the tracks at the end of the station, paved with concrete, and from it and on the same level a paved platform extended on the outer side of each track, there being no division between the pavement of the street and the platform. A picket fence also extended from the street between the tracks past the station, which prevented crossing except on the street. An automatic bell was rung by every train from the time it approached until it left the station. The train of plaintiff's intestate stopped with the rear car on the street crossing, and, as he was passing to it from the waiting room along the street, he was struck and killed by a through train on the nearer track going in the opposite direction at high speed. Held, that the question of negligence was for the jury. Atlantic City R. Co. *v.* Clegg, 183 Fed. 216, 105 C. C. A. 478.

Plaintiff was a passenger on defendant's train on a branch line. Plaintiff's train stopped at the station, where the main track ran parallel between the branch track and the depot. A person standing on the ground by the train could see the main track 250 feet. As the train drew into the station, plaintiff stepped to the ground, and took three or four steps towards the depot, when he was struck by a train on the main track running at a high rate of speed, endeavoring to pass before plaintiff's train stopped. Held, that the question of defendant's negligence was properly submitted to the jury. Jewell *v.* New York, etc., R. Co., 50 N. Y. S. 848, 27 App Div. 500.

Plaintiff, who was a passenger on defendant's railroad, alighted at a station from which it was necessary to cross the tracks to reach the street leading to the town. She passed behind the train, and started diagonally across the tracks at a place which the evidence tended to show was customarily used for that purpose, and when upon the adjoining track was struck by a freight train approaching from the opposite direction, and injured. A rule of the company required freight trains to stop when approaching a passenger train discharging passengers at a station, and there was evidence that such rule was not observed in this instance. Held, that the question of the company's negligence was properly submitted to the jury. Chesapeake, etc., R. Co. *v.* King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102.

Running car past usual stopping place.—Whether it is negligence for a suburban electric railway company to run a car past a usual stopping place, when persons can be seen standing at such place between the inner rails from the other direction, is a question for the jury, especially where the company knows that intending passengers frequently stand in such space, and has given sanction to the practice by opening the car gates and permitting them to enter from that side. Chunn *v.* City, etc., Railway, 23 App. D. C. 551, reversed on another point in 28 S. Ct. 63, 207 U. S. 302.

Two cars coming from opposite directions were approaching a crossing of a principal street. A traveler, desiring to catch one car, crossed the track on which the other car was coming, and was caught between the two cars. The one injuring him was running fast, and gave no signal, and its speed was not checked before the accident. Held, that the question of negligence was for the jury. Fonda *v.* St. Paul City R. Co., 74 N. W. 166, 71 Minn. 438, 70 Am. St. Rep. 341.

Running car at high speed past car standing on parallel track to allow passengers to alight.—Wise *v.* Brooklyn Heights R. Co., 61 N. Y. S. 530, 46 App. Div. 246.

Whether carrier negligently omitted to give warning of approach of train is properly left for the jury to determine where it appeared that the plaintiff was standing upon the platform of a station of the defendant company, when he was hit by a passing train, and injured, and there was evidence that the bell on the engine of the train was not rung, and that suitable warning of its approach was not given. Sonier *v.* Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84.

22. Redhing *v.* Central R. Co., 68 N. J. L. 641, 54 Atl. 431.

23. Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713, affirming 68 Ill. App. 635.

§ 3303. Railroad Cars.—The question of the carrier's negligence where a passenger has been injured by reason of the condition of railroad cars is generally for the jury.[24] Thus, it has been held for the jury to determine whether platform gates provided for cars were sufficient,[25] whether a metal catch used to hold open the door of a coach was defective,[26] whether the carrier was negligent in respect to the construction of an overhead rack,[27] or a window,[28] whether a carrier failed to furnish proper accommodation for a passenger inside, and made it necessary for him to stand on the platform, from which he was thrown by a lurch of the train,[29] and whether the carrier was negligent in failing to keep the door of a car so it could be closed.[30] Where a carrier operates a train, advertised as completely vestibuled, in whole or in part not vestibuled, a passenger, reasonably believing from the advertisement that the train is vestibuled, and relying on that fact, and thereby induced to attempt to pass from one car to another, and injured because of the absence of the vestibule, is entitled to have the question of the carrier's negligence submitted to the jury.[31] Where a passenger was injured by the giving way of an adjustable hand rail when boarding a vestibule car, because the lower end of the rail had not been put in its socket by the servant who adjusted it, a nonsuit was properly denied.[32] Where a shipper of live stock, in attempting to board the car, grasped a hasp on the side of the car door which was the only thing to catch hold of, and the hasp gave way and he fell to the ground and was injured, and there is evidence of prior similar use by the plaintiff and railroad employees of hasps so located, it is error to direct a verdict for the defendant.[33]

Inspection of Car.—The question of the sufficiency of defendant's inspection of the car, alleged as negligence, is for the jury.[34] In an action against a

24. Condition of railroad cars.—In an action for injury to a passenger by getting his foot caught between the bumpers of two passenger cars, as he was crossing from one car to another while the train was stopping at a station, and claimed to have been caused by some improper action of the air brake, or because the space was not covered, the carrier's negligence held for the jury. Central, etc., R. Co. *v.* Storrs, 169 Ala. 361, 53 So. 746.

25. Whether platform gates sufficient.—Boston, etc., R. Co. *v.* Stockwell, 146 Fed. 505, 77 C. C. A. 19.

26. Defective catch.—Where a carrier used a metal catch to hold open the door of a coach while passengers alighted at stations, and a brakeman announced a station and pushed back the door on the catch, and while the car was at rest the door closed, injuring a passenger, and there was no unusual jolt or intervening cause which unloosed the door, the jury could find actionable negligence of the carrier, though the coach, when stopped, was inclined from the side on which the door was hinged. Kellogg *v.* Boston, etc., Railroad, 96 N. E. 525, 210 Mass. 324.

27. Overhead rack.—Louisville, etc., R. Co. *v.* Rommele, 152 Ky. 719, 154 S. W. 16.

28. Window.—Boice *v.* Ulster, etc., R. Co., 105 N. Y. S. 83, 120 App. Div. 643.

Where a passenger was injured by the falling of a car window, caused by defective or insufficient fastenings, whether defendant's failure to provide the windows with reasonably safe fastenings and keeping them in that condition was negligence was for the jury, and hence it was error for the court to charge as a matter of law that "any failure or omission of defendant" to so provide and keep reasonably safe fastenings was negligence. International, etc., R. Co. *v.* Hubbs, 37 Tex. Civ. App. 77, 82 S. W. 1062.

29. Central, etc., R. Co. *v.* Brown, 165 Ala. 493, 51 So. 565.

30. Defective door.—In an action by a railway mail clerk against a railroad company for damages sustained in that the railroad company failed to keep the door of the car in such condition that it could be closed, whereby he contracted a cold and was made seriously ill, under the evidence, defendant's negligence, held for the jury. Decker *v.* Chicago, etc., R. Co., 102 Minn. 99, 112 N. W. 901.

31. Train not vestibuled as advertised.—Pittsburgh, etc., R. Co. *v.* Schepman, 171 Ind. 71, 84 N. E. 988, reversing 82 N. E. 998.

32. Machlin *v.* Pennsylvania R. Co., 83 N. J. L. 362, 85 Atl. 340.

33. Blatcher *v.* Philadelphia, etc., R. Co., 31 App. D. C. 385, 16 L. R. A., N. S., 991.

34. Inspection of car.—Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969.

In an action for injuries to a passenger struck by a broken door of a freight car in a train moving in the opposite direction, the question whether the inspection made of the car by the carrier prior to the accident relieved it of negligence held under the evidence for the jury. Kuttner *v.* Central R. Co., 80 N. J. L. 11, 77 Atl. 470, judgment affirmed in 81 N. J. L. 731, 80 Atl. 1135.

railroad company for injuries to a passenger caused by the falling of a car window, evidence that almost immediately after leaving a terminal the latch of the window was in a broken condition warrants the submission to the jury of the question of defendant's negligence in inspection.[35] Though the uncontradicted evidence in a suit by a passenger injured in a train wreck caused by the breaking of a wheel shows that the highest degree of care by skilled persons was used in testing it at the factory, and that it was perfect when it left there, the court can not assume and charge that fact.[36]

Derailment Caused by Defects in Cars.—See post, "Derailment of Cars," § 3313.

§ 3304. Cars and Equipment of Street Railroads.—The question of a street car company's negligence as to the construction and condition of its cars and equipment is generally for the jury.[37] Thus, it is held for the jury to de-

35. Bunch *v.* Charleston, etc., R. Co., 91 S. C. 139, 74 S. E. 363.

36. Houston, etc., R. Co. *v.* Greer, 22 Tex. Civ. App. 5, 53 S. W. 58.

37. Cars and equipment of street.—Beave *v.* St. Louis Trans. Co., 212 Mo. 331, 111 S. W. 52.

Illustrations.—The benches on an open street car projected beyond the floor on each side, and on the inner side there were two lateral rails fastened along the side of the car, one of them eighteen and the other twenty-six inches above the floor. Held, that it was a question for the jury whether the car was defectively constructed, owing to the liability of children to fall through the opening below the lower rail. Metropolitan R. Co. *v.* Falvey, 5 App. D. C. 176.

Where plaintiff was injured while boarding a street car by his hand coming in contact with the partially open door as it was in the process of opening, and plaintiff's testimony showed that the door came to a stop when nearly open and then started again, a request for a ruling that there was no evidence that the car was of improper construction was properly refused. Carter *v.* Boston, etc., St. R. Co., 91 N. E. 142, 205 Mass. 21.

Plaintiff's dress, when she was leaving a street car in the usual manner, caught in the sheetiron covering of the car wheel projecting above the floor, which had been unscrewed, throwing her forward to the ground. It was shown that the defect in question was known to the person in charge of the car. Held, that the question whether the defect was the cause of plaintiff's injury was properly submitted to the jury, and their verdict for the plaintiff justified by the evidence. Chase *v.* Jamestown St. R. Co., 60 Hun 582, 15 N. Y. S. 35, 38 N. Y. St. Rep. 954.

Failure to provide safer coupling.—Birmingham R., etc., Co. *v.* Bynum, 139 Ala. 389, 36 So. 736.

Failure to provide straps or handholds.—Kebbe *v.* Connecticut Co., 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167.

Defective handholds.—Gerlach *v.* Detroit United Railway, 171 Mich. 474, 137 N. W. 256.

Defective step.—In an action by a passenger for injuries received in alighting from a street car, where there was evidence to show that the car step sagged, permitting the heel of the person using it to be caught and held while she attempted to alight, the question of whether the step was defective was properly submitted to the jury. McCormick *v.* Seattle Elect. Co., 96 Pac. 220, 49 Wash. 652.

Defective electric appliances.—In an action by a passenger against a street car company for injury from an electric shock, it appeared that flames broke from the controller box and extended beneath the car for its entire length, being preceded by a loud report. Plaintiff, in escaping from the car, stepped on the door sill and received a shock. It was proved that the phenomenon could not have existed if the electrical appliances of the car were in proper shape. After the accident the car was used the same day on four other trips without further harm. There was no evidence of any subsequent inspection, and no direct evidence that the car was out of order. Held, that defendant's negligence was a question for the jury. Buckbee *v.* Third Ave. R. Co., 72 N. Y. S. 217, 64 App. Div. 360.

Defective controller.—While plaintiff was a passenger in an open trolley car of defendant, in the evening, a flashing or flaming shot out of the motor box or controller, from two to six feet high, enveloping the motorman, and continuing while the car proceeded for some one hundred feet. The plaintiff was so much alarmed that she leaped from the car, and received the injuries complained of. There was evidence on behalf of defendant that the apparatus was a standard appliance, but the flaming on this occasion was of a very unusual character; that dirt in the controller was likely to cause such results; that the car in question had not been inspected that day; and that after the accident the controller was found to be dirty. Held, that the facts required the submission to the

termine whether failure to put guards in front of the wheels of a car, as required by statute,[38] or failure to equip cars on parallel tracks with gates or bars to prevent passengers from getting off on the side next to the parallel track,[39] is negligence, and whether the carrier exercised the utmost care in the maintenance of the platform gate of a car.[40] Whether a railway operating its cars upon double tracks so close together as to be dangerous for passengers ought to provide guards at the windows to prevent passengers from extending their arms outside is for the jury.[41] Where the evidence is conflicting, the question of negligence is for the jury.[42] Where there is evidence sufficient to justify an inference of negligence, it is error to dismiss plaintiff's complaint.[43] And where there is evidence of the insufficiency of the appliances to stop the car on the incline where an accident occurred with the cable out of the grip, a nonsuit is properly refused.[44]

§ 3305. Tracks and Roadbeds.—Where the evidence showed that a passenger was fatally injured by striking against an open gate on a stock chute near defendant's track while leaning out of a car window, the court properly refused to submit to the jury the question whether, in building and maintaining the stock chute and gates in close proximity to the track, defendant ought to have an-

jury of the question of defendant's negligence. Poulsen *v.* Nassau Elect. R. Co., 51 N. Y. S. 933, 30 App. Div. 246.

In an action against a street railway company for injuries to a passenger by reason of the blowing out of the controller on the car, witnesses for the company testified that they did not know what the cause of the accident was, and that sometimes a blowing out would occur and the cause could not be ascertained. Plaintiff showed different causes for the explosion which might have been controlled and remedied by the company. Held, that the question whether the company rebutted the presumption of negligence arising from the occurrence of the accident was for the jury. Firebaugh *v.* Seattle Elect. Co., 82 Pac. 995, 40 Wash. 658, 2 L. R. A., N. S., 836, 111 Am. St. Rep. 990.

Shock received from controller box on car.—South Covington, etc., R. Co. *v.* Smith, 27 Ky. L. Rep. 811, 86 S. W. 970.

Explosion in controller box of passing car.—German *v.* Brooklyn Heights R. Co., 95 N. Y. S. 112, 107 App. Div. 354.

Defective brake.—In an action against a street railway for injuries to a passenger, where there was testimony that the brake rod had broken the day previous to the accident, but was repaired so that the brakeman had no reason to doubt the efficacy of the brake until he tried to use it, and it was found that after the accident the brake rod was useless for want of a bolt, the question of negligence, when taken in connection with the fact of the accident, was for the jury. Howell *v.* Lansing City Elect. R. Co., 99 N. W. 406, 136 Mich. 432.

In an action against a street car company, where there was evidence that, after the car had slowed down as if to stop, it gave a suden lurch, it was improper to declare as a matter of law that there was no evidence that the brakes were insufficient. Frost *v.* Los Angeles R. Co., 132 Pac. 442, 165 Cal. 365.

38. Failure to put guards in front of wheels.—Finkeldey *v.* Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996.

39. Columbus R. Co. *v.* Asbell, 133 Ga. 573, 66 S. E. 902.

40. Maintenance of gate.—Stappers *v.* Interurban St. R. Co., 106 N. Y. S. 854, 56 Misc. Rep. 337.

41. Pell *v.* Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542. See, Gage *v.* St. Louis Trans. Co., 211 Mo. 139, 109 S. W. 13.

42. Where evidence conflicting.—In an action for injuries to a passenger on one of defendant's open trolley cars, it appeared that the span wire broke from some unexplained cause while the car was going very fast; that the trolley pole and wire fell on the car, and, in the unusual commotion which ensued, plaintiff was either thrown or jumped in fright from the car, though in her complaint she alleged that she was thrown from the car. The evidence was conflicting, and would support either theory. The defendant offered no testimony as to why the pole or wire fell. Held, that the alleged negligence of the defendant was properly submitted to the jury. Stern *v.* Westchester Elect. R. Co., 90 N. Y. S. 870, 99 App. Div. 491.

43. Erroneous dismissal of complaint.—Evidence that, while plaintiff was riding in defendant's street car, flames and smoke appeared in various parts of the car, creating a panic, so that while plaintiff was attempting to escape from the car she was injured, was sufficient to justify an inference of negligence. Dorff *v.* Brooklyn Heights R. Co., 88 N. Y. S. 463, 95 App. Div. 82.

44. Refusal of nonsuit.—Roscoe *v.* Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32.

ticipated that the gate might inflict the injury it did.[45] Where a street railroad company places its tracks so near an obstruction, which it is necessary to pass, that its passengers, standing on the footboards of its cars, where they are permitted, and often compelled, to stand, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence.[46]

Collision or Derailment Caused by Defects in Track.—See post, "Collision," § 3312; "Derailment of Cars," § 3313.

§ 3306. Condition of Elevators.—The question of the negligence of a carrier by elevator in maintaining an elevator in a defective condition is ordinarily for the jury to determine.[47] Whether an elevator was furnished with the best safety devices known and in use at the time of an accident, and whether a defect in those appliances or devices was a latent one, and such as had not been, and could not be, discovered upon due inspection, nor by the application of the usual and recognized tests of science in that behalf, are questions of fact for the jury.[48]

§§ 3307-3314. Management of Conveyances—§ 3307. In General.—Ordinarily, it is a question for the jury whether the carrier has been negligent as to the management of its conveyances.[49] Thus, it is held for the jury to

45. Tracks and roadbeds.—Gulf, etc., R. Co. *v.* Phillips, 32 Tex. Civ. App. 238, 74 S. W. 793. See post, "Passing Other Vehicle or Objects," § 3311.

46. West Chicago St. R. Co. *v.* Marks, 82 Ill. App. 185, affirmed in 55 N. E. 67, 182 Ill. 15.

47. Condition of elevators.—Oregon Co. *v.* Roe, 176 Fed. 715, 100 C. C. A. 269; Cubbage *v.* Youngerman, 155 Iowa 39, 134 N. W. 1074; Ferguson *v.* Truax, 136 Wis. 637, 118 N. W. 251.

It is a question for the jury whether there is negligence in running an elevator operated by a boy, and having an excessive lateral vibration, with the exit unguarded, and a space opposite it at each floor, cut into the wall of the shaft, sixteen inches deep, with a door at the rear leading to the hallway, so that a passenger losing his balance might fall onto such landing, and thence under the elevator in the shaft. Lee *v.* Publishers, etc., Co., 137 Mo. 385, 38 S. W. 1107; S. C., 155 Mo. 610, 56 S. W. 458.

Evidence showed that plaintiff was in defendants' elevator, on their invitation, for the purpose of descending from an upper floor, and that when one of their employees on the outside pulled the elevator cord the elevator gave way, and dropped rapidly below, injuring plaintiff. Held, that the negligence of defendants was a question for the jury. Miller *v.* Brewster, 53 N. Y. S. 1, 32 App. Div. 559.

48. Hartford Deposit Co. *v.* Pederson, 67 Ill. App. 142, affirmed in 168 Ill. 224, 48 N. E. 30. See, Field *v.* French, 80 Ill. App. 78.

49. Management of conveyance.—Louisville R. Co. *v.* Sheehan, 146 Ky. 168, 142 S. W. 221; Roscoe *v.* Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32; Beave *v.* St. Louis Trans. Co., 212 Mo. 331, 111 S. W. 52; Donohue *v.* Public Service R. Co., 79 N. J. L. 537, 78 Atl. 183; Karr *v.* Milwaukee Light, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A., N. S., 283.

The question whether or not a freight train was conducted with the highest degree of care consistent with the practical handling of the train, is for the jury. Moore *v.* Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112.

Illustrations.—In an action against a railway for personal injuries to a passenger, where negligence of the defendant's servants is alleged in failing to keep the plates over the bumpers between passenger cars, and in backing the engine violently against the coaches while passengers were entering, the question of negligence was properly submitted to the jury. St. Louis, etc., R. Co. *v.* Snell, 82 Ark. 61, 100 S. W. 67.

Where a street car was operated between two points, the motorman and conductor changing places on making the return trip, the question whether a reasonable opportunity was afforded for the removal of accumulations of ice or snow in the vestibule when the motorman and conductor changed places before starting on a return trip was for the jury. Dorrance *v.* Michigan United R. Co., 175 Mich. 198, 141 N. W. 697.

A trolley car approached a railroad crossing to within a couple of lengths, when the conductor got off and went forward, looking for trains. He motioned to the motorman to start, and after the car started, evidently becoming aware of an approaching train, motioned again to the motorman to stop, which the latter failed to do. The car crossed the track barely in time to avoid a collision. A

determine the questions of the carrier's negligence in leaving open the door of a vestibule,[50] or the trapdoor in the vestibule platform,[51] in failing to maintain light in a vestibule,[52] in failing to light the car properly,[53] in failing to keep platform gates closed,[54] in failing to keep car steps free from ice,[55] in allowing

passenger on the car jumped therefrom to avoid injury, and was hurt. Held, that the question of the carrier's negligence was for the jury. Robson *v.* Nassau Elect. R. Co., 80 N. Y. S. 698, 80 App. Div. 301.

The car, in which plaintiff was, was full, and an empty car was put on. Several people passed from the full car to the empty one, but as plaintiff attempted to do so the cars separated, owing to the coupling not having been successfully made and plaintiff fell between the cars and was injured. There was no one stationed to warn passengers not to pass from one car to the other, and no chain guards. Held, that the question of negligence should have been submitted to the jury. Lent *v.* New York, etc., R. Co., 54 N. Y. Super. Ct. 317, 8 N. Y. St. Rep. 93, affirmed in 120 N. Y. 467, 24 N. E. 653.

Whether it was negligence for trainmen in charge of a cattle train and caboose containing passengers accompanying the cattle, knowing that the caboose had stopped on a bridge, where it would be dangerous for any one to leave it, and knowing that it was the duty of passengers to get off the car at stops to attend to the cattle, or knowing that they might get off to attend to a call of nature, for the relief of which the caboose was not provided, to fail to warn a passenger, whom they saw leave the car, of the danger which he would encounter, was a question for the jury. Cruseturner *v.* International, etc., R. Co., 38 Tex. Civ. App. 466, 86 S. W. 778.

Passenger riding on step of platform or running board.—A street car passenger, because of the crowded condition of the car, stood on the step of the front platform of the car, outside of the gate inclosing the platform, and on the side next to the track on which cars were operated in the opposite direction. The motorman saw him, and warned him that it was a position of danger. The conductor saw him, and, without warning, collected his fare. It was feasible to carry a passenger safely in that position. The company carried men safely in that position, and carried this passenger for about two miles, when he was injured by the car and a car traveling on the other track coming nearly in contact with each other at a curve in the road, because of a violation of the rule of the companies operating cars on the tracks, governing the passing of cars at curves. There was nothing to show that the passenger was guilty of negligence after taking his position on the step. Held, that the question of defendants' negligence was for the jury. Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

Where a boy under fourteen got on the lower step of the front platform of a crowded street car, and rode two miles as a passenger, holding on with but one hand, and, while the car was going at the usual speed of one not overloaded, with a rocking motion so great as to attract the attention of numerous passengers, he was jolted off and injured, the question of the company's negligence was for the jury. West Philadelphia Pass. R. Co. *v.* Gallagher, 108 Pa 524.

Where, in an action for the death of a street car passenger occasioned by his being thrown from the car, the evidence showed that decedent was obliged to stand on the running board of the car because of its crowded condition, and that he held onto the post with both hands, and that previous to the accident the car swayed violently, the question of the negligence of the company in operating the car was for the jury. Verrone *v.* Rhode Island Suburban R. Co., 62 Atl. 512, 27 R. I. 370, 114 Am. St. Rep. 41.

50. Leaving open vestibule door.—Bronson *v.* Oakes, 76 Fed. 734, 22 C. C. A. 520; Kearney *v.* Oregon R., etc., Co., 59 Ore. 12, 112 Pac. 1083, 115 Pac. 593.

51. Leaving open trap door.—Clanton *v.* Southern R. Co., 165 Ala. 485, 51 So. 616, 27 L. R. A., N. S., 253; St. Louis, etc., R. Co. *v.* Oliver, 92 Ark. 432, 123 S. W. 662; Rivers *v.* Pennsylvania R. Co., 83 Atl. 883, 83 N. J. L. 513, reversing judgment 80 N. J. L. 217, 76 Atl. 455.

52. Failing to light vestibule.—Bronson *v.* Oakes, 76 Fed. 734, 22 C. C. A. 520; Clanton *v.* Southern R. Co., 165 Ala. 485, 51 So. 616, 27 L. R. A., N. S., 253.

53. Failing to properly light car.—Beiser *v.* Cincinnati, etc., R. Co., 152 Ky. 522, 153 S. W. 742.

54. Failing to keep gates closed.—Boston, etc., R. Co. *v.* Stockwell, 146 Fed. 505, 77 C. C. A. 19; Adams *v.* Washington, etc., R. Co., 9 App. D. C. 26.

55. Car steps.—Where a substantial conflict as to the performance by servants of a carrier of their duties in keeping the steps of the car free from ice is conflicting, the question is for the jury. Murphy *v.* North Jersey St. R. Co., 80 Atl. 351, 81 N. J. L. 706, 35 L. R. A., N. S., 592, reversing judgment 73 Atl. 1119. See Thompson *v.* Chicago, etc., R. Co., 189 Fed. 723, 111 C. C. A. 261.

In an action for injuries to a passenger alighting from a car, the question of defendant's negligence is for the jury, where there is evidence that ice on the step had accumulated on a prior day, or

a passenger's hand to be caught in the car door,[56] in permitting a passenger to ride on the running board of a street car,[57] in failing to warn a passenger before starting a car,[58] or in making a "flying switch."[59] And the question of the carrier's negligence is for the jury, where a passenger is injured by the fall of a tool negligently left standing in the vestibule by another passenger,[60] or by the fall of another passenger's suit case from the parcel rack,[61] or by stumbling over a suit case which another passenger had placed on the floor.[62] Whether a motorman was negligent in running upon so small an object as a single stick of dynamite in the night time,[63] or in failing to completely shut off the power when the car became stalled before leaving it in an attempt to push it from the track,[64] or in leaving the car in such condition that it could be easily started by a passenger,[65] is for the jury to determine. The questions whether defendant railroad company stopped its train at a station, and as to how many feet beyond the usual stopping place it could go before coming to a standstill are for the jury.[66] Where the evidence is conflicting, the question is for the jury.[67]

at such an hour that proper inspection would have discovered it. Sutton *v.* Pennsylvania R. Co., 79 Atl. 719, 230 Pa. 523.

56. When passenger's hand caught in door.—In an action against a carrier to recover for injuries to plaintiff's hand by closing a car door on it, it is a question for the jury whether the conductor, in closing the door before seeing that plaintiff had cleared it, was exercising due care. Louisville, etc., R. Co. *v.* Mulder, 149 Ala. 676, 42 So. 742.

Where a street car passenger was injured by placing his hand on the partially open door of the car as he was about to enter it, it could not be ruled, as a matter of law, that the conductor was not bound to warn him against the danger of so doing. Carter *v.* Boston, etc., St. R. Co., 205 Mass. 21, 91 N. E. 142.

Plaintiff, a passenger, waited sufficient time before starting to leave the car after the train had stopped, and the car door had been opened by the brakeman, and had been caught so as to hold it open by a device provided for that purpose, plaintiff having heard it catch when it was opened. In leaving the car plaintiff rested her hand upon the door jamb, and the door came shut without an apparent cause, injuring her hand. Held, that whether the company was negligent because of a defect in the door or door catch, or because the brakeman neglected to push the door firmly against the catch, was for the jury. Silva *v.* Boston, etc., Railroad, 90 N. E. 547, 204 Mass. 63.

57. Permitting passenger to ride on running board.—North Chicago, etc., R. Co. *v.* Polkey, 203 Ill. 225, 67 N. E. 793.

58. Failure to give warning.—Metropolitan St. R. Co. *v.* Warren, 74 Kan. 244, 86 Pac. 131, affirmed on rehearing in 89 Pac. 656.

59. Making "flying switch."—White *v.* Fitchburg R. Co., 136 Mass. 321.

60. Fall of tool in vestibule.—Luddy *v.* Old Colony St. R. Co., 210 Mass. 293, 96 N. E. 675.

61. Suit case falling from rack.—Adams *v.* Louisville, etc., R. Co., 134 Ky. 620, 121 S. W. 419, 21 Am. & Eng. Ann. Cas. 321.

62. Stumbling over fellow passengers suit case.—Pitcher *v.* Old Colony St. R. Co., 196 Mass. 69, 81 N. E. 876, 13 L. R. A., N. S., 481, 12 Am. & Eng. Ann. Cas. 886; Burns *v.* Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

63. Running upon dynamite.—Bigwood *v.* Boston, etc., St. R. Co., 209 Mass. 345, 95 N. E. 751, 35 L. R. A., N. S., 113.

64. Failing to shut off power.—Barnes *v.* Danville St. R., etc., Co., 85 N. E. 921, 235 Ill. 566.

65. Baldosta St. R. Co. *v.* Fenn, 11 Ga. App. 586, 75 S. E. 984.

66. Cooper *v.* Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543.

67. Conflicting evidence.—In an action for injuries through failure to let a woman off a street car after disorderly persons began fighting thereon, evidence of plaintiff that the conductor stood in the front door, and that "he did not say anything to me when I screamed and wanted to be let off—never moved"—and paid no attention to her, and of a witness, who saw the car pass, that she saw the conductor standing where plaintiff said he stood while the struggle was in progress (in the middle of the car), contradicts defendant's evidence that the conductor was engaged in attempting to disarm one of the disorderly persons when he responded to her request by calling to the motorman to stop the car, and that he failed on account of an obstruction forcibly placed in his way, so as to take plaintiff's case to the jury. Cross *v.* Detroit Citizens' St. R. Co., 79 N. W. 11, 120 Mich. 137.

In an action against a carrier for personal injuries to a passenger alleged to be due to negligently failing to stop a train long enough at a station to enable her to go forward to another car in safety, the evidence produced by defendant, standing alone, showed that plaintiff did not leave or attempt to leave the car

Nonsuit or Direction of Verdict.—Where there is evidence to show negligence in an action against a railroad company for injuries caused by the management of its conveyance, the question should be submitted to the jury,[68] and

until the train had started, whereas the evidence of plaintiff and her son was direct and positive that they started out as soon as the train stopped and before it started. Held, that there was therefore a direct conflict in the evidence on this point, and it was for the jury to settle it. Smith *v.* Chicago, etc., R. Co., 119 Mo. 246, 23 S. W. 784.

68. When question should be submitted to jury.—Stembridge *v.* Southern R. Co., 65 S. C. 440, 43 S. E. 968.

Illustrations.—Plaintiff, who was recovering from a severe illness, by advice of her physician went in January from Memphis to New Orleans, traveling on the railroad of one of defendants, and riding in a sleeping car of the other defendant. The weather at Memphis was very cold, with ice and snow on the ground. The car was not heated until four hours after leaving Memphis, although defendants were advised of plaintiff's condition, and she suffered continuously from cold during that time. The second day after reaching New Orleans she suffered a relapse, and was again very ill for several months. In an action against defendants for negligence, on the question of damages, physicians were called as experts, and, while admitting that the relapse and subsequent illness might possibly have been due in whole or part to exposure in going to and from the stations and the fatigue of the journey, they testified that the far more probable cause was the continued exposure to cold in the car. Held, that such evidence required the submission of the question to the jury. Marbury *v.* Illinois Cent. R. Co., 176 Fed. 9, 99 C. C. A. 483.

A lamp in defendant's car opposite where plaintiff was sitting blazed up, and she changed her seat to the other end of the car, next to the baggage car, while a bystander, and then the conductor, unsuccessfully tried to fan out the flame. A brakeman tried to smother it with oily waste, which caught fire, and part of it dropped to the floor, and the flames came out under the lamp, and the brakeman rushed for the rear of the car, and it looked as if the car was on fire. Plaintiff rose to go into the baggage car, and struck and injured her arm. There was evidence that the lamp needed more care than ordinary lamps; that the means used to put out the fire were dangerous; and that, with proper skill, the trouble could have been avoided. Held, that the case was properly left to the jury, as, if her fear was reasonable, and her action the natural and reasonable consequence of the situation as it appeared to her, her conduct was the consequence of defendant's mismanagement, for which it is responsible. Gannon *v.* New York, etc., R. Co., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833.

Where the action is for damages, on the theory that plaintiff suffered a severe illness as a result of a cold contracted while a passenger in defendant's car, and it appears that the car was very cold; that plaintiff notified the trainmen of his suffering, and repeatedly requested them to make a fire; that there were stoves in the car, and defendant could easily have supplied the needed heat, the facts are for the jury. Taylor *v.* Wabash R. Co. (Mo.), 38 S. W. 304, 42 L. R. A. 110.

In an action for injuries to a passenger, where the petition alleged that the employees of defendant, in violation of a rule of the company and of ordinances of the city, failed to stop a cable train before it began the descent of an incline, and the evidence showed oral instructions to the motormen, and that the grip was likely to be loosened from the cable just before reaching that point, the refusal of an instruction withdrawing from the consideration of the jury that allegation of negligence was proper. Roscoe *v.* Metropolitan St. R. Co., 101 S. W. 32, 202 Mo. 576.

In an action for injuries on a street car, defendant's negligence is sufficiently shown to carry the case to the jury by showing that the car was unsafely run in passing over a curve which threw the passenger's head beyond the guard rail, so that it struck a car passing on another track. Cline *v.* Pittsburg R. Co., 75 Atl. 850, 226 Pa. 586, 27 L. R. A., N. S., 936.

Where the trolley of a disabled car, which was being pushed by another car, jumped its wire, striking and breaking a cross wire, thus causing the accident to plaintiff, the question of negligence is for the jury, on testimony that the proper course was to tie down the trolley of the disabled car, and that the conductor thereof was told by the conductor of the other so to do, but refused or neglected. Schenkel *v.* Pittsburgh, etc., Tract. Co., 44 Atl. 1072, 194 Pa. 182.

Testimony that just as a street car was slowly turning from an avenue onto a street the conductor, at the instance of a passenger on the back platform, signaled to stop the car, whereupon the passenger crossed the platform and took his position on the lower step of the car, with his hand on the stanchion, ready to alight when the car stopped, and that, instead of stopping, the motorman increased the speed of the car so that it was going eight or ten miles when or soon after it got round the curve, and that the pas-

it is error to direct a verdict for the defendant[69] or grant a nonsuit.[70] But where the evidence considered most favorably for the plaintiff is insufficient to show negligence on the part of the carrier, it is proper to direct a verdict for it.[71]

§ 3308. Overloading or Crowding Cars.—Whether it is negligence for a common carrier of passengers to permit its cars to be overcrowded is, ordinarily, a question for the jury to determine under all the facts and circumstances of the case.[72] So where a street car company fails to provide seats or standing room, so that a passenger must stand on the platform, which is so crowded that he is liable to be pushed off, and the company permits him to ride there, the question of its negligence is for the jury;[73] as is also the contributory negli-

senger was thrown off, is sufficient to go to the jury on the question of negligence of the persons operating the car in leading the passenger into a place of danger and throwing him off his guard. Weir *v.* Seattle Elect. Co., 84 Pac. 597, 41 Wash. 657.

69. Direction of verdict.—In an action against an electric railway company, by a passenger who jumped or was pushed from the defendants' car as the result of a stampede of passengers caused by an explosion following the blowing out of a fuse box, while the car, which was part of a train of three cars, was being propelled up a heavy grade, it was error to direct a verdict for defendant, where there was testimony that the explosion occurred just as the motorman turned on his current almost full, and the expert testimony for the defendant was that the result of turning on the full force of the current suddenly on a car pushing a heavy load on a hill would be to melt out a fuse and cause an explosion. Kight *v.* Metropolitan R. Co., 21 App. D. C. 494.

70. Nonsuit.—Plaintiff testified that, while a passenger standing upon the running board of a crowded trolley car, he was thrown off the car by the conductor stumbling against him while passing along the board in the discharge of his duties, but that he did not know the cause of the stumble. Held, that on this state of the case a nonsuit was erroneous. Whalen *v.* Consolidated Tract. Co., 40 Atl. 645, 61 N. J. L. 606, 41 L. R. A. 836, 68 Am. St. Rep. 723.

71. Plaintiff, while attempting to alight from a north bound street car at a street crossing, fell, and was injured by a south bound car. The north bound car stopped at both crossings of the street to let off passengers a sufficient length of time to have enabled plaintiff to have alighted. He gave no signal to the conductor of his intention to alight, and there was nothing to show that the conductor knew of his intention. After the car had started up after the second stop, he fell from the footboard where he was standing while the car crossed the street. There was no evidence that the car's motion after leaving the street was increased by any sudden or violent jerk. Held, that the evidence, though considered most favorably for the plaintiff, was insufficient to show that the car from which he fell was operated in a negligent manner, and hence it was not error for the trial court to direct a verdict for defendant. Judgment 94 Ill. App. 130, affirmed in Ackerstadt *v.* Chicago City R. Co., 62 N. E. 884, 194 Ill. 616.

72. Crowding cars.—Alton, etc., Tract. Co. *v.* Oller, 119 Ill. App. 181, judgment affirmed in Alton, etc., Tract. Co. *v.* Oliver, 75 N. E. 419, 217 Ill. 15, 4 L. R. A., N. S., 399; Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778; Lobner *v.* Metropolitan St. R. Co., 79 Kan. 811, 101 Pac. 463, 21 L. R. A., N. S., 972; Geddes *v.* Metropolitan R. Co., 103 Mass. 391.

73. Passenger forced to stand on platform.—Cattano *v.* Metropolitain St. R. Co., 173 N. Y. 565, 66 N. E. 563, affirming 73 N. Y. S. 1131, 67 App Div. 615; Kohm *v.* Interborough Rapid Trans. Co., 93 N. Y. S. 671, 104 App. Div. 237, 16 N. Y. Ann. Cas. 315.

Illustrations.—Where a passenger on a crowded street car gave up his seat to his wife, and sought a place on the front platform, where he stood with one foot on the steps, and holding on to the rail of the dasher with his right hand. The pressure of the crowd broke his hold, and he fell under the car, and was injured. Held, that whether defendant negligently caused the injury was a question for the jury. Lehr *v.* Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889.

The question of negligence is properly left to the jury, on evidence that plaintiff, a passenger on defendant's street car, the rear platform being too crowded to allow him to get on it, got on the front platform, which was also crowded, standing with one foot on the platform and the other on the step, holding onto the dashboard rail; that the conductor ran forward to get on the front platform, and at the first attempt failed, and on a second attempt, calling out for the passengers to make room for him, hit against plaintiff, and he and the conductor were immediately forced off, and he was run over. Gray *v.* Metropolitan St. R. Co., 57 N. Y. S. 587, 39 App. Div. 536, reversed on an-

gence of the passenger.[74] Whether a train was overcrowded is a question for the jury and not the court.[75] Where it appeared that defendant had advertised an excursion, and on the day thereof its regular passenger and mail train, which was followed by two excursion trains, took on passengers who had purchased excursion tickets, the question whether defendant rested under a duty not to allow the mail train to be delayed in order to place a less crowded train in front, or whether defendant was negligent in not making such delay, was for the jury.[76]

Nonsuit or Direction of Verdict.—Where there is evidence of the carrier's negligence, it is error to direct a verdict in its favor.[77] And the grant of a nonsuit is erroneous where there is evidence that the passenger was forced by the crowded condition of the car to stand near the door, and that the car gave a sudden jerk, causing him to grasp the door facing to keep from falling, and that the door slammed against his fingers.[78]

§ 3309. Rate of Speed.—Whether a particular rate of speed amounts to negligence is usually a question for the jury under all the circumstances of the case,[79] as where a train or car is run at a rapid rate of speed while passing a

other point in 59 N. E. 262, 165 N. Y. 457. See Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

Rate of speed.—Where a railroad train was so crowded with passengers that some of them were standing on the platform, and the train rounded a curve at the rate of twenty-five or thirty miles an hour, and a passenger was thrown off, in an action for his injuries it could not be said as a matter of law that there was no negligence in so operating the train. Chicago, etc., R Co. *v.* Newell, 72 N. E. 416, 212 Ill. 332, dismissed in 25 S. Ct. 801, 198 U. S. 579, 49 L. Ed. 1171.

In an action against a street railroad company for personal injuries, the case should go to the jury where plaintiff proved, and defendant denied, that plaintiff was received as a passenger on a car which was so filled that he had to stand on the rear platform, that the platform became so crowded that he had to stand on the side step, and that the car increased its speed so that he was jolted off and injured. Saltzman *v.* Brooklyn City R. Co., 73 Hun 567, 26 N. Y. S. 311, 56 N. Y. St. Rep. 220.

74. Contributory negligence of passenger.—Gray *v.* Metropolitan St. R. Co., 57 N. Y. S. 587, 39 App. Div. 536, reversed on another point in 165 N. Y. 457, 59 N. E. 262.

Plaintiff was a passenger in a street car, the seats of which were occupied, and he rode on the front platform, with seven others. In going fast on a downgrade the driver, in his efforts to apply the brakes, jostled the crowd, and decedent was thrown off, and instantly killed. Held, that the question of contributory negligence was for the jury. Cattano *v.* Metropolitan St. R. Co., 173 N. Y. 565, 66 N. E. 563, affirmed in 73 N. Y. S. 1131, 67 App. Div. 615.

75. Whether train overcrowded.—Lane *v.* Choctaw, etc., R. Co., 19 Okla. 324, 91 Pac. 883.

76. Williams *v.* International, etc., R. Co., 28 Tex. Civ. App. 503, 67 S. W. 1085.

77. Direction of verdict.—Plaintiff, a lad of fourteen years, boarded defendant's train, which was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made, he stepped off to allow a fellow passenger to alight, and was unable to get on the platform again. He went forward, and secured standing room on the front step of the trailer, holding on to the dashboard and to the iron rail attached to the car for some distance, when he was forced, by the pressure of the other passengers, to relinquish his hold, and fell. There was evidence that the pressure which forced him off was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. Held, it was error to direct a verdict for the defendant. Pray *v.* Omaha St. R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

78. Nonsuit.—Holleman *v.* Georgia, etc., R. Co., 12 Ga. App. 755, 78 S. E. 428.

79. Rate of speed.—*Connecticut.*—Kebbe *v.* Connecticut Co., 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167.

Indiana.—Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860.

Iowa.—Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399.

Kentucky.—Louisville R. Co. *v.* Sheehan, 146 Ky. 168, 142 S. W. 221.

Mississippi.—Leeke *v.* Gulf, etc., R. Co., 91 Miss. 398, 46 So. 68.

Missouri.—Van Natta *v.* People's St. R., etc., Co., 133 Mo. 13, 34 S. W. 505.

New York.—Whitaker *v.* Staten Island, etc., R. Co., 76 N. Y. S. 548, 72 App. Div. 468.

Pennsylvania.—Wright *v.* Pennsylvania R. Co. (Pa.), 3 Pittsb. Rep. 116; Reber *v.* Pittsburg, etc., Tract. Co., 179 Pa. 339,

curve,[80] switch[81] or place in the track containing a rail below its opposite

36 Atl. 245, 57 Am. St. Rep. 599.

Wisconsin.—White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

In the absence of municipal or statutory regulation, no speed of a railroad train can be declared negligence as a matter of law, but the question must be left to the jury. St. Louis, etc., R. Co. *v.* Woods, 96 Ark. 311, 131 S. W. 869, 33 L. R. A., N. S., 855.

Illustrations.—Where, in an action for personal injuries to a passenger occasioned by the derailing of a train, it appeared that the engineer knew that a storm had prevailed which had occasioned high water at some points, and there was evidence that the conductor had, just before the accident, betrayed his uneasiness at the rate of speed by several times pulling the bell rope, and tending also to show that if the speed had been six miles per hour, instead of eighteen or twenty, the accident would not have occurred, the question of negligence in running at such a rate was for the jury. Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399.

It is not error to submit to the jury the issue as to whether the car that caused the injuries to plaintiff was moving at rapid speed, where the evidence disclosed that the rate thereof was from three and a half to five miles an hour. Van Natta *v.* People's St. R., etc., Co., 133 Mo. 13, 34 S. W. 505.

The motorman, on a dark, stormy evening saw a load of hay on the track, going in the same direction, at a distance of seventy-five or eighty feet, but did not reverse the current until within twenty feet of the wagon; and the car was going at the rate of seven miles per hour, and, on reversing, the circuit breaker blew out, causing a loud explosion and a flash of light in the car, which was followed by a crash of breaking glass from the collision; and plaintiff, a nervous woman, jumped from the car and was injured, while the other passengers remained on the car and were uninjured. Held, that it was not error to refuse to set aside special findings that defendant, in the manner in which it operated the car, failed to exercise the highest degree of skill and care which a careful and vigilent man would have exercised in like circumstances, and that the car could have been stopped before the accident occurred, by the use of the appliances with which it was equipped, and that the motorman, by the exercise of the utmost care in exercising his duty, could have avoided the collision, since, under the circumstances, the question as to whether the speed of the car was negligenly high was for the jury. Wanzer *v.* Chippewa Valley Elect. R. Co., 84 N. W. 423, 108 Wis. 319.

In an action for personal injury to plaintiff while riding in one of defendant's horse cars, it appeared that, as the car was passing over a drawbridge, a key and pole, weighing about 300 pounds, fell, one end of the pole projecting about three feet into the car, and causing the injury. The pole and key, when not used for operating the drawbridge, were hung up on two railroad spikes, driven in a slant into the trestlework near the track. The evidence was conflicting, but tended to show that the undue rate of speed of the car caused the bridge to oscillate, and dislodge the key and pole. The driver testified that he "was always afraid of an accident—was always afraid it would fall;" and that he knew, if he "went over on a trot, it would shake the bridge," and "the faster you go the more it will shake the bridge." Held, that a case was made calling for submission to the jury of the question of the negligence of defendant's driver. Catalanotto *v.* Coney Island, etc., R. Co., 7 N. Y. S. 628, 27 N. Y. St. Rep. 47.

80. Passing curve.—Metropolitan, etc., R. Co. *v.* Kowalski, 139 Ill. App. 89; Olund *v.* Worcester Consol. St. R. Co., 206 Mass. 544, 92 N. E. 720; Partelow *v.* Newton, etc., R. Co., 196 Mass. 24, 81 N. E. 894; Muelhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Trussell *v.* Morris County Tract. Co., 79 N. J. L. 533, 77 Atl. 535, 30 L. R. A., N. S., 351.

Whether a street railway company was negligent in running an open car so fast around a curve that a passenger was thrown therefrom was a question for the jury. Macy *v.* New Bedford, etc., R. Co., 65 N. E. 397, 182 Mass. 291.

Where a passenger on a motor car, who had been directed by the conductor to stand on the front platform while smoking, was, while holding on with both hands to the rail behind him, thrown off as the car went round a sharp curve, the question of excessive speed and the carrier's negligence is for the jury; it being shown that the car was going at a high speed, which was not decreased at the curve, and passengers who were sitting down as well as those standing up, having testified that the lurch of the car threw them on their knees. Francisco *v.* Troy, etc., R. Co., 88 Hun 464, 34 N. Y. S. 859, 68 N. Y. St. Rep. 792.

It is a question for the jury whether a street railway company was negligent in running an electric car, the platform of which was crowded with passengers, at the rate of fifteen miles an hour down grade and around a sharp curve. Reber *v.* Pittsburg, etc., Tract. Co., 36 Atl. 245, 179 Pa. 339, 57 Am. St. Rep. 599.

81. Passing switch.—Brown *v.* Chester Tract. Co., 230 Pa. 498, 79 Atl. 713.

When the conductor of an electric

rail.[82] Where the evidence was conflicting, the speed of the train from which plaintiff alighted was for the jury.[83]

§ 3310. Sudden Lurches, Jerks, or Jolts.—Ordinarily, the question of the carrier's negligence when a passenger has been injured by a sudden jerk or jolt of the carrier's conveyance is for the jury.[84] Where the evidence is con-

street car, knowing of a passenger's exposed position standing upon the running board, runs the car at such an unreasonably high speed while passing a switch as to cause the passenger to be whirled off, the question of defendant's negligence is for the jury. Olund *v.* Worcester Consol. St. R. Co., 92 N. E. 720, 206 Mass. 544, wherein it was held that the evidence presented was insufficient to go to the jury on the issue whether the car was run unreasonably fast over a switch.

See State *v.* United R., etc., Co., 101 Md. 183, 60 Atl. 249, holding that when one was thrown from the rear platform of a street car as the car entered and passed over a switch, "going at a good rate of speed," but there was no evidence of negligence on the part of defendant or its employees, directing a verdict for defendant was proper.

82. Depressed rail.—Where one of the rails of defendant's horse car track had been depressed from four to six inches below its opposite rail for several days during improvements in the street, which depression extended about three feet along the track, making a sharp pitch hole, over which defendant's car at the time of the accident was rapidly driven, and by the bounding of the car intestate was thrown from the front platform, on which he was riding as a passenger, and killed, whether the carrier was guilty of negligence was for the jury. Depew *v.* New York City R. Co., 98 N. Y. S. 276, 112 App. Div. 260.

83. Bishop *v.* Illinois Cent. R. Co., 25 Ky. L. Rep. 1363, 77 S. W. 1099.

84. Sudden jerks or jolts.—Birmingham R., etc., Co. *v.* Yates, 169 Ala. 381, 53 So. 915; South Chicago, etc., R. Co. *v.* Dufresne, 200 Ill. 456, 65 N. E. 1075, affirming 102 Ill. App. 493; Louisville, etc., R. Co. *v.* Kemp, 149 Ky. 344, 149 S. W. 835; Illinois Cent. R. Co. *v.* Colly, 27 Ky. L. Rep. 730, 86 S. W. 536; Etson *v.* Fort Wayne, etc., R. Co., 114 Mich. 605, 72 N. W. 598; Reese *v.* Detroit United Railway, 159 Mich. 600, 124 N. W. 539; Newton *v.* Central Vt. R. Co., 80 Hun. 491, 30 N. Y. S. 488, 62 N. Y. St. Rep. 387; Grotsch *v.* Steinway R. Co., 45 N. Y. S. 1075, 19 App. Div. 130; Sheeron *v.* Coney Island, etc., R. Co., 79 N. Y. S. 752, 78 App. Div. 476; Harty *v.* New York, etc., R. Co., 88 N. Y. S. 422, 95 App. Div. 119; San Antonio, etc., R. Co. *v.* Choate, 22 Tex. Civ. App. 618, 56 S. W. 214.

Illustrations.—Plaintiff, with her husband, purchased first-class tickets for transportation between two stations on defendant's railroad, and made her journey in the caboose of a freight train. When the train arrived at their destination, it stopped, with the engine opposite the station and the caboose some distance back. While so standing, the plaintiff rose from her seat to look from the window, and was thrown down and injured by a violent jerk given the caboose by the starting of the train. It further appeared that the movement of the train was the same as was usual at that station. Held, that it could not be said, as a matter of law, that defendant's servants were not guilty of negligence causing the injury, but that the question was one of fact for the jury. Sprague *v.* Southern R. Co., 92 Fed. 59, 34 C. C. A. 207.

Where a passenger on a vestibuled train, while passing from one car to another, was caused, by a sudden jerk or the swaying motion of the train while rounding a curve, to strike his heel on a stool causing a fall and the injuries complained of, whether the injury was caused by the running of the train, was for the jury. St. Louis, etc., R. Co. *v.* Pollock, 93 Ark. 240, 123 S. W. 790.

In an action for personal injuries received by plaintiff while a passenger on defendant's local freight train, caused by a sudden and violent jerk of the train while moving on after it had stopped near plaintiff's destination, and while she and other passengers were standing, preparatory to alighting, evidence of defendant's negligence held sufficient to go to the jury. St. Louis, etc., R. Co. *v.* Brabbzson, 87 Ark. 109, 112 S. W. 222.

A passenger on a railroad, while standing in the door of the car, the train having stopped at a station, was thrown off his balance by a sudden backward and then forward jerk of the car, and grasped the door casing for support, when the door slammed upon his fingers. Held, that whether the injury was caused by the company's negligence was for the jury. McCurrie *v.* Southern Pac. Co., 55 Pac. 324, 122 Cal. 558.

In an action against a carrier for injuries to a passenger alleged to have been occasioned by the company's negligence in the maintenance of its road, evidence that the track was not in proper repair, and such passenger was thrown off the car by its giving a sudden lurch as it passed over a defective joint, is sufficient to require the submission of the cause to

flicting, the question is for the jury.[85] Whether the jerks or jolts causing the

the jury. Holloway *v.* Pasadena, etc., R. Co., 62 Pac. 478, 130 Cal. 177.

Evidence that, on the calling of a street by the conductor of an electric street car, a passenger went to the rear platform, and after certain persons had alighted before the car had stopped, but while it was slowly crossing the street, he took his position on the step, holding on the rail, and while waiting for it to come to a full stop it gave a sudden jerk, and increased its speed, throwing him off, is sufficient evidence of negligence to go to the jury, though it is not alleged or proved that the jerk was unusual. Louisville R. Co. *v.* Williams, 99 S. W. 245, 30 Ky. L. Rep. 493.

The locomotive was not one of the largest, and had never been used before on a fifteen car train, but the engineer testified that it could draw fifteen loaded passenger coaches. The train was stopped at a steep grade, on a curve, by the application of the air brakes, by a person not in defendant's employ, and the engineer could not start the train without backing to take up the slack which resulted in each car going backward with a sudden jar. Defendant's servants did not warn the passengers that the cars would be so started, and plaintiff was injured by being thrown down by the backward motion. Held sufficient evidence of defendant's negligence in failing to furnish sufficient motive power, and of its employees in failing to call attention to the danger, to go to the jury. Farnon *v.* Boston, etc., R. Co., 62 N. E. 254, 180 Mass. 212.

Where a passenger was injured by the car suddenly receiving a shock from in front, just as he had entered it by invitation of the carrier, while it was standing on the track, with the engine and other cars in front detached and engaged in switching, the question whether the shock was caused by negligently backing the engine and other cars against the one in which the passenger was is for the jury. Moore *v.* Saginaw, etc., R. Co., 78 N. W. 666, 119 Mich. 613.

Where a passenger riding on the platform of a car was thrown off by a sudden and unusual jerk of the train, and there was evidence that the engineer was not negligent in applying the brakes, and that the roadbed and track were in a reasonably good condition, and that there was no defect in the train, the question whether the jerk was due to the carrier's negligence is for the jury. Ebert *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 49 S. W. 1105.

Jarring train by violent coupling.— Hardin *v.* Forth Worth, etc., R. Co. (Tex. Civ. App.), 100 S. W. 995; Lane *v.* Spokane Falls, etc., R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821.

85. Where evidence conflicting.— Plaintiff testified that, upon being advised by the conductor that defendant's freight train would remain on the sidetrack forty or fifty minutes, he entered one of the cars to look after his cattle, and that while in there the car was suddenly moved a few feet, and was suddenly stopped, without warning, throwing the weight of half the cattle in the car against him, and pushing him against a trough, whereby he received a serious injury in his abdomen. Plaintiff did not mention the fact of his having been hurt to any of the servants of defendant, though he proceeded with his car of cattle to its destination, where he and an employee drove the cattle to a ranch thirty-seven miles distant. A witness who saw plaintiff before he went into the cattle car and immediately after he came out testified that he saw a difference in plaintiff after he came out, and that he had a bruised place on his side. The conductor, brakeman, and engineer of the train testified that the car which plaintiff entered was not moved while he was in it. Held, in an action for damages, that the court properly refused to direct a verdict for defendant. Texas, etc., R. Co. *v.* White, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90.

In an action against a railroad company for personal injuries, plaintiff's evidence showed that, while rightfully on the platform, passing from one car to another as a passenger, a sudden and unusual jerk of the train, while it was running at a rate prohibited by law, threw him off his balance, and the railing gave way, and he fell. The evidence was contradicted by the employees of defendant and by certain doctors, to whom plaintiff had made statements. Held error to peremptorily direct a verdict for defendant, under the statute providing that the jury in all cases shall be the exclusive judges of the facts proved and of the weight of the testimony. Gaunce *v.* Gulf, etc., R. Co., 48 S. W. 524, 20 Tex. Civ. App. 33.

While a caboose, on which plaintiff was a passenger, was standing, with other detached cars, the forward part of the train backed down to make a coupling, and plaintiff was injured by the shock. Plaintiff and another, both being familiar with the coupling of freight trains, testified that the shock was an unusual one, the caboose being driven backward thirty feet. Defendant's witnesses contradicted any unusual violence. Held, that the question of the company's negligence should have been submitted to the jury. Harden *v.* Chicago, etc., R. Co., 78 N. W. 424, 102 Wis. 213.

injury complained of were unusual or unnecessary in the operation of the carrier's conveyance, is generally a question for the jury in the light of the facts.[86] Whether the carrier was negligent in suddenly starting[87] or stopping its conveyance,[88] is for the jury to determine. Whether a stopping of a horse

86. Whether jerks or jolts unusual or unnecessary.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 101, 112 S. W. 212; St. Louis, etc., R. Co. *v.* Holmes, 96 Ark. 339, 131 S. W. 692.

Georgia.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 30 L. R. A. 673.

Kentucky.—Chesapeake, etc., R. Co. *v.* Jordan, 25 Ky. L. Rep. 574, 76 S. W. 145.

New York.—Murphy *v.* Interurban St. R. Co., 93 N. Y. S. 728, 105 App. Div. 110; Miles *v.* King, 45 N. Y. S. 379, 18 App. Div. 41.

Texas.—Choate *v.* San Antonio, etc., R. Co., 90 Tex. 82, 37 S. W. 319, reversing 36 S. W. 247.

87. Suddenly starting conveyance.—Oliver *v.* Fort Smith Light, etc., Co., 89 Ark. 222, 116 S. W. 204; Glidden *v.* New York, etc., R. Co. (N. Y.), 20 Wkly. Dig. 313.

A child seven years old was placed by her father on the seat of defendant's street car. The car had stopped on a curve, and, when it started, she fell off. The father testified that the car started with a quick motion, and threw the child out; that he had not had time to take his seat before the car started; and that the sudden start threw him into a seat. Held, that the question of negligence was for the jury. Lansing *v.* Coney Island, etc., R. Co., 45 N. Y. S. 120, 16 App. Div. 146.

A street car passenger was knocked from the running board of a car by the sudden starting of the car after it had slowed down. He was accustomed to ride on cars, and knew that the car would not stop until it reached a particular point. After the car had slowed down he reached for a package, and as he clasped it there was a plunge forward of the car. There was no defect in the car or tracks, and there was no evidence of incompetency of the servants. Held insufficient as a matter of law to show negligence on the part of the company. Sanderson *v.* Boston Elev. R. Co., 194 Mass. 337, 80 N. E. 515.

88. Suddenly stopping conveyance.—Smalley *v.* Detroit, etc., R. Co., 131 Mich. 560, 91 N. W. 1027.

Evidence that a street car was stopped with unusual suddenness and a jerk, and that by the sudden stopping of the car plaintiff was thrown from his seat and injured, raises a question for the jury on the issue of negligence in the manner of stopping the car. Ball *v.* Mobile, etc., R. Co., 39 So. 584, 146 Ala. 309, 119 Am. St. Rep. 32.

Where, in an action by a passenger against a street railway company for injuries, it appears that the car was so crowded that he had to stand in the aisle and hold one of the straps, and that the car stopped suddenly, throwing a number of passengers against him with great force, causing the injuries, the declaration is sufficiently supported to make the question one of fact for the jury. Judgment 98 Ill. App. 662, affirmed in Chicago City R. Co. *v.* Morse, 64 N. E. 304, 197 Ill. 327.

It can not be held as a matter of law that it was not negligence for a motorman, when starting ahead after slowing down, to throw on the whole power at once, instead of putting it on slowly, notwithstanding that at the time the combined retarding effect of an upgrade and a curve was at the maximum. Cutts *v.* Boston Elev. R. Co., 89 N. E. 21, 202 450.

Plaintiff started to leave a crowded railway train during its stop at a station, but, when she reached the platform, holding a valise in one hand and the train of her dress in the other, the cars had started. A brakeman, on being informed that she desired to alight, pulled the bell rope, and the car stopped suddenly, throwing her off and injuring her. The length of time that the train stopped in the first instance was in dispute. Held, that defendant could not complain of the submission to the jury of the question of the brakeman's negligence in failing to warn plaintiff, or to take steps to protect her before stopping the train. Smalley *v.* Detroit, etc., R. Co., 91 N. W. 1027, 131 Mich. 560.

Where an open street car, which was on fire, came to such a sudden stop as to hurl a passenger to the pavement, in an action for the injuries it was error to direct a nonsuit on evidence showing such facts, since, if the motorman stopped the car, his conduct was plainly negligent, and if the fire caused the sudden stoppage the burden was on defendant to explain the cause of the accident. Glassberg *v.* Interurban St. R. Co., 92 N. Y. S. 731.

Where a passenger notified the railroad company's employees that he was ignorant of railroad traveling, and they invited him to alight before the train arrived at the station, and he went upon the platform and was hurled therefrom by the sudden application of the brakes, there was sufficient evidence to go to the jury on the question of defendant's negligence. Doolittle *v.* Southern R. Co., 40 S. E. 133, 62 S. C. 130.

car so suddenly as to throw a passenger over the front dashboard could have been caused by a sudden application of the brake is for the jury.[89] Where a passenger, as he approached his destination, stood inside the car, near the rear door, which was open, and a violent jerk of the train threw him out of the car, and he was seriously injured, it was not error to refuse a nonsuit at the close of his case.[90] And where it appears, in an action by a passenger against a street car company, that the street car was stopped by the motorman so suddenly as to throw the passenger forward against the seat in front of him, it is improper to order a compulsory nonsuit; there being a presumption of negligence.[91] When the evidence fails to show negligence on the part of the defendant, it is proper to direct a verdict in its favor,[92] or grant a nonsuit.[93] It has been held that when a passenger entered a street car while it was standing partly on a curve, and, after going a few steps into the car, was thrown down, by its motion in going around the curve, and the motorman operating the car was an inexperienced man, but there was no direct evidence of the speed of the car, it was error to submit to the jury the question of defendant's negligence.[94] Evidence that plaintiff was thrown from a cable car by a jerk of the car caused by some action of the gripman, without showing what the gripman did, or how he caused the jerk, or that he caused it at all, is not prima facie sufficient to submit to the jury the question of the gripman's negligence.[95]

Knowledge of Passenger.—It is matter of common knowledge that jerks and jars ordinarily attend the handling and running of freight trains, and more than that of regular passenger trains, so that it is error to submit to the jury whether one who became a passenger on a freight train had such knowledge.[96]

§ 3311. Passing Other Vehicle or Objects.—Ordinarily the question of the carrier's negligence is for the jury to determine where a passenger has been injured while the car was passing another car,[97] or other

89. Bradley *v.* Second Ave. R. Co., 54 N. Y. S. 256, 34 App. Div. 284.

90. Field *v.* Delaware, etc., R. Co., 69 N. J. L. 433, 55 Atl. 241.

91. Tilton *v.* Philadelphia Rapid Trans. Co., 231 Pa. 63, 79 Atl. 877.

92. De Yoe *v.* Seattle Elect. Co., 53 Wash. 588, 102 Pac. 446, 1133, judgment affirmed on rehearing in 104 Pac. 647.

Proof, in an action for suffering endured by plaintiff's testator in consequence of an injury while on a street car, that the testator, who walked feebly, fell in a car starting apparently in the usual way with something of a jerk, is insufficient as a matter of law to show that the testator was in the exercise of due care or that the employees in charge of the car were negligent, essential to a recovery. Jameson *v.* Boston Elev. R. Co., 79 N. E. 750, 193 Mass. 560.

Plaintiff was sitting in defendant's dining car on an unfastened chair, such as were usually used on defendant's and other railroads. In going around a curve, the car gave a sudden lurch, which tipped the chair over backward, injuring plaintiff. The train was not running at an unusual rate of speed, and defendant's roadbed was in proper condition. Held, that negligence could not be inferred, and it was error to submit the question to the jury. Nelson *v.* Lehigh Valley R. Co., 50 N. Y. S. 63, 25 App. Div. 535.

93. A passenger on an open street car, having rung for the car to stop, and assuming that it would stop at the nearest side of a street which it was approaching, stepped out on the footboard, and the jolting of the car on passing over intersecting tracks threw him from the footboard. There was no evidence that the crossing was made at unusual speed. There was a sign in the vicinity which said "Stop," but it was not shown that the direction was to the motormen, or that it directed the car to stop at any particular point. Held, in an action for the injuries, that a nonsuit was proper. Nies *v.* Brooklyn Heights R Co., 74 N. Y. S. 41, 68 App. Div. 259.

94. Ayers *v.* Rochester R. Co., 156 N. Y. 104, 50 N. E. 960, reversing 35 N. Y. S. 1102, 88 Hun 613.

95. Bartley *v.* Metropolitan St. R. Co., 148 Mo. 124, 49 S. W. 840.

96. Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335.

97. Passing another car.—Allen *v.* St. Louis Trans. Co., 183 Mo. 411, 81 S. W. 1142.

Whether carrier negligent in running passing cars so close together.—Ft. Wayne Tract. Co. *v.* Hardendorf, 164 Ind. 403, 72 N. E. 593; Gage *v.* St. Louis Trans. Co., 211 Mo. 139, 109 S. W. 13; Georgetown, etc., R. Co. *v.* Smith, 25 App. D. C. 259, 5 L. R. A., N. S., 274.

Failure to warn passengers of the close proximity of cars while passing.—Pell *v.*

vehicles,[98] or objects.[99]

§ 3312. Collision.—In an action for injuries to a passenger caused by a collision, it is ordinarily for the jury to determine the question of the carrier's negligence,[1] as whether a motorman was negligent in the operation of a

v. Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542, affirming judgment 142 Ill. App. 362.

98. Passing other vehicles.—Walsh *v.* Interurban St. R. Co., 98 N. Y. S. 656, 50 Misc. Rep. 637.

Where a passenger was injured while sitting on the platform of an electric car, with his feet on the lower step, whether the motorman was guilty of negligence in running the car forward when a truck had just pulled off the track and was so near that it struck the passenger, was a question for the jury. Seller *v.* Market St. R. Co., 72 Pac. 1006, 139 Cal. 268.

Where a passenger standing on the side step of an overloaded summer street car is struck by the hub of a wheel of an ice wagon standing so near the track as to project over the step, the negligence of the motorman, who did not slacken his speed till the accident, is for the jury, he being able to see the position of the wagon when a block from it, its presence there at that time of day being something that was to be expected, and there being hardly room at that place for a wagon to stand between the tracks and the side of the street. Bumbear *v.* United Tract. Co., 47 Atl. 961, 198 Pa. 198.

A passenger on defendant's car on the north track was injured by a collision with lumber which protruded from the rear of the wagon on the south track of defendant's road, the injury occurring as the wagon turned from the track. In an action for plaintiff's injuries, held, that it was for the jury to say whether the accident was caused by the negligence of the driver of the wagon. Alexander *v.* Rochester, etc., R. Co., 59 Hun 616, 12 N. Y. S. 685, 35 N. Y. St. Rep. 701.

99. Passing other objects.—Where a passenger in a railroad train was injured by a stone on a derrick near the track swinging against the car in which he was riding, and the track for a distance of 1,000 feet was straight, and no obstruction prevented the engineer from seeing the stone as his train approached, and the negligence of the men in charge of the derrick was clearly shown, a motion in an action against both the railroad company and the owner of the derrick to take the case from the jury was properly denied. Judgment, Chicago, etc., R. Co. *v.* Murphy, 99 Ill. App. 126, affirmed in 64 N. E. 1011, 198 Ill. 462.

Where plaintiff, while riding on the step of defendant's street car, was knocked off by a derrick standing near the track, the fact that the track had been moved nearer the derrick on the day of the accident tends to show negligence on the part of defendant's driver, as he must have known of its proximity to the cars, and for that reason should have used care to avoid exposing passengers to danger, and the question as to his negligence is for the jury. Seymour *v.* Citizens' R. Co., 114 Mo. 266, 21 S. W. 739.

Plaintiff was a passenger in a street car, the seats of which were occupied, and he rode on the running board. Workmen had been excavating the street, and had built a fence near the car track, allowing a beam to project over where the running board would be. Held, that whether or not defendant's motorman was negligent in running past the fence at a high rate of speed, and failing to see the beam or to appreciate its danger, was a question for the jury. Judgment Kramer *v.* Brooklyn Heights R. Co., 100 N. Y. S. 276, 114 App. Div. 804, reversed in Cramer *v.* Brooklyn Heights R. Co., 83 N. E. 35, 190 N. Y. 310.

A street railway company constructed its tracks so near the superstructure of a bridge as to leave only eighteen inches between the framework thereof and the outer edge of the footboard of its open cars. A passenger riding on the footboard—the seats inside the car all being occupied—was injured by coming in contact with a strut of the bridge. There was evidence that the car was going at an unlawful rate, and that no warning was given. Held, that the company's negligence was a question for the jury. Anderson *v.* City, etc., R. Co., 71 Pac. 659, 42 Ore. 505.

Where a passenger, while seated by an open window in a street car, was struck on the arm by an iron post placed near the track, and the evidence was conflicting as to whether the passenger had her arm out of the window at the time, the question of negligence was properly submitted to the jury. New Orleans, etc., R. Co. *v.* Schneider, 60 Fed. 210, 8 C. C. A. 571.

Injuries sustained by contact with trolley pole.—Wheeler *v.* South Orange, etc., Tract. Co., 70 N. J. L. 725, 58 Atl. 927; Cameron *v.* Lewiston, etc., R. Co., 103 Me. 482, 70 Atl. 534, 18 L. R. A., N. S., 497; Pomeroy *v.* Boston, etc., St. R. Co., 193 Mass. 507, 79 N. E. 764.

Failure to warn passengers of danger of contact with trolley poles.—Chapman *v.* Capital Tract. Co., 37 App. D. C. 479.

1. Collision.—*California.*—Seigel *v.* Eisen, 41 Cal. 109; Kimic *v.* San Jose-Los

car,[2] whether an engineer was negligent in failing to observe cars obstructing

Gatos, etc., R. Co., 156 Cal. 379, 104 Pac. 986.

Illinois.—Chicago City R. Co. *v.* McClain, 211 Ill. 589, 71 N. E. 1103; Ratner *v.* Chicago City R. Co., 233 Ill. 169, 84 N. E. 201, reversing judgment, 133 Ill. App. 628; Math *v.* Chicago City R. Co., 243 Ill. 114, 90 N. E. 235; Chicago City R. Co. *v.* Bennett, 214 Ill. 26, 73 N. E. 343; Chicago City R. Co. *v.* Shreve, 226 Ill. 530, 80 N. E. 1049, affirming judgment 128 Ill. App 462.

Iowa.—Parker *v.* Des Moines City R. Co., 153 Iowa 254, 133 N. W. 373, Ann. Cas. 1913E, 174.

Massachusetts.—Jordan *v.* Old Colony St. R. Co., 190 Mass. 330, 76 N. E. 909; Doherty *v.* Boston, etc., St. R. Co., 207 Mass. 27, 92 N. E. 1026; Wright *v.* Boston, etc., R. Co., 203 Mass. 569, 89 N. E. 1073; Chaffee *v.* Consolidated R. Co., 196 Mass. 484, 82 N. E. 497.

Michigan.—Thurston *v.* Detroit United Railway, 137 Mich. 231, 100 N. W. 395.

Missouri.—Stauffer *v.* Metropolitan St. R. Co., 243 Mo. 305, 147 S. W. 1032.

New Jersey.—Walsh *v.* North Jersey St. R. Co., 71 N. J. L. 641, 60 Atl. 335.

New York.—Watkins *v.* Atlantic Ave. R. Co. (N. Y.), 20 Hun 237; Seidlinger *v.* Brooklyn City R. Co. (N. Y.), 28 Hun 503; Hourney *v.* Brooklyn City R. Co., 7 N. Y. S. 602, 27 N. Y. St. Rep. 49; Brown *v.* New York Cent. R. Co. (N. Y.), 31 Barb. 385; Suse *v.* Metropolitan St. R. Co., 80 N. Y. S. 513, 80 App. Div. 24.

Pennsylvania. — Goorin *v.* Allegheny Tract. Co., 179 Pa. 327, 36 Atl. 207; Prethrow *v.* West Jersey, etc., R. Co., 214 Pa. 112, 63 Atl. 415, 112 Am. St. Rep. 736.

Texas.—Ft. Worth, etc., R. Co. *v.* Day, 50 Tex. Civ. App. 497, 111 S. W. 663.

Utah.—Dearden *v.* San Pedro, etc., R. Co., 33 Utah 147, 93 Pac. 271.

Vermont.—Strong *v.* Burlington Tract. Co., 80 Vt. 34, 66 Atl. 786, 12 L. R. A., N. S., 197.

Whether presumption of negligence overcome.—Whether the prima facie case of negligence made out by injury to a passenger by a train breaking in two parts, and the parts afterwards colliding, is overcome, is a question for the jury; there being testimony tending to show that the separation was occasioned by a broken pin, and the pin not being produced, and no one undertaking to testify to its condition; the switchmen who made up the train, and the brakeman who first discovered its separation, not being witnesses, though there was testimony of inspection on the trip by employees passing along the train with a torch or lantern. Larkin *v.* Chicago, etc., R. Co., 92 N. W. 891, 118 Iowa 652. See Feldschneider *v.* Chicago, etc., R. Co., 122 Wis. 423, 99 N. W. 1034.

Failure to apply brakes—Crowded car.—In an action for injuries sustained by a passenger on defendant's railway, it appeared that the cars were so crowded that, when the engineer gave the signal to put on the hand brakes, the trainmen could not get at one or more of the brakes in time to avoid the collision which caused the injury. Held, that whether there was any negligence on the part of defendant arising from this state of facts was a question for the jury. Dlabola *v.* Manhattan R. Co., 8 N. Y. S. 334, 29 N. Y. St. Rep. 149, 15 Daly 470.

Break in cable.—Plaintiff, a passenger on defendant's cable car, was injured in a collision caused by a break in the cable where it was spliced. Defendant proved that the cable was the best in use; that a system of constant inspection was in operation; and that the defect was not discovered in time to avoid the accident; but the inspectors on duty the day of the accident were not called. The splicer, who was corroborated by another, testified that he made the splice eight days before; that the work was thoroughly and carefully done; and that a splice would last five or six weeks. Held insufficient to overcome the presumption of negligence arising from the accident, and the case was therefore properly submitted to the jury. Smith *v.* Metropolitan St. R. Co., 69 N. Y. S. 176, 59 App. Div. 60.

Failure to use derailing switch.—In an action for injuries to a passenger from a collision with cars which had run from a passing track upon the main track, the passing track having been used three weeks for the storage of cars, the charge of negligence in not using a derailing switch was properly submitted to the jury. Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622.

2. Whether mortorman negligent.—Doherty *v.* Boston, etc., St. R. Co., 92 N. E. 1026, 207 Mass. 27.

In an action against a street railway for injuries to a passenger by a collison between a passenger car and a heavily loaded freight car, it appeared that, after starting down a steep incline at the bottom of which the passenger car was waiting, the motorman on defendant's car endeavored to apply the air brakes; that, finding that they would not work, he made several subsequent attempts before reversing the current; and that, after finding that the reverse did not work, he failed to try the hand brake on the car. Held, that whether the motorman was negligent or not was a question for the jury. Rouston *v.* Detroit United Railway, 115 N. W. 62, 151 Mich. 237.

In an action against a street railway for injuries to plaintiff, a passenger, in a collision between a passenger car and

the track in time to avoid a collision,[3] whether a towerman gave wrong signals,[4]

a heavily loaded freight car, whether the motorman of the freight car was negligent in starting down a steep incline at the rate of fifteen miles an hour, knowing that the passenger car was at the foot of the incline, and relying on air brakes alone to check the speed of his car, was a question for the jury. Rouston *v.* Detroit United Railway, 115 N. W. 62, 151 Mich. 237.

In an action against a street railway company for the death of a passenger caused by a collision between the car on which he was riding and a broken down wagon on the track, there was evidence that the gripman was engaged in conversation with a passenger, and was not looking at the track ahead of him. Passengers on the train testified that they saw the wagon on the track when within 50 to 125 feet from it, and the driver of the wagon and another testified that the driver had gone up the track about sixty feet to warn the approaching car, but that the gripman paid no attention to him; the evidence being conflicting whether the car could have been stopped within forty feet or in not less than seventy-five feet. Held, that the question of the gripman's negligence was for the jury. Sweeney *v.* Kansas City Cable R. Co., 51 S. W. 682, 150 Mo. 385.

Whether a motorman, who, on a downgrade, shut off his power, and allowed the car to drift, and thus approached so close to a wagon traveling in front of him on the tracks that he was unable to prevent a collision, injuring a passenger, the wheels of the wagon skidding when the driver attempted to leave the track, was negligent in operating his car, is a question for the jury. Brackney *v.* Public Service Corp., 71 Atl. 149, 77 N. J. L. 1.

Plaintiff, while riding on the front platform of a street car of defendant S. Co., was thrown therefrom by the shock of a collision with a car of defendant H. Co., at the point of intersection of the two lines. When within fifty feet of the crossing, the H. car driver shouted to the S. car driver that his car, going down grade, had become unmanageable. The S. car driver was looking in an opposite direction from the one in which the H. cars must approach on its single track, and did not see the H. car approaching at double its usual speed; otherwise he might have seen that car, and then have stopped his own car in a space of five or six feet. Held, that the evidence was sufficient to justify the submission of the question of the S. car driver's negligence to the jury. Schneider *v.* Second Ave. R. Co., 59 N. Y. Super. Ct. 536, 15 N. Y. S. 556, 39 N. Y. St. Rep. 370.

In an action against a street railway company and the owner of a wagon for negligence, there was evidence that plaintiff sat on the east side of a south bound car, near the rear. A short distance south of a street intersection, the car met the wagon, coming north on the east track in front of a north bound car. To get out of the way of the car behind it, the wagon crossed to the west, and collided with the rear of the south bound car, striking and injuring plaintiff. The gripman of the south bound car ran it across the intersecting street at full speed, and the wagon driver first started to cross the west track when the car was about seventy-five feet away. The wagon was a heavy one, and could not be stopped at once. Held, the issue of negligence was for the jury. Judgment 54 N. Y. S. 391, 34 App. Div. 297, affirmed in Keegan *v.* Third Ave. R. Co., 59 N. E. 1124, 165 N. Y. 622.

Where a street was in an abnormal condition, owing to excavations, at the time of a collision between defendant's car and a team using defendant's tracks, which resulted in injury to plaintiff, a passenger, it was for the jury to say whether defendant's motorman was justified in assuming that he could operate his car, and that the driver of the wagon would use reasonable care to get out of the way. Frank *v.* Metropolitan St. R. Co., 86 N. Y. S. 1018, 91 App. Div. 485.

In an action by a passenger to recover of a horse railroad company for personal injuries occasioned by a grocer's wagon running against the car, there was evidence that the wagon came rapidly down a street intersecting at right angles, and could have been seen by the car driver 250 feet distant, and that the car might have been stopped in twelve feet. Held, that the question of negligence should go to the jury. Watkins *v.* Atlantic Ave. R. Co. (N. Y.), 20 Hun 237.

In an action to recover damages sustained in consequence of a collision between a street car, on which plaintiff was a passenger, and a hook and ladder truck of the fire department, it appeared that the car was going west on State street; the truck, south on Fourth street, The driver of the car did not look north, as he came to the east line of Fourth street, to see if there was any vehicle approaching. If he had looked, he could have seen the truck, and taken precautions to avoid the collision. Held, that the question of the driver's negligence was properly submitted to the jury. Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

3. Whether engineer negligent.—Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622.

4. Whether towerman gave wrong signals.—Van Orman *v.* Lake Shore, etc., R. Co., 115 N. W. 968, 152 Mich. 185.

whether the carrier was negligent in securing a freight car which was moved from a siding by the wind,[5] whether the brakes on a freight car of a street railway colliding with a passenger car were defective,[6] whether the operation of a railway train with the locomotive in its rear was negligence,[7] whether a street car company was negligent in running two cars towards each other on the same track [8] or in failing to ring a gong,[9] or whether it used due care to avoid a collision at a railroad crossing.[10] Whether there was a rule, practice, or custom giving to the cars of one traction company a superior right of way over the cars of another company at a particular crossing is a question of fact, where the evidence is conflicting in an action by a passenger for injuries caused by a collision with a car of the other company.[11] Where an engineer knew that cars were to be stored on an incline passing track, which the company knew was without a derailing switch, the question of negligence in the speed of a train, resulting in a collision with cars which had run upon the main track, was properly submitted to the jury.[12]

Failure to Keep Switch Locked.—Where the evidence shows that a passenger was injured in a collision caused by the failure of a railroad company to keep a main-track switch locked or guarded, so as to prevent it from being improperly thrown, whether this was actionable negligence is a question for the jury.[13]

5. Negligence in securing car.—Webster *v.* Rome, etc., R. Co., 21 N. E. 725, 115 N. Y. 112.

6. Whether brakes defective.—Rouston *v.* Detroit United Railway, 115 N. W. 62, 151 Mich. 237.

7. Chicago, etc., R. Co. *v.* Grimm, 57 N. E. 640, 25 Ind. App. 494.

8. Palmer *v.* Warren St. R. Co., 56 Atl. 49, 206 Pa. 574, 63 L. R. A. 507.

9. Failure to ring gong.—Where a passenger on a street car was injured by a collision between the car and a buggy going in the same direction, the defendant was not entitled to an instruction that failure to ring gong was, as matter of law, not negligence. Judgment 90 Ill. App. 105, affirmed in West Chicago St. R. Co. *v.* Tuerk, 61 N. E. 1087, 193 Ill. 385.

Where a street car's collision with a wagon caused a passenger's injury, the motorman was not negligent as a matter of law merely because the ringing of the gong, which was not done, would have prevented the obstruction; the inference of negligence not being necessarily contained in that finding. Strong *v.* Burlington Tract. Co., 66 Atl. 786, 80 Vt. 34, 12 L. R. A., N. S., 197.

10. Collision at crossing.—Washington, etc., R. Co. *v.* Trimyer, 110 Va. 856, 67 S. E. 531; Cooke *v.* Des Moines City R. Co., 155 Iowa 384, 136 N. W. 221.

Illustrations.—In an action against an electric railway company for injuries to a passenger in a collision between the car on which she was riding and a train of a steam railroad company at a crossing, whether the company was guilty of actionable negligence, because it permitted the car to stand at the crossing from three to five minutes without any precaution to ascertain whether a train was approaching or to give notice to the train that the track was blocked, was for the jury. Schlauder *v.* Chicago, etc., Tract. Co., 97 N. E. 233, 253 Ill. 154, reversing judgment 160 Ill. App. 309.

In an accident to a street car at a crossing of railroad tracks the street car was struck by an engine on the second track. The conductor crossed but one track in advance of his car, to look for trains. Held, that it was for the jury to say whether the conductor should have gone over in advance of the car. Douglass *v.* Sioux City St. R. Co., 91 Iowa 94, 58 N. W. 1070.

Where operatives of a street car ran the same onto a railroad crossing in front of an approaching train, which was in plain view, with the headlight burning, without stopping the car and going ahead to ascertain by looking and listening to learn whether the way was clear, resulting in a collision, and injury to a passenger on the street car, whether the street car company was guilty of negligence was for the jury. Renders *v.* Grand Trunk R. Co., 108 N. W. 368, 144 Mich. 387.

Proof that a street car was going very fast as it approached a crossing, and that it did not slacken its speed before colliding with a truck approaching the car track, and that a passenger was injured in the collision, was sufficient to require the submission to the jury of the carrier's negligence. Kaliniak *v.* Joline (App. Term), 123 N. Y. S. 54.

11. Schmidt *v.* Chicago City R. Co., 144 Ill. App. 512, affirmed in 88 N. E. 275.

12. Mitchell *v.* Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622.

13. Failure to keep switch locked.—Elgin, etc., Tract. Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436, affirming judgment 120 Ill. App. 371. See Leeke *v.* Gulf, etc., R. Co., 91 Miss. 398, 46 So. 68.

Nonsuit or Direction of Verdict.—Where a trolley car was driven past a barrel wagon moving in an opposite direction, and the wagon had projecting sides, and the roadway was such that a lurch of the wagon might be anticipated, and the space between the two vehicles at the place of passing was not sufficient to prevent the car being struck, it was not error to refuse to order a nonsuit or direct a verdict for the defendant.[14] But where there is no evidence of negligence on the part of the defendant, it is proper to order a nonsuit,[15] or direct a verdict for defendant.[16]

§ 3313. Derailment of Cars.—In a passenger's action against a carrier for injuries through the derailment of a train or car, whether the defendant was negligent is usually a question for the jury.[17] Where the evidence is con-

14. Nonsuit or direction of verdict.—Rodman *v.* North Jersey St. R. Co., 58 Atl. 1095, 71 N. J. L. 43.

15. Downey *v.* Pittsburg R. Co., 219 Pa. 592, 69 Atl. 71.

16. In an action for injuries to a passenger, where the evidence, taken in its aspect most favorable to plaintiff, shows that the accident occurred either by reason of the sudden stopping of the car to avoid collision with an ice wagon, which had come without warning in front of the car, or a sudden stopping coupled with an unexplained collision, a verdict was properly directed for defendant. Niland *v.* Boston Elev. R. Co., 100 N. E. 554, 213 Mass. 522.

Directing verdict for a defendant, in an action for injury to plaintiff from collision of a delivery wagon and the conveyance in which plaintiff was riding, was proper, no testimony conecting such defendant, its servants or property, with what occurred. Sloan *v.* Detroit United Railway, 172 Mich. 68, 137 N. W. 691.

17. Derailment of cars.—*United States.*—Minahan *v.* Grand Trunk, etc., R. Co., 138 Fed. 37, 70 C. C. A. 463.

California.—Doolin *v.* Omnibus Cable Co., 140 Cal. 369, 73 Pac. 1060.

Georgia.—Carswell *v.* Macon, etc., R. Co., 118 Ga. 826, 45 S. E. 695.

Maryland.—United R., etc., Co. *v.* Dean, 117 Md. 686, 84 Atl. 75.

Massachusetts.—Tobin *v.* Pittsfield Elect. St. R. Co., 92 N. E. 887, 206 Mass. 581.

Michigan.—Schulte *v.* Michigan Cent. R. Co., 162 Mich. 76, 127 N. W. 21; Niedzinski *v.* Bay City, etc., Elect. Co., 160 Mich. 517, 125 N. W. 409; Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 95 N. W. 546.

Texas.—Houston, etc., R. Co. *v.* Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 777.

Vermont.—Parker *v.* Boston, etc., Railroad, 84 Vt. 329, 79 Atl. 865.

Where a declaration against a carrier for injuries to a passenger alleged negligence in the derailment of the car on which plaintiff was riding, in the existence of a broken rail, and in the neglect and default of the carrier's employees, a prayer asked by the carrier that the court rule as matter of law upon the pleadings and evidence that defendant had proven that the accident was not due to its negligence or that of its servants could not properly have been given, although the evidence conclusively exculpated the carrier in respect to the cause which produced the broken rail, unless the court could further rule as matter of law that the other alleged acts of negligence had been disproved by defendant. Western Maryland R. Co. *v.* Shivers, 61 Atl. 618, 101 Md. 391.

Illustrations.—A request to rule, in an action against a street railway company for injury to a passenger, that on all the evidence defendant had proved there was no negligence on its part, and had thus overcome the effect of the evidence of the mere running off the track by the car, and to direct a verdict for defendant, is properly refused, there being evidence that the car had run off the track an hour before the accident, and that, immediately before it again ran off, causing plaintiff's injury, it was running at the rate of fifteen miles an hour, down a grade, and around a curve. Harriman *v.* Reading, etc., St. R. Co., 53 N. E. 156, 173 Mass. 28.

In an action against a railroad company for injuries received by a passenger on one of its trains by reason of the car in which he was riding being derailed, the evidence for defendant tended to show that the roadbed, track, and cars were well built and in good condition, and that the train was properly managed; the circumstances of its management and of the accident being shown. Held, that this was sufficient, as against the presumption of negligence on the part of defendant, to require the submission of the question of its negligence to the jury, although the real cause of the accident was not shown. Eldridge *v.* Minneapolis, etc., R. Co., 32 Minn. 253, 20 N. W. 151.

Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box car, and several flat cars. Deceased and others were riding on a flat car next the engine, to the knowledge of the conductor and brakemen, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car,

flicting as to whether the train was operated at a high rate of speed, and as to the condition of the roadbed and the cars, the question whether defendant was exercising a proper degree of care is for the jury.[18] But where there is undisputed evidence that the car was in good order and suitable for the purpose, and that the track where the derailment occurred was in a safe condition, it is proper to eliminate the question of negligence on those points.[19] And where the petition alleged that a short distance beyond the point of the injury there was a curve in bad condition or improperly constructed, and the only evidence on the question was introduced by plaintiff, and showed that the curve was not improperly constructed, and there was no evidence that plaintiff knew of any defect in or danger arising from the curve, the court should not have submitted such question to the jury.[20]

Defective Cars.—Where one of the wheels of a car broke down while the train was running at a very rapid speed, causing its derailment, on account

but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured, except those on the flat car. Held, that the question of negligence was for the jury. Wagner *v.* Missouri Pac. R. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; Zuendt *v.* Missouri Pac. R. Co. (Mo.), 10 S. W. 491.

In an action for personal injuries sustained by plaintiff by being thrown from a street car on its jumping the track, where there was evidence that the car at the time was going at a "pretty good rate," and that the accident happened at a point where there were side tracks leading into the car stables, the question of defendant's negligence was for the jury. Hollahan *v.* Metropolitan St. R. Co., 76 N. Y. S. 751, 73 App. Div. 164.

While plaintiff was a passenger on defendant's horse car, a place was reached where there were a great many tracks, and the street was in such bad condition that the car was obliged to stop. Plaintiff testified that, when the driver undertook to start the car, he gave the horse a blow with the whip, whereupon the horse made a plunge, and the car went off the track, and plaintiff was thrown off, and injured. Held, that the evidence was sufficient to present a question to the jury as to defendant's negligence. Hastings *v.* Central Crosstown R. Co., 7 App. Div. 312, 40 N. Y. S. 93.

Plaintiff, a passenger, was injured by the derailment of the train, and in an action for the injuries sustained alleged that defendant was negligent in the formation of the train, in its operation in a negligent manner, and in that the roadway was defective. There was evidence that the derailment might have been caused by a broken rail, and it was admitted that the train at the time was being operated with a locomotive in the rear, a passenger coach, and two tank cars in front. There was also testimony that it was necessary to move the train as constructed at the time of the derailment, to reach a siding on which it was to be rearranged, and that the other tracks were so congested that the use of the siding was the only feasible way to accomplish the purpose, and that the train was then being moved cautiously and only four miles an hour. It also appeared that these changes might have been made before permitting passengers to board the train, but were not. Held, that an instruction that the operation of a train so arranged for the carriage of passengers was negligence per se, was erroneous, though the jury was also charged that, in order to warrant a recovery on such ground, the jury must be satisfied that such negligence was the proximate cause of plaintiff's injury; whether the operation of a train so arranged under such circumstances was negligent being for the jury. Baltimore, etc., R. Co. *v.* White, 176 Fed. 900, 100 C. C. A. 370.

Verdict directed for plaintiff.—Defendant's railroad train encountered a washout, and, going too close to the breach in the track, the engine overturned. The cars were pushed back some distance, and a brakeman was sent to get the passengers out, as the water was running alongside the track, and washing away the embankment. He made the announcement, but plaintiff's wife and another passenger, who did not understand English, remained in the car, and no further attempt was made to remove them, although the cars stood upon the track for thirty or forty minutes, when they overturned, and plaintiff's wife was injured. Held, in an action to recover for the injury, that, on evidence showing such facts, it was not error to direct a verdict for plaintiff. Southern Pac. Co. *v.* Tarin, 108 Fed. 734, 47 C. C. A. 648, 54 L. R. A. 240.

18. Where evidence conflicting.—Pate *v.* Columbia, etc., R. Co., 100 Pac. 324, 52 Wash. 166.

19. Taking question from jury.—Sloan *v.* Little Rock R., etc., Co., 117 S. W. 551, 89 Ark. 574.

20. Georgia R., etc., Co. *v.* Gilleland, 66 S. E. 944, 136 Ga. 621.

of which the plaintiff, who was a passenger, sustained personal injuries, the question of the negligence of the defendant railroad company was for the jury.[21]

Derailment Caused by Condition of Track.—It is generally a question for the jury whether the carrier has been negligent as to the condition of its track,[22] as where a derailment was caused by a spreading of the rails,[23] or by a broken rail.[24] Proof of the derailment of the train in the light of evidence that the track at the place of derailment was in bad condition is sufficient to carry the issue of negligence to the jury.[25] And where a train ran off the track where a gang of men were relaying ties, an issue whether it was negligence for the company to allow the foreman of the gang to procure his own watch and to regulate it is for the jury.[26]

Misplaced Switch.—Where a derailment was caused by a misplaced switch, the misplacement being made possible by the fact that a bolt and key were out of place, it is a question for the jury whether the employees of defendant, whose duty it was to inspect the switch, had exercised the proper care.[27]

Stone on Track.—The negligence of the carrier where a derailment was

21. Defective cars.—Chesapeake, etc., R. Co. *v.* Howard, 14 App. D. C. 262, judgment affirmed in 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015. See Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 95 N. W. 546.

22. Derailment caused by condition of track.—Plaintiff was injured as a result of the derailment of defendant's street car. The track at the place of the accident was constructed by putting ties down on a wellworn cedar block pavement, and spiking on these fifty-pound rails that had been used a number of years. There was no filing or ballasting, except at the ends of the temporary track, where it curved to join the permanent track. Held, the question of defendant's negligence was for the jury. Edlund *v.* St. Paul City R. Co., 81 N. W. 214, 78 Minn. 434.

Where a passenger was injured by derailment of the train, and there was evidence that the ties at the place of derailment were so rotten that they would not hold the spikes, etc., the court properly submitted the issues of negligence as to the condition of the track. Houston, etc., R. Co. *v.* Cheatham, 52 Tex. Civ. App. 1, 113 S. W. 777.

23. Spreading of rails.—Whipple *v.* Michigan Cent. R. Co., 106 N. W. 690, 143 Mich. 41; S. C., 106 N. W. 692, 143 Mich. 47.

24. Broken rail.—Where the cause of a railway accident and injury to the plaintiff was a broken rail that threw the car in which he was riding off the track, it was held that it was error not to allow the plaintiff to go to the jury on the question whether the rail was not broken before the train on which he was riding came upon it. McPadden *v.* New York Cent. R. Co. (N. Y.), 47 Barb. 247.

An accident to a train being caused by a broken rail, which had been in use sixteen years as the outside rail on a sharp curve, and had been worn so that its weight was reduced from sixty to fifty-five pounds per yard, and it having been broken some months before, and repaired by use of splices or side bars, and being greatly weakened by the wear and fracture, there is evidence for the jury of the company's negligence. McCafferty *v.* Pennsylvania R. Co., 44 Atl. 435, 193 Pa. 339, 74 Am. St. Rep. 690.

25. Cox *v.* High Point, etc., R. Co., 147 N. C. 353, 61 S. E. 183; Western Maryland R. Co. *v.* Shivers, 101 Md. 391, 61 Atl. 618.

26. Matteson *v.* New York Cent. R. Co. (N. Y.), 62 Barb. 364.

27. Misplaced switch.—Illinois Cent. R. Co. *v.* Sandusky, 14 Ky. L. Rep. 767. See Texas, etc., R. Co. *v.* Clippenger, 47 Tex. Civ. App. 510, 106 S. W. 155; Heyde *v.* St. Louis Trans. Co., 102 Mo. App. 537, 77 S. W. 127.

In an action by a passenger for injuries sustained by reason of the car running through an open switch the declaration alleged, that defendant's negligence consisted in want of reasonable care, in not having the switch properly adjusted, in not keeping the implements used in adjusting it so that children and others could not improperly use them to move the switch, in running the car at a high rate of speed, and in failing to approach the switch with the car under control. It was shown that the switch was at a public place, where many children congregated; that it was not fastened; that it was opened by any one desiring to do so by the use of a bar left there by defendant; that the car approached the switch at a rate of fifteen or twenty miles an hour; and that some one had thrown the switch open. Held, that the evidence was sufficient to require the submission of the case to the jury. Leslie *v.* Jackson, etc., Tract. Co., 96 N. W. 580, 134 Mich. 518.

caused by a stone on the track is generally for the jury.[28] Where contractors employed by a railroad company to deliver stone placed it in ridges near a rail, and, while a train was passing, one of the stones fell on the track and derailed the train, it is a question for the jury as to whether the company had used due diligence to guard against danger.[29]

§ 3314. Management of Elevators.—Ordinarily, the question of negligence in the operation and management of elevators is for the jury to determine.[30] In an action for injuries to a customer in a store by falling into an

28. Stone on track.—Where a street car passenger was injured by the derailment of the car caused by a brick placed on the track by a boy some forty or fifty feet in front of the car, whether the motorman by the exercise of reasonable diligence could have seen the brick placed on the track, or could have seen it after it had been placed there for a sufficient length of time to have permitted him, with the means and appliances at his command, to stop the car, was for the jury. O'Gara *v.* St. Louis Trans. Co., 103 S. W. 54, 204 Mo. 724, 12 L. R. A., N. S., 840, 11 Am. & Eng. Ann. Cas. 850.

A car of the defendant company, while plaintiff was riding on it as a passenger, was suddenly derailed, and the plaintiff thereby thrown to the floor and injured. The derailment of the car resulted from its colliding with a paving stone, which lay between the rails and was wholly or partially covered by snow and slush. Held, that it was for the jury, not the court, to determine whether the presence of the paving stone might not have been discovered, and the accident avoided, by the exercise of that high degree of care which the law imposes on common carriers for the safety of their passengers. Dusenbury *v.* North Hudson County R. Co., 48 Atl. 520, 66 N. J. L. 44.

29. Virginia Cent. R. Co. *v.* Sanger, 56 Va. (15 Gratt.) 230.

30. Management of elevators.—*Illinois.*—Masonic Fraternity Temple Ass'n *v.* Collins, 210 Ill. 482, 71 N. E. 396, affirming 110 Ill. App. 504.

Iowa.—Cubbage *v.* Youngerman, 155 Iowa 39, 134 N. W. 1074.

Massachusetts.—Sullivan *v.* Marin, 175 Mass. 422, 56 N. E. 600.

Michigan.—Roulo *v.* Minot, 132 Mich. 317, 93 N. W. 870.

Missouri.—Hensler *v.* Stix, 113 Mo. App. 162, 88 S. W. 108.

Rhode Island.—Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

Washington.—Perrault *v.* Emporium Department Store Co., 128 Pac. 1049, 71 Wash. 523.

Illustrations.—In an action against the owner of a building for the death of plaintiff's intestate, caused by his being caught between the floor of an ascending passenger elevator and the top of the door in the elevator cage, evidence that the operator of the elevator stopped at the floor where deceased was killed without calling that floor, or that he started the elevator upward before the door at that floor was closed, justified submission to the jury of the issue of defendant's negligence. Judgment 110 Ill. App. 504, affirmed in Masonic Fraternity Temple Ass'n *v.* Collins, 71 N. E. 396, 210 Ill. 482.

The floor of an elevator car was two inches thick, and the dimensions of the car such that, when its floor was level with the hall floor, there was considerable open space between the car floor and the threshold of the door giving access. Defendant, operating the elevator himself, opened the door, and asked plaintiff to step in, the floor of the car being then six or seven inches above the hall floor. Plaintiff attempted to enter, and in so doing sustained injuries. Held, that the question of the negligence of defendant was for the jury. Sullivan *v.* Marin, 56 N. E. 600, 175 Mass. 422.

Plaintiff entered an elevator in an office building, and requested the conductor to let him off at the office of a tenant. All the passengers had left, except plaintiff, when the ninth floor was reached. On the elevator reaching the ninth floor, it was stopped, and the doors opened; and, plaintiff concluding that the elevator had stopped for him to alight, started to do so, when, as he was stepping from the elevator, the conductor started the elevator, and, before it could be stopped, plaintiff was crushed against the overhead framework. Held, that whether the conductor was guilty of negligence was for the jury. Roulo *v.* Minot, 93 N. W. 870, 132 Mich. 317.

Defendants' elevator operator shut the elevator door on plaintiff's dress while she was standing in the car, and lowered the elevator at the same instant. The operator, seeing plaintiff's peril, suddenly reversed the lever, which resulted in the car suddenly turning upward, causing plaintiff's injuries; the operator claiming that, unless he acted as he did, the descent of the elevator could not have been stopped quickly enough to save plaintiff from harm. Held, that whether the operator was negligent in handling the elevator after he saw plaintiff's danger was for the jury. Hensler *v.* Stix, 88 S. W. 108, 113 Mo. App. 162.

Sudden drop of elevator car, of from twelve to fifteen inches, may, in connec-

elevator shaft through an open door leading to the elevator, whether defendant was guilty of negligence was a question for the jury.[31] Where the plaintiff in an elevator accident case contends that the operator was negligent in attempting to pull plaintiff into the car, instead of stopping it, it is not error to refuse to instruct that the attempt to pull plaintiff into the car was not negligence, since such fact must be considered in connection with the failure to stop the elevator.[32] It is proper to refuse a peremptory instruction for defendant where the evidence tends to show negligence on its part.[33] But the court must take the case from the jury when, on all the evidence, no negligence appears.[34]

§ 3315. Protection of Passengers from Incidental Dangers.—Ordinarily the question of the carrier's negligence in failing to protect passengers from incidental dangers is for the jury,[35] as where a trunk is thrown against a pas-

tion with surrounding circumstances, make a question for the jury as to the negligence of its owners. Harris *v.* Guggenheim, 138 N. Y. S. 1037, 154 App. Div. 289.

31. Falling into elevator shaft.—Phillips Co. *v.* Pruitt, 82 S. W. 628, 26 Ky. L. Rep. 831; S. C., 83 S. W. 114, 26 Ky. L. Rep. 1105; Burgess *v.* Stowe, 134 Mich. 204, 96 N. W. 29.

32. Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. 28.

33. Refusal of peremptory instruction.—Plaintiff entered defendant's elevator on the eighth floor, desiring to go to the ground floor, and knowing it to be the custom, when a passenger wished to get off at an intermediate floor, to notify the conductor. On reaching the second floor the elevator stopped, and plaintiff, under the impression that it was the ground floor, started to leave, without speaking to the conductor, who started the elevator before closing the door, and plaintiff was injured. Held, that it was not error to refuse a peremptory instruction for defendant. Chicago Exch. Bldg. Co. *v.* Nelson, 64 N. E. 369, 197 Ill. 334, affirming 98 Ill. App. 189.

An elevator operator testified that after a passenger had been caught in the door, and the elevator raised a couple of feet, it came to a full stop, and the passenger could have got back into the car; that he let the car down, watching the passenger more than he should have done, and the elevator less, and permitted it to go too low, injuring the passenger. Held, that an instruction to find for the defendant was properly refused. Luckel *v.* Century Bldg. Co., 76 S. W. 1035, 177 Mo. 608.

34. Gibson *v.* International Trust Co., 58 N. E. 278, 177 Mass. 100, 52 L. R. A. 928.

35. Protection from incidental dangers.—The evidence showed that while plaintiff was rightfully on the platform of a station on defendant's railroad a large number of sparks escaped from the bottom of a passing engine, which were blown upon the platform, and one of which struck plaintiff's eye, destroying the sight. There was also evidence tending to show that the escape of sparks in that manner from an engine was not usual if the ash pan was in proper repair, and the engine properly handled. Held, that such evidence was sufficient to justify the submission of the question of defendant's negligence to the jury. Philadelphia, etc., R. Co. *v.* Young, 90 Fed. 709, 33 C. C. A. 251.

Plaintiff, a passenger on defendant's train, was standing at the rear door of the coach, viewing the scenery; his left hand resting on the water-closet door to brace himself. The conductor, approaching from behind, opened the closet door, and shut it quickly; catching and crushing plaintiff's little finger, which had slipped into the crevice without his knowledge. Plaintiff testified that the conductor said he saw him there, and ought to have spoken to him, and that he did not hear the conductor approaching. Held, that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. Romine *v.* Evansville, etc., R. Co., 56 N. E. 245, 24 Ind. App. 230.

Whether one standing at the depot fifteen feet from the track, as a train went by, running sixty to seventy miles an hour according to his testimony, and forty miles an hour according to the company's testimony, was struck by a piece of coal from the tender, is a question for the jury; he testifying that he was struck by a piece of coal which was crushed into small fragments, and that he saw it leave the tender, and it appearing that he was then found to be injured. Louisville, etc., R. Co. *v.* Reynolds, 71 S. W. 516, 24 Ky. L. Rep. 1402.

The front part of defendant's car was equipped and used for passenger service only, the rear part being used for baggage. Along and parallel with the sides of such rear part were seats, with upright slats extending from the floor to the roof of the car between the back of the seats and the sides of the car. Plaintiff entered the forward compartment, and on complaining to the conductor that it was cold, the latter directed one of the train hands to build a fire in the stove in the rear compartment, which plaintiff there-

senger while defendant's employees are unloading baggage at the depot,[36] or he is bitten by a vicious dog, fastened in defendant's railroad station.[37] In an action against a street railroad company by a passenger for injuries alleged to have been caused by negligence of the conductor in allowing a guard rail to fall on plaintiff's hand, testimony of the plaintiff that the conductor knew his position, and that he did not know that the conductor intended to let the guard-rail down, was sufficient to require submission of the issue to the jury of the defendant's negligence.[38] Under a statute, making railroad companies not liable for negligence of expressmen on the train, not in their employ, a passenger testifying that she was hit by a bundle thrown from the express car is not entitled to have the question whether she was injured by the railroad company submitted to the jury, as they would not be justified in presuming that the bundle was thrown by trainmen.[39]

§§ 3316-3318. Setting Down Passengers—§ 3316. In General.—In an action for injuries to a passenger while attempting to alight from the carrier's conveyance, whether there has been negligence on the part of the carrier is ordinarily a question for the jury.[40] It is for the jury to say whether there has been negligence, where the evidence is conflicting[41] or the facts are such that reasonable minds might differ as to the conclusions to be drawn therefrom.[42]

Taking Case from Jury.—The court is not authorized to take the questions involved from the jury unless the evidence is of such a conclusive character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.[43] A motion for a nonsuit should not be granted, if there is

upon entered, taking a seat near the stove; the conductor taking up his ticket from such seat. While sitting there, plaintiff rested his arm on the back of the seat, and, without noticing it, extended his elbow back between two of the upright slats. While in this position, the door of the baggage compartment was slid back, passing between the slats and the car, striking and injuring plaintiff's elbow. Held, that it could not be said, as a matter of law, that the place provided by defendant was as safe as could have been procured, and that the question was for the jury. Wood *v.* New York, etc., R. Co., 96 N. Y. S. 419, 109 App. Div. 770.

36. Trunk thrown against passenger.—Holcombe *v.* Southern R. Co., 66 S. C. 6, 44 S. E. 68.

37. Passenger bitten by dog.—Trinity, etc., R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

38. McDonald *v.* Savannah Elect. Co., 47 S. E. 547, 120 Ga. 49.

39. Mass. St. 1894, c. 469, § 3; Winship *v.* New York, etc., R. Co., 170 Mass. 464, 49 N. E. 647.

40. Negligence in setting down passengers.—Benson *v.* Wilmington City R. Co., 1 Boyce's (24 Del.) 202, 75 Atl. 793; McHugh *v.* St. Louis Trans. Co., 190 Mo. 85, 88 S. W. 853.

Plaintiff claimed that, while riding on a street car in the sole charge of a motorman, she signaled him to stop, but that the intersecting street was passed some distance before the car slackened, as she thought, to allow her to alight, and when she undertook to do so the car suddenly moved forward, causing her to fall. Held that, if the motorman saw plaintiff signal, the question whether, in the exercise of ordinary care, he should have anticipated that she would attempt to alight while between such crossings, was a question for the jury, and it was error to instruct that he should have anticipated such movement. Root *v.* Des Moines R. Co., 98 N. W. 291, 122 Iowa 169.

Directing passenger to go to the rear platform while car in motion.—Hennessy *v.* Muskegon Tract., etc., Co., 97 N. W. 36, 135 Mich. 29.

41. Where evidence conflicting.—Mahoning Valley R. Co. *v.* O'Hara, 196 Fed. 945, 116 C. C. A. 495; Birmingham R., etc., Co. *v.* Pritchett, 161 Ala. 480, 49 So. 782; Louisville R. Co. *v.* Steubing, 143 Ky. 364, 136 S. W. 634; Carroll *v.* Central Railroad, 81 N. J. L. 567, 79 Atl. 293; Gensemer *v.* Conestoga Tract. Co., 237 Pa. 224, 84 Atl. 901.

42. Carroll *v.* Central Railroad, 81 N. J. L. 567, 79 Atl. 293.

It was a question for the jury whether a carrier should have prevented a boy fourteen years old jumping from a moving train where it knew that he was in the habit of jumping every morning at a crossing near a school. Kambour *v.* Boston, etc., Railroad (N. H.), 86 Atl. 624.

43. Taking case from jury.—Long *v.* Red River, etc., R. Co. (Tex. Civ. App.), 85 S. W. 1048.

It appeared by plaintiff's evidence that the train did not stop at his station, and, on plaintiff seeing conductor, he said he had forgotten him, and suggested that plaintiff jump from the train, as it was running slow, which he refused to do.

any evidence to go to the jury such as might justify them in inferring from the testimony that the plaintiff was entitled to a verdict.[44] It is held that the court may properly direct a verdict for defendant when there is no more than a mere scintilla tending to prove defendant's negligence.[45] Where the proof is defective and facts essential to plaintiff's right to recover could only be reached by the jury by conjecture, surmise or guess, it is proper to dismiss plaintiff's complaint.[46] Where a passenger was injured in jumping from a train at a place where there was no platform, at the instance of a person on the train, and there was no testimony that such person was dressed in the uniform in which the employees of the company were dressed, or that he was an employee of the company, it was error to submit the question of his service to the jury.[47]

Assisting Passengers to Alight.—The duty of a carrier to assist passengers to alight from its conveyance may arise where the circumstances suggest such necessity, and whether in a given case the circumstances were such is a question for the jury.[48]

Setting Down Passenger at Improper Place.—The question of the carrier's negligence in setting down a passenger at an improper place is generally for the jury.[49] Testimony that, after plaintiff had fallen, while attempting to

Conductor then agreeing to slow up at a safe place for him to get off, plaintiff agreed to follow his advice, and went out on the platform as the train slowed up, going about as fast as a man could walk, but saw a signal to go ahead, and did not step off for that reason. Then, feeling the increased motion of the train, plaintiff stepped off, believing he was at, and relying on conductor's picking, a safe place, and was injured. Held evidence sufficient to go to the jury. Cable *v.* Southern R. Co., 29 S. E. 377, 122 N. C. 892.

44. Nonsuit.—Cooper *v.* Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543. See Bartle *v.* New York, etc., R. Co., 193 N. Y. 362, 85 N. E. 1091.

In an action to recover for injuries received in alighting from a train in motion, where there is evidence that plaintiff was invited by the conductor to get ready to get off, and went with him to the car step, and the train slowed up, and upon its beginning to run faster he jumped, while the conductor was present, and was injured, a nonsuit was properly refused. Cooper *v.* Georgia, etc., R. Co., 39 S. E. 543, 61 S. C. 345.

In an action against a railroad for personal injuries, plaintiff testified that he was ninety-one years old; that, when the train stopped, the conductor told him he could get off on the opposite side without fear; that it was very dark, and that after the train pulled out he attempted to find the platform; that he crawled upon what he supposed was the platform, and, in walking along it, fell off and was injured. Held, that a nonsuit was properly denied. Owen *v.* Washington, etc., R. Co., 69 Pac. 757, 29 Wash. 207.

45. Direction of verdict.—Cable *v.* Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Evidence held sufficient under the scintilla doctrine to take case to jury.—Louisville, etc., R. Co. *v.* Payne, 31 Ky. L. Rep. 1173, 104 S. W. 752.

46. Dismissal of complaint.—Baker *v.* Interurban St. R. Co., 86 N. Y. S. 9.

47. Texas, etc., R. Co. *v.* Woods, 15 Tex. Civ. App. 612, 40 S. W. 846.

48. Assisting passengers to alight.—Southern R. Co. *v.* Reeves, 42 S. E. 1015, 116 Ga. 743; Ft. Worth, etc., R. Co. *v.* Spear (Tex. Civ. App.), 107 S. W. 613; San Antonio Tract. Co. *v.* Flory, 45 Tex. Civ. App. 233, 100 S. W. 200.

In an action for injuries to a female passenger while alighting from a street car at a place where the ground was steep and sloping, and below the ordinary distance from the running board, whether it was the duty of defendant's conductor to assist plaintiff to alight was a question for the jury. Morarity *v.* Durham Tract. Co., 70 S. E. 938, 154 N. C. 586.

49. Setting down passenger at improper place.—Harkness *v.* Kansas, etc., R. Co. (Miss.), 33 So. 77.

Illustrations.—Where the undisputed evidence showed that a carrier stopped its train beyond a station, and that a passenger destined for that station alighted at night to walk back to the station, that she was aged and feeble, and that she was injured while attempting to walk back to the station, and the evidence was conflicting as to whether the train stopped at the station for the reception or discharge of passengers, the liability of the carrier was for the jury. Alabama, etc., R. Co. *v.* Cox, 173 Ala. 629, 55 So. 909.

In a sick passenger's action for injuries caused by exposure by being put off at her destination about 185 yards from the station shed, evidence as to the carrier's negligence held to make a question for the jury. Anderson *v.* Atlantic, etc., R. Co., 77 S. E. 402, 161 N. C. 462.

Plaintiff was a passenger on defendant's train, which was stopped at eight

alight, the conductor asked witness if he had seen that, raises the question whether the conductor saw the passenger attempting to alight.[50]

Alighting from Moving Train.—In an action by a passenger for personal injury alleged to have been sustained in getting off a moving train under the direction of the train porter, the question of negligence is for the jury to determine under proper instructions.[51]

o'clock at night by a washout. The conductor, knowing the track could not be repaired till the next ray, refused to back the train to the last station passed, and ordered all passengers to get off and go to a farmhouse about two miles back. The night was dark and rainy, and the path to the farmhouse dangerous. Held, that it was a question for the jury whether defendant should have backed its train. Houston, etc., R. Co. *v.* Rogers, 40 S. W. 201, 16 Tex. Civ. App. 19.

The questions of negligence and contributory negligence are for the jury, in case of a passenger who was put off just beyond her station, which was before the one called for by her ticket; her testimony that the conductor agreed to put her off at that station being corroborated, and she testifying that the station was not announced in her car, and that she was not aware it was reached till the train was moving away, when she spoke to him, and he immediately stopped the train and assisted her off, and, on her saying that she did not know where she was, lighted her around the car, and pointed out a light, and told her to go for that, and that it was at the station; that, on her saying she did not feel as if she could go further, he went back to the car; that she started towards the depot, caught her foot in some irons and fell, got up, and continued towards the depot, saw the platform indistinctly on account of the light, which blinded her, and, thinking it was not elevated, attempted to get off from the track onto it, and in some way stumbled and fell against it. Case *v.* Delaware, etc., R. Co., 43 Atl. 319, 191 Pa. 450.

Plaintiff, a passenger on defendant's train, testified that as it approached his station, which was at an opening 332 feet long in a tunnel, the station platform being at the bottom of a deep cut, the conductor twice hurriedly cried out in the smoker, where he was seated, "All out for Pennsylvania Avenue Station;" that he arose and passed down the aisle, the speed of the car decreasing, it being soon difficult to determine whether or not it had stopped; that, as the conductor closed the door of the ladies' car, plaintiff stepped out of the smoker; that the conductor then went down the steps, and leaned out, looking ahead; that then plaintiff started down, having satisfied himself that the car had stopped, and, just as he got to the bottom step, the conductor sprang up the steps of the ladies' car; that plaintiff turned his head to see what the conductor was going to do, and saw him take hold of the door of the ladies' car, and supposed he was going to let the ladies alight; that then he looked out, and found himself confronted by darkness and in the tunnel; and that then there came a surge, and he lost his hold and fell. Held, that the question of negligence was for the jury. Baltimore, etc., R. Co. *v.* Jean, 57 Atl. 540, 98 Md. 546.

Whether car stopped to let passenger off.—The passenger and several witnesses testified that they did not notice whether the conductor rang the bell, but all the witnesses except one, who was on the sidewalk, were on the rear car. One witness testified that the conductor placed his hand on the bell rope. Held, that the evidence raised the question whether the car was stopped to let the passenger off. Cobb *v.* Lindell R. Co., 50 S. W. 310, 149 Mo. 135.

Whether passenger justified in alighting.—Several blocks before reaching a crossing, a passenger on a street car told the conductor to let her off there, and, seeing that the car was about to pass that point, she again signaled him to let her off, and he nodded to her. Immediately the car slowed down until the motion was scarcely perceptible, when she attempted to alight, taking hold of the railing, and, when one foot was on the ground, the car suddenly started, throwing her. The company claimed that the car slowed up where it did, as was usual, to enable the motorman to see if there were any cars on an intersecting line on the next street, but the testimony did not show that the passenger knew this, or knew that it was unlawful to stop in the middle of a block to discharge passengers. She knew it was customary for the conductor to ring the bell to stop, but testified that she did not know whether he rang it this time or not, and that she did not see him after she signaled. Held, that the case was properly left to the jury to determine whether the passenger was justified in alighting. Cobb *v.* Lindell R. Co., 50 S. W. 310, 149 Mo. 135.

50. Cobb *v.* Lindell R. Co., 149 Mo. 135, 50 S. W. 310.

51. Alighting from moving train.—St. Louis, etc., R. Co. *v.* Leamons, 82 Ark. 504, 102 S. W. 363.

Evidence that after the name of a station had been called at night, and the porter had opened the door, a passenger went out on the steps while the train was

Misleading Invitation to Alight.—The question of the negligence of a carrier in giving a misleading invitation to alight is generally for the jury.[52] What amounts to an invitation to a passenger to alight is ordinarily a question for the jury.[53] The question whether language addressed to the plaintiff amounted to a request, a direction, or an advice to plaintiff to leave the train is for the jury.[54] It is a question for the jury whether defendant was guilty of negligence in announcing the station, and stopping the train at a railway crossing, without warning the passengers that the first stop would be at the crossing.[55]

§ 3317. Starting or Moving Car While Passenger Is Alighting.—Whether the carrier has been negligent in starting or moving its conveyance while a passenger is alighting is ordinarily a question for the jury.[56] Where

moving; that the porter then said, "All right, sir;" that the passenger stepped off, and was injured; and that he did not know that the train was moving, is sufficient to warrant the submission of the issue as to the company's negligence. Hodges *v.* Southern R. Co., 27 S. E. 128, 120 N. C. 555.

The evidence showed that it was the custom on defendant's night trains to turn down the lights and furnish pillows to passengers who paid for their use; that a passenger who was asleep on such a train when it reached his destination at one o'clock in the morning was immediately awakened after it left the station; that, assisted by the porter, he went forward and stepped off the train and was killed; that the train was not stopped nor its speed slackened, nor the passenger restrained, though his danger was manifest. Held, that a demurrer to the evidence was properly overruled. Hanson *v.* Chicago, etc., R. Co., 112 Pac. 152, 83 Kan. 553, 31 L. R. A., N. S., 624.

52. Misleading invitation to alight.—Miller *v.* East Tennessee R. Co., 93 Ga. 630, 21 S. E. 153; Hooks *v.* Alabama, etc., R. Co., 73 Miss. 145, 18 So. 925; Texas, etc., R. Co. *v.* Garcia, 62 Tex. 285.

Where a brakeman called out the name of the next station and opened the doors of the vestibule on the car, and the train shortly stopped at a point before it reached the station, those facts were an invitation to a passenger to alight at that point and, the passenger having been jerked from the steps of the car by the sudden starting of the train and killed, the question of the railroad company's negligence was one for the jury. Dallas *v.* Illinois Cent. R. Co., 139 S. W. 958, 144 Ky. 737.

53. What constitutes invitation to alight.—Whether the acts and conduct of the conductor of an electric car in calling out the name of the station, and leaving the platform and putting up the fender, amounted to an invitation to a passenger to leave the car, was a question of fact. Elwood *v.* Connecticut R., etc., Co., 58 Atl. 751, 77 Conn. 145.

Whether stopping car constituted an implied invitation to alight.—Mobile, etc., R. Co. *v.* Walsh, 146 Ala. 290, 40 So. 559.

54. Lewis *v.* Delaware, etc., Canal Co. 145 N. Y. 508, 40 N. E. 248, reversing 80 Hun 192, 30 N. Y. S. 28.

55. Larson *v.* Minneapolis, etc., R. Co., 88 N. W. 994, 85 Minn. 387; Wolf *v.* Chicago, etc., R. Co., 131 Wis. 335, 111 N. W. 514.

56. Starting or moving car while passenger is alighting.—*Alabama.*—Birmingham, R., etc., Co. *v.* McGinty, 158 Ala. 410, 48 So. 491.

Arkansas.—Hill *v.* St. Louis, etc., R. Co., 85 Ark. 529, 109 S. W. 523; Davis *v.* Kansas, etc., R. Co., 75 Ark. 165, 86 S. W. 995.

Illinois.—Peterson *v.* Chicago Consol. Tract. Co., 83 N. E. 159, 231 Ill. 324.

Iowa.—Mitchell *v.* Des Moines City R. Co. (Iowa), 141 N. W. 43.

Kentucky.—Louisville, etc., R. Co. *v.* Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

Maryland.—United R., etc., Co. *v.* Rosik, 107 Md. 138, 68 Atl. 511.

Massachusetts.—Vine *v.* Berkshire St. R. Co., 212 Mass. 580, 99 N. E. 473; McClinchy *v.* Boston Elev. R. Co., 206 Mass. 7, 91 N. E. 882; McDonough *v.* Boston Elev. R. Co., 191 Mass. 509, 78 N. E. 141.

Minnesota.—Currie *v.* Mendenhall, 79 N. W. 677, 77 Minn. 179.

Montana.—Knuckey *v.* Butte Elect. R. Co., 122 Pac. 280, 45 Mont. 106.

New Jersey.—Oakerson *v.* Atlantic, etc., Elect. R. Co., 77 N. J. L. 769, 73 Atl. 496.

New York.—Koues *v.* Metropolitan St. R. Co., 83 N. Y. S. 380, 86 App. Div. 611; Gordon *v.* Nassau Elect. R. Co., 93 N. Y. S. 487; Bessenger *v.* Metropolitan St. R. Co., 79 N. Y. S. 1017, 79 App. Div. 32.

South Carolina.—Cooper *v.* Georgia, etc., R. Co., 39 S. E. 543, 61 S. C. 345.

Texas. — Galveston, etc., R. Co. *v.* Thornsberry (Tex.), 17 S. W. 521; Williams *v.* Galveston, etc., R. Co., 34 Tex. Civ. App. 145, 78 S. W. 45.

Virginia.—Wickham *v.* Leftwich, 112 Va. 225, 70 S. E. 503.

Washington.—Breeden *v.* Seattle, etc., R. Co., 60 Wash. 522, 111 Pac. 771.

Illustrations. — Plaintiff was injured while alighting from a train, drawn by a dummy which ran along certain streets, stopping at crossings for passengers. There was evidence that, as it approached

a certain street, a signal from a person taking passage having been given, the train was brought nearly to a stop, and that thereupon plaintiff, with her left hand holding a bundle, and her right the hand railing, descended to the steps of the car platform about the time the other passenger got aboard, and as she reached the bottom step, and was about to step from the train, its speed was quickened with a jerk, whereby she was thrown to the ground. Plaintiff testified that the dummy stopped regularly at the crossing. Held, that the question of negligence was for the jury. Sweet *v.* Birmingham R., etc., Co., 33 So. 886, 136 Ala. 166.

The question of negligence is for the jury, there being testimony that when plaintiff, a passenger on a street car, attempted to alight, it was not in motion, and no signal had been given to start; that she looked at the starter, all the time while she was getting out; that he could have seen her if he had looked; that he gave the signal before she had alighted; and that the car was started when she had got as far as the running board, throwing her down. Meade *v.* Boston Elev. R. Co., 70 N. E. 197, 185 Mass. 327.

Plaintiff arrived at her destination before the conductor had taken her ticket, and when the station was announced she started to get off the train; but the stop was too short, and the train being started with a jerk before she had time to alight, without the operatives ascertaining that persons were not in the act of alighting, plaintiff was thrown to the ground and injured. Held, that such facts did not show an absence of negligence on the part of the carrier as a matter of law. O'Dea *v.* Michigan Cent. R. Co., 105 N. W. 746, 142 Mich. 265.

Where there is evidence that a passenger on a street car indicated to the conductor a desire to get off, and that he rang the bell, and the car slowed up, and the passenger then went to the step to get off on the car's stopping, when the car suddenly started forward with a jerk, throwing such passenger off, and the testimony as to the signal to stop being given is not disputed, though there is a dispute as to the sudden starting of the car, the evidence is sufficient to go to the jury on the question of negligence. Judgment 75 N. Y. S. 377, 70 App. Div. 202, affirmed in Crow *v.* Metropolitan St. R. Co., 66 N. E. 1106, 174 N. Y. 539.

Where, in an action against a street railway company for injuries sustained on alighting from a car, plaintiff and another testified that the car had come to a full stop, and that as she started to put her foot on the pavement the car started off suddenly and she was thrown down, and the conductor testified that he warned plaintiff, and there was some evidence that plaintiff and her husband stated at the time that the conductor was not to blame, it was proper to submit the case to the jury. Willis *v.* Metropolitan St. R. Co., 71 N. Y. S. 554, 63 App. Div. 332.

A passenger, who was asleep when the train reached the terminal station, awoke a few moments after the other passengers had left the train, and in leaving the car, which was standing still at the time, was thrown and injured by the car being suddenly started with a jerk, without warning. Held, that the question of the company's negligence was for the jury. Daly *v.* Central R. Co., 49 N. Y. S. 901, 26 App. Div. 200.

Plaintiff, a man weighing about 300 pounds, was injured in alighting from defendant's street car. He testified that he was sitting with one side of his hip on the seat, with his foot on the running board, about to step down, when he was thrown "out and forward," as a result of a sudden forward jerk of the car, which had come nearly to a standstill at the time the conductor rang the signal bell. Held, that a motion for a nonsuit on the ground that plaintiff's evidence was in contravention of a well known physical law, that the sudden starting of a car will throw the body backward, and not forward, was properly denied, since the jury were not bound to find whether he was thrown off forward or backward. Guntzer *v.* Yonkers R. Co., 64 N. Y. S. 857, 51 App. Div. 222.

The testimony of plaintiff that she informed the conductor that she desired to alight at a certain street, that the conductor called the street, and plaintiff went to the door of the car, and made a step to alight, when the car was suddenly jerked without warning, required a submission of the case to the jury. Thorp *v.* Durham Tract. Co., 159 N. C. 33, 74 S. E. 644.

Plaintiff testified that, as she approached her destination at night, on defendant's train, the train stopped, and the brakeman said to her, "I will help you out with your things now;" that she followed him to the end of the car, where he held back the door while she passed out, and started down the steps; that the brakeman passed to the other side of the platform, and stood with his side towards her; and, after the car had stopped about fifteen seconds, the train suddenly started, throwing her beneath the car. Her testimony as to the train stopping about fifteen seconds before it reached the depot, and then suddenly starting, was corroborated by four witnesses. Held, that the evidence of the company's negligence was sufficient to take the case to the jury. Smitson *v.* Southern Pac. Co., 60 Pac. 907, 37 Ore. 74.

Car started by fellow passenger.—It appeared that plaintiff was a passenger on defendant's street car; that at a crossing where the car always stopped a passenger on the rear platform rang the bell; that

the evidence is conflicting, the issue of defendant's negligence is for the jury.[57] So where the evidence is conflicting as to whether plaintiff was thrown by the starting of a car as he was alighting, or whether he stepped from it while in motion, the question is for the jury.[58] Evidence that, after the train stopped at a station, and without warning, there was a violent and unusual backward jerk of the car which plaintiff was about to quit in the usual manner, is sufficient to go to the jury.[59] Whether the stopping of a railway train after a station has been called, but before it reached the platform, and the starting again without warning to passengers, was negligence which rendered the company liable for the injury of a passenger who had started to alight, is a question to be determined by the jury, on consideration of all the attendant circumstances which may affect the questions of defendant's negligence and plaintiff's contributory negligence.[60] Whether a fireman on a passenger train, whose duty it

the conductor was inside the car, and called the crossing, and nodded to plaintiff, who had already told him that she wished to stop there; that many passengers rushed out, plaintiff being about the last; that as she was about to step from the platform the same passenger who rang the bell for the stop rang the signal to start, and plaintiff was swung off by the sudden starting of the car. The conductor testified that he heard neither signal, and had not authorized the passenger to ring the bell, but there was evidence that passengers sometimes rang the bell to start, as the conductor knew. Held, that it was a question for the jury whether defendant had failed in its duty in not taking greater precautions to prevent its car being started before plaintiff had time to get safely off. Nichols *v.* Lynn, etc., R. Co., 47 N. E. 427, 168 Mass. 528.

Evidence insufficient to jury.—Masterson *v.* Crosstown St. R. Co., 94 N. E. 1086, 201 N. Y. 499, reversing 120 N. Y. S. 1134, 136 App. Div. 908.

57. Where evidence conflicting.—Garland *v.* Boston Elev. R. Co., 210 Mass. 458, 97 N. E. 97; McCullom *v.* Atlantic, etc., R. Co., 77 N. J. L. 603, 72 Atl. 87; Latimer *v.* St. Louis, etc., R. Co., 40 Tex. Civ. App. 614, 90 S. W. 665.

Plaintiff's evidence showed that she was one of the last of seven passengers to alight from defendant's train at a station, and that when she was on the last step of the car the train suddenly jerked forward, causing her to fall; that she prepared to get off as the station was called; that the conductor did not aid her, and was not there when the passengers alighted. Her witnesses were contradicted by defendant's evidence, which showed that defendant was not negligent. Held, that the issue of defendant's negligence was for the jury, and hence it was not error to deny defendant's motion to dismiss. Parlier *v.* Southern R. Co., 39 S. E. 961, 129 N. C. 262.

In an action against a street railway for personal injuries, where plaintiff testified that as he was attempting to alight from a car it suddenly started forward, throwing him to the ground, and there was testimony partially corroborating him, and defendant's witnesses testified that the conductor of the car assisted plaintiff to alight, and that after he had alighted he staggered and fell, and there was other testimony that he used morphine and whiskey, etc., it was the province of the jury to determine which theory as to how the accident occurred was true. Miller *v.* South Covington, etc., R. Co., 74 S. W. 747, 25 Ky. L. Rep. 207.

58. White *v.* Philadelphia Rapid Trans. Co., 79 Atl. 982, 231 Pa. 93; Schilling *v.* Union R. Co., 78 N. Y. S. 1015, 77 App. Div. 74.

In a suit by a passenger against a street railway company for personal injuries, where plaintiff testified that the car came to a stop, and that while he was attempting to alight it started, suddenly throwing him to the ground, it was error to dismiss the complaint, notwithstanding that five of defendant's employees and three apparently disinterested passengers testified that he attempted to alight before the car came to a stop, the case being for the jury. Steinle *v.* Metropolitan St. R. Co., 74 N. Y. S. 482, 69 App. Div. 85.

Plaintiff, who was an old lady of good character, testified that a street car had stopped before she attempted to alight, and started again suddenly, while she was stepping off, throwing her to the ground, and causing the injuries complained of. One of her witnesses testified that the car stopped, and plaintiff took hold of the post, and sprang out, and then fell. On cross-examination, she stated that the car did not stop and move again. Three other passengers, the motorman, and conductor testified that plaintiff stepped off the car before it stopped. Held that, plaintiff's story not being intrinsically improbable, it was not reversible error for the court to deny defendant's motion to direct a verdict in its favor. Bading *v.* Milwaukee Elect. R., etc., Co., 81 N. W. 861, 105 Wis. 480.

59. Emery *v.* Boston, etc., Railroad, 67 N. H. 454, 36 Atl. 367.

60. Midland Valley R. Co. *v.* Page, 182 Fed. 125.

On a dark, rainy night, just after O., at which a change of cars was to be made,

is to receive from the conductor a signal to start the train and to convey the order to the engineer, is negligent in thinking that he sees such a signal given by the conductor when it is not, and instructing the engineer to start the train while a passenger is in the act of alighting, is a question of fact for the jury.[61]

What is a reasonable time for a passenger to alight safely, is generally a question of fact for the jury.[62] Thus, it is for the jury to determine whether or not a passenger about to alight from a train and encumbered with hand baggage or parcels was, under the circumstances, afforded by the company reasonable time and opportunity to leave the train in safety.[63] And where the jury in answer to special questions find that the train stopped about a minute, which was the usual stop at the station where the injury occurred, and that it ordinarily takes passengers about a minute to leave the train, the court can not say that the time was sufficient, but whether the stop was reasonably sufficient under the circumstances was a question for the jury.[64]

Taking Case from Jury.—Where there is evidence that plaintiff was injured while attempting to alight from the carrier's conveyance by its sudden start, it is proper to refuse to direct a verdict for defendant,[65] or to order a

was called out, the car stopped, and plaintiff, attempting to alight, was thrown by the starting of the car. The stop was for a railroad; O. being on the further side of it. Held, the question of the carrier's negligence was for the jury. Smith *v.* Detroit United Railway, 119 N. W. 640, 155 Mich. 466.

61. Clement *v.* Boston, etc., Railroad, 184 Mass. 312, 68 N. E. 1126.

62. Reasonable time to alight.—*Alabama.*—Dilburn *v.* Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210.

Arkansas.—Hill *v.* St. Louis, etc., R. Co., 85 Ark. 529, 109 S. W. 523.

Georgia.—Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384.

Iowa.—Farrell *v.* Citizens,' etc., R. Co., 137 Iowa 309, 114 N. W. 1063.

Michigan.—Smalley *v.* Detroit, etc., R. Co., 131 Mich. 560, 91 N. W. 1027.

New York.—Schæfer *v.* Central Crosstown R. Co., 61 N. Y. S. 806, 30 Misc. Rep. 114.

South Carolina.—Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Where the facts are not conceded, and the testimony as to them is conflicting, reasonableness of the time allowed for passengers to alight from a railroad train is not a question of law. Florida R. Co. *v.* Dorsey, 59 Fla. 260, 52 So. 963.

Plaintiff's testimony that she went immediately to the steps of the car when the station was announced, and, it being dark, and she thinking the train had stopped, got off, and was injured, the train being in motion, and testimony that thereafter the train was again stopped, by the ringing of the bell, to let off other passengers, presents a case for the jury as to negligence in stopping too short a time. Toler *v.* Yazoo, etc., R. Co. (Miss.), 31 So. 788.

Where plaintiff was injured by reason of defendant's train, upon which he was a passenger, starting while he was attempting to alight at a station, there being evidence to show that the train was crowded, and many people were standing in the aisles; that the front door of the car was locked, causing plaintiff to lose time; and that there were other circumstances tending to delay passengers in getting off, the question as to whether a reasonable time was allowed for plaintiff to get off was for the jury. Walters *v.* Chicago, etc., R. Co., 89 N. W. 140, 113 Wis. 367.

63. Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384.

64. Chicago, etc., R. Co. *v.* Wimmer, 84 Pac. 378, 72 Kan. 566, 4 L. R. A., N. S., 140.

65. Direction of verdict.—Illinois Cent. R. Co. *v.* Souders, 178 Ill. 585, 53 N. E. 408; Fenig *v.* North Jersey St. R. Co., 64 N. J. L. 715, 46 Atl. 602.

In an action against a street railway company by a passenger, plaintiff testified that while her daughter, who had alighted from the car, was walking towards the front of the car in the street to procure a basket from the motorman, the plaintiff attempted to alight, when the car, which had been at rest, suddenly started and threw the plaintiff to the ground, and she was thus injured. Her daughter gave substantially the same evidence, stating that the car had come to a stop before she alighted, and that she alighted before her mother attempted to get off, and that it was while her mother was in the act of getting off that the car made a sudden jerk or start, and that just as she was about to take the basket from the motorman she heard her mother scream, and, turning to look, saw her thrown down beside the car. Held that the trial court properly refused to direct a verdict for the defendant. City, etc., R. Co. *v.* Svedborg, 20 App. D. C. 543, affirmed in 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

Plaintiff, who was injured in attempting to alight from a train, testified that

nonsuit,[66] or to sustain a demurrer to the evidence.[67] But where there is no evidence that plaintiff had signaled the conductor or motorman to stop, or that either of them had notice of his intention to alight, or that the car had been started again with a knowledge on their part that he was in the act of alighting, the complaint should be dismissed.[68]

§ 3318. Providing Safe Place or Means for Alighting.—Whether the carrier has been negligent as to providing a safe place or means for alighting from its conveyance is ordinarily a question for the jury.[69] Thus, the question

at the time she fell she was going down the steps on the left hand side at the front end of the coach, and had reached the third step, and had a valise and three bundles in her hand, and could not hold to the railing; that the train had been standing about fifteen seconds, and started suddenly, throwing her from the steps. Further evidence showed that she fell on her back, with her limbs across the track, in an oblique position, as the right limb was crushed above and the left below the knee. Hence, if her testimony was true, her body must have turned completely around as she fell. She was otherwise uninjured, tending to show that the train must have been in swift motion when the wheels crushed her limbs; which seemed probable also from the fact that the train, consisting of only an engine, baggage car, and one coach, moved 120 feet from where she fell, though the signal to stop was immediately given. The fireman testified for defendant that, as the train approached the station, the steam was shut off, and the train was "drifting in," and came to a halt before the switch was passed; and the brakeman corroborated that statement by his testimony that, on opening the car door, he gave the "go-ahead" signal, as he saw they were stopping before the station was reached. The fact that the train came to a halt, and then went faster again, was corroborated by other witnesses for the defendant. Held, that the plaintiff's testimony was not sufficiently contradicted by physical facts to warrant the direction of a verdict for the defendant, especially when the testimony of defendant's own witnesses tended to corroborate her statements. Smitson *v.* Southern Pac. Co., 60 Pac. 907, 37 Ore. 74.

66. Nonsuit.—If, in an action by a passenger to recover damages from a surface railway company for injuries sustained through the alleged negligence of defendant in suddenly starting a car while plaintiff was leaving it, plaintiff testifies positively that, when he was stepping from the car, it had, for that purpose, been brought to a full stop, and was then suddenly started, a motion for a nonsuit, made at the close of his case, is properly denied. Freeman *v.* Consolidated Tract. Co., 53 N. Y. S. 410, 24 Misc. Rep. 764, affirmed in Friedman *v.* Consolidated Tract. Co., 54 N. Y. S. 1099, 24 Misc. Rep. 773.

Where the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake, who replied "Yes, sir," but, instead of suffering the car to remain stationary until the plaintiff should alight, he turned the brake and set the car in motion, thereby precipitating the plaintiff, who was in the act of alighting, from the car into the street, thereby causing an injury, it was held that it was not the province of the court to nonsuit the plaintiff. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370.

67. Demurrer to evidence.—Where, in an action for injuries against a street railway company, caused by the negligent handling of a car on which plaintiff was a passenger, there is some evidence that the accident resulted from the gripman's starting the car suddenly after slowing it down to allow plaintiff to alight, a demurrer to plaintiff's evidence is properly overruled. Grace *v.* St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121.

68. Grabenstein *v.* Metropolitan St. R. Co. (App. Term), 84 N. Y. S. 261.

69. Providing safe place or means for alighting.—Harrington *v.* Manchester St. Railway, 76 N. H. 575, 82 Atl. 720; Hancock *v.* New York, etc., R. Co., 184 N. Y. 540, 76 N. E. 1096, affirming 91 N. Y. S. 601, 100 App. Div. 161.

Whether a railroad, maintaining a depot platform thirteen and five-eight inches from the outer edge of the lowest car step, and five and three-quarter inches below it, for the use of passengers in the nighttime, provided a reasonably safe place for passengers to alight from trains, held for the jury. Skow *v.* Green Bay, etc., R. Co., 123 N. W. 138, 141 Wis. 21.

Where a street car was stopped at the station with the step opposite the curved end of the platform, the railway company having charge of both construction and management of the station, when it failed to bring the car wholly alongside the platform as usual, where access would be without danger, the question whether it was negligent, so as to render it liable for injuries to a passenger by stepping into the space left between the car step and the platform, was for the jury. Brisbin *v.* Boston Elev. R. Co., 207 Mass. 553, 93 N. E. 572.

Passenger stepping into excavation or

of negligence is for the jury, where the carrier furnishes no place for alighting at a station, except on the filling between the tracks, which is at about the same height as the top of the ties, and the passenger jumps down when it is dusk, and alights with one foot in a hole;[70] also, where the carrier makes provision only on one side of its track for passengers to alight, and it is dangerous to alight on the other side, and fails to provide some means to prevent passengers from alighting on the wrong side or to notify them not to do so.[71] And it is for the jury to decide whether it is negligence for the carrier to fail to provide a stool for passengers in getting on and off trains,[72] or to place a stool on uneven ground.[73] Where, in an action for injuries to a passenger on a freight train while attempting to alight from the caboose at a place where the train stopped, the evidence was conflicting on the issue whether the stopping of the train with the caboose on a trestle was necessary in the operations of the train and therefore a risk incident to travel thereon, the issue was for the jury.[74]

§ 3319. Proximate Cause of Injury.—In an action against a carrier for injuries to a passenger, the question of proximate cause is ordinarily one for the jury to determine.[75] Thus, it is held the province of the jury to deter-

hole while alighting.—Murray *v.* Seattle Elect. Co., 50 Wash. 444, 97 Pac. 458.

It is a question for the jury whether it was the duty of the conductor of a street railway car, upon his stopping the car at a street corner to enable a passenger, a woman, to alight, to warn her of an excavation near the track at that point, made in the course of the repair of the street, if under the circumstances he was not justified in assuming she had observed or would observe it; and it is immaterial whether the excavation was made by the municipality or the railway company. Capital Tract. Co. *v.* Wathen, 35 App. D. C. 577.

Whether a hole in the street at the place of discharging a passenger was the cause of the passenger's injury, and was such a defective place for discharging passengers as to render it obviously unsafe, were questions of fact for the jury. Sweet *v.* Louisville R. Co., 113 Ky. 15, 67 S. W. 4, 23 Ky. L. Rep. 2279.

Defect in pavement.—Where a passenger on a street car, on alighting at a cross walk, passed behind the car by the conductor's direction, and was injured by a defect in the pavement, which a municipal ordinance required to be kept in repair by the street car company, the question of its negligence was for the jury. Fielders *v.* North Jersey St. R. Co., 50 Atl. 533, 67 N. J. L. 76, reversed in 53 Atl. 404, 54 Atl. 822, 68 N. J. L. 343, 59 L. R. A. 455, 96 Am. St. Rep. 552

70. Truesdell *v.* Erie R. Co., 104 N. Y. S. 243, 119 App. Div. 371.

71. Ruffin *v.* Atlantic, etc., R. Co., 55 S. E. 86, 142 N. C. 120; McKimble *v.* Boston, etc., Railway, 139 Mass. 542, 2 N. E. 97; Chicago, etc., R. Co. *v.* Winters, 175 Ill. 293, 51 N. E. 901, affirming 65 Ill. App. 435.

A passenger was injured in alighting on the wrong side of a train. The custom up to a short time before the accident had been to pull into the station, but at the time of the accident the train before reaching the station was turned around on a Y and backed into the station. The passenger claimed that he had no notice of the change. Held, that the question of the negligence of the carrier was for the jury. Ruffin *v.* Atlantic, etc., R. Co., 55 S. E. 86, 142 N. C. 120.

72. Failure to provide stool.—Missouri, etc., R. Co. *v.* Sherrill, 32 Tex. Civ. App. 116, 72 S. W. 429. See Singletary *v.* Seaboard, etc., Railway, 88 S. C. 565, 71 S. E. 57.

Whether there was a stool on the platform.—Singletary *v.* Seaboard, etc., Railway, 88 S. C. 565, 71 S. E. 57.

73. Atlanta, etc., Railway *v.* Wheeler, 154 Ala. 530, 46 So. 262.

74. International, etc., R. Co. *v.* Cruseturner, 44 Tex. Civ. App. 181, 98 S. W. 423.

75. Proximate cause of injury.—Washington, etc., R. Co. *v.* Lukens, 32 App. D. C. 442; Munsey *v.* Webb, 37 App. D. C. 185; McDonald *v.* Metropolitan St. R. Co., 219 Mo. 468, 118 S. W. 78, 16 Am. & Eng. Ann. Cas. 810. See Sacrey *v.* Louisville R. Co., 152 Ky. 473, 153 S. W. 760; Decker *v.* Chicago, etc., R. Co., 102 Minn. 99, 112 N. W. 901.

Illustrations.—It can not be said, as matter of law, that if the conductor neglected his duty to assist a blind passenger, and, upon seeing a fellow passenger undertake to help him, directed the plaintiff to be carried into a position of greater danger, with no warning or assistance to accomplish a safe alighting, this was not the proximate cause of the injury. Georgia R., etc., Co. *v.* Rives, 137 Ga. 376, 73 S. E. 645, 38 L. R. A., N. S., 564.

In an action against a railroad for injuries sustained by a passenger, the complaint alleged that the injury was owing

mine whether injuries complained of were caused by running a street car at an excessive rate of speed,[76] negligently starting a car while a passenger was attempting to board[77] or alight,[78] jerking the train as a passenger had arisen from his seat to alight,[79] prematurely calling the station,[80] negligently using a

to the fact that when the passenger stepped on a platform on alighting from a train he slipped upon an accumulation of ice, and there was evidence that at the time plaintiff alighted the train was in motion. Held, that the question as to the proximate cause of the injury was in issue and was one of fact for the jury. Harris *v.* Pittsburg, etc., R. Co., 70 N. E. 407, 32 Ind. App. 600.

There was evidence that plaintiff, having been carried beyond her station, was required to alight on a steep embankment covered with slippery stones; that the brakeman remained on the platform, and merely took hold of plaintiff's arm as she descended; and that she kept her right hand on the railing till both feet were on the ground, when she slipped, fell down the embankment, and was injured. Held, that it was for the jury to determine whether defendant's negligence in failing to discharge plaintiff at a place where there were adequate facilities for alighting in safety was the proximate cause of her injury. Minor *v.* Lehigh Valley R. Co., 47 N. Y. S. 307, 21 App. Div. 307.

The station of a carrier stood between its main track and a siding. The platform adjacent to the siding was high, and not adapted to use by passengers. Trains usually passed at such station, one of them going on the siding. Sometimes passengers were taken on from the siding, in which event the train would proceed without returning to the platform on the main track, and again it would return to the platform on the main track. The platform at the siding was unsuitable and insufficient for the convenience of passengers, while that beside the main track was suitable. A passenger had frequently taken the train at the siding, and, on the occasion of receiving his injury, attempted to board the train from the platform on the siding, while it was moving. Held, that whether the carrier was guilty of negligence proximately causing such passenger's injury was for the jury. Mills *v.* Missouri, etc., R. Co., 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497, reversing 57 S. W. 291.

Whether illness or disease due to carrier's negligence.—Louisville, etc., R. Co. *v.* Grimes, 150 Ky. 219, 150 S. W. 346; Nelson *v.* Chicago, etc., R. Co., 130 Wis. 214, 109 N. W. 933.

In an action against a carrier to recover for injuries from a collision of the car on which plaintiff was riding with another one of defendant's cars, plaintiff contended that the accident had resulted in neurasthenia, while defendant contended that her condition was due to hysteria, with which she was suffering prior to the accident. Held, that it was a question of fact whether plaintiff was suffering from neurasthenia produced from defendant's negligence. El Paso Elect. R. Co. *v.* Bolgiano (Tex. Civ. App.), 109 S. W. 388.

76. Excessive rate of speed.—Evidence that a street car company ran its car at an excessive rate of speed and of concurrent injury to a passenger was sufficient to make it a jury question whether the excessive speed caused the injury. Austin *v.* Washington Water Power Co., 67 Wash. 508, 123 Pac. 775.

Plaintiff was injured by being thrown from a street car which left the track while going around a curve at a prohibited rate of speed, the flange on the car wheel breaking. Defendant's witnesses testified that a perfect wheel would safely support a similar car, running at a much greater speed. Held, that it was not error to submit to the jury the question of whether or not the excessive speed was the proximate cause of the injury. Johnson *v.* Oakland, etc., Elect. Railway, 60 Pac. 170, 127 Cal. 608.

Whether the derailment of a train causing injury to a passenger was caused by a broken flange on one of the wheels of the car that first jumped the track, and whether the proximate cause of the derailment was the high speed of the train or the broken flange held for the jury. Shelton *v.* Southern Railway, 67 S. E. 899, 86 S. C. 98.

77. Negligently starting car.—Where the immediate effect of the negligent starting of a street car was not to throw a passenger, who was attempting to board, to the ground, but instead he maintained his hold on the rail, and ran alongside for some distance in an effort to board, when finally his hold was broken or relinquished, and he fell and was injured, the question whether his fall was the proximate result of the negligent starting of the car, if the facts permitted of a question, was for the jury. Burger *v.* Omaha, etc., St. R. Co., 139 Iowa 645, 117 N. W. 35.

78. Birmingham R., etc., Co. *v.* Lide, 177 Ala. 400, 58 So. 990; Thompson *v.* Norfolk, etc., Tract. Co., 109 Va. 733, 64 S. E. 953.

79. Jerking train.—Moorman *v.* Atchison, etc., R. Co., 105 Mo. App. 711, 78 S. W. 1089.

80. Prematurely calling station.—Fox *v.* Chicago, etc., R. Co., 121 Minn. 511, 141 N. W. 845.

stool provided for passengers in getting on or off trains,[81] failing to furnish a seat,[82] failing to have depot premises properly lighted,[83] failing to put guards in front of wheels of street car,[84] failing to stop the train at the usual stopping place,[85] or carrying a passenger beyond his station.[86] Where, in an action against a carrier for the death of a passenger alleged to have been the result of a collision, it is doubtful whether the deceased was killed by the collision, the question is one for the jury.[87]

§ 3320. Companies Liable.—Where the evidence tends to show an arrangement by the defendant company to operate the road upon which the accident complained of occurred, it is a question for the jury whether the defendant company was at the time engaged in the operation of such road.[88] Where plaintiff purchased a ticket which on its face indicated that defendant steamboat company controlled the transportation by steamboat and trolley to plaintiff's destination, and defendant, in an action for injuries to plaintiff on the trolley road, introduced certain testimony showing that the trolley was operated by another company, whether such was the fact was for the jury.[89] It is a question for the jury whether a lease of railroad property was made in good faith as a business transaction where the same officers thereafter remain in control of the road, which is advertised and operated as before, and where after a time the lessee company is no more heard of.[90] Where in an action by a street car passenger for injuries received in a collision with the street car of another line, it appeared that at the point where the accident occurred the tracks approach so closely that the projecting roofs of the cars touch each other in passing, it was for the jury to determine on which company the negligence lay.[91]

81. St. Louis, etc., R. Co. *v.* Johnson, 100 Tex. 237, 97 S. W. 1039, reversing 94 S. W. 162

82. Failing to furnish seat.—Ft. Worth, etc., R. Co. *v.* Wilkinson (Tex. Civ. App.), 152 S. W. 203.

83. Failure to properly light premises.—Where, in an action for injuries caused by the alleged failure of a railroad company to have its depot premises properly lighted there is evidence tending to show that the fall and injury of plaintiff immediately followed his leaving the ticket office to take the train, it can not be affirmed on the evidence, as matter of law, that the absence of a light was not the proximate cause. Alabama, etc., R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337.

84. Whether the absence of guards in front of the wheels of a street car, was the cause of injury to one who, trying to get on the front platform while the car was moving, missed his footing, and got his foot under the wheel, while holding with both hands on the railings, is a question for the jury. Finkeldey *v.* Omnibus Cable Co., 45 Pac. 996, 114 Cal. 28.

85. Where a carrier fails to stop its train at the usual stopping place for passengers, it should suppose that a passenger would attempt to alight from the moving train if he could do so prudently; and, when a stranger assists the passenger in so doing and the latter is injured, it is for the jury to determine whether the negligence of the company or that of the assisting person was the proximate cause of the resulting injury. Martin *v.* Southern Railway, 58 S. E. 3, 77 S. C. 370.

86. Carrying passenger past his station.—Davis *v.* Atlanta, etc., R. Co., 83 S. C. 66, 64 S. E. 1015; Nelson *v.* Chicago, etc., R. Co., 130 Wis. 214, 109 N. W. 933; Georgia R., etc., Co. *v.* Norris, 135 Ga. 838, 70 S. E. 793.

Whether a carrier's negligence in carrying a passenger beyond his station was the proximate cause of injuries received while walking back to the station was a question for the jury. Rawlings *v.* Wabash R. Co., 97 Mo. App. 511, 71 S. W. 535.

87. Providence, etc., Steamship Co. *v.* Clare, 127 U. S. 45, 32 L. Ed. 199, 8 S. Ct. 1094.

88. Whether defendant operating road.—Chesapeake, etc., R. Co. *v.* Howard, 14 App. D. C. 262, judgment affirmed in 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015.

89. Clemmens *v.* Washington Park Steamboat Co., 162 Fed. 815.

90. Whether lease made in good faith.—Chesapeake, etc., R. Co. *v.* Howard, 14 App. D. C. 262, affirmed in 20 S. Ct. 880, 178 U. S. 153, 44 L. Ed. 1015.

91. People's Pass. R. Co. *v.* Lauderbach (Pa.), 2 Sad. 187, 3 Atl. 672.

§§ 3321-3368. Instructions—§§ 3321-3362. Actions for Personal Injuries—§§ 3321-3336. General Consideration—§ 3321. Right to and Propriety of Instructions Generally.—In a passenger's action for personal injuries, the plaintiff and defendant are each entitled to instructions on their respective theories of the case,[92] but the instructions should not submit plaintiff's case on conflicting theories, one to the effect that it is an action for tort and the other for the breach of the contract.[93]

§§ 3322-3326. Form and Requisites—§ 3322. Correct, Full and Fair Statement of Law.—The instructions given by the court in a passenger's action for personal injuries must correctly,[94] fully and fairly,[95] and not too broadly,[96] state the law applicable to the case as made by the evidence.[97] Whether

92. Propriety of instructions—Respective theories of case.—See post, "Conformity to Pleadings and Issues," § 3329.

In an action against a railway company for injuries to a passenger, where plaintiff's testimony tended to show that the car had stopped at the proper place to receive passengers, that there was an implied invitation to enter, that while she, in the usual way and with proper care, was entering the car, there was a sudden movement forward throwing her down with one foot under the wheels, and defendant's testimony tended to show either that plaintiff was forced against and under the car by a crowd pushing to get on, or that she negligently undertook to mount a moving car before it reached the stopping place, and was injured by her own inadvertence, each party was entitled to instructions on their respective theories of the case. Flaherty *v.* St. Louis Trans. Co., 106 S. W. 15, 207 Mo. 318.

93. In an action for assault on a passenger, instructions stating who are passengers and the duty of the carrier toward them, and the measure of damages for the breach of this duty, were not erroneous as submitting the case on two different theories; the one that it is an action for tort, and the other, for the breach of the contract. Rand *v.* Butte Elect. R. Co., 107 Pac. 87, 40 Mont. 398.

94. Correct, full and fair statement of law.—Where plaintiff's slaves, who were passengers on the steamboat of defendant, who was a common carrier, were drowned by an accident to the boat, it was error to charge that defendant was liable for the loss of the slaves in the same manner as for the loss of goods, since the loss might have occurred from the acts of the slaves themselves. McDonald *v.* Clark (S. C.), 4 McCord 223.

95. Columbia, etc., R. Co. *v.* Means, 136 Fed. 83, 68 C. C. A. 651.

In an action against a street railway for injuries received through being pushed off a station platform, which defendant was alleged to have permitted to become overcrowded, a requested ruling that defendant was not responsible for accidents happening solely through the ordinary rushing and crowding occurring on the road during rush hours was properly refused. Beverley *v.* Boston Elev. R. Co., 194 Mass. 450, 80 N. E. 507.

A passenger on a freight train was thrown from his seat and injured by a collision between sections of the train, which in some way had become uncoupled while running. The court left the question of negligence to the jury, under an instruction that negligence is the want of the care that would be exercised by a reasonable and prudent person under like circumstances, and also charged, erroneously, that a passenger on a freight train does not assume the risks usually attendant on the operation of such trains with reasonable skill and caution. Held, that the error was not harmless, though a collision is not usually incident to the operation of a freight train with reasonable skill and caution. Steele *v.* Southern R. Co., 33 S. E. 509, 55 S. C. 389, 74 Am. St. Rep. 756.

A request to charge that would have required the jury to acquit the railroad company of negligence even though the quick effort of the motorman to stop the car, by which the passenger was injured, was made carelessly and negligently, was properly refused. Daggett *v.* North Jersey St. R. Co., 68 Atl. 179, 75 N. J. L. 630.

96. Must not be too broad.—In an action for injuries to a passenger in a collision between cable trains, in which defendant was charged with general negligence, and in which it appeared that all the instrumentalities connected with the collision were absolutely under defendant's control, and there was no evidence of an intervening cause, the court, after first declaring the rule as to the degree of care which defendant was obliged to use in such cases, and its responsibility for failure to use such care, stated that, if there was a collision between defendant's two trains on one of which plaintiff was a passenger, the presumption was that it was due to some negligence of defendant, and the burden of proof was

97. See post, "Applicability to Evidence," §§ 3330-3332.

it does is determined by considering the charge as a whole.[98]

Must Embrace All Facts and Conditions Essential to Verdict Authorized.—Where an instruction in a passenger's action for personal injuries directs a particular verdict, if the jury should find certain facts and conditions, it must embrace all the facts and conditions essential to such a verdict.[99]

Law of State Where Accident Occurred.—In a passenger's action for personal injuries suffered in a state other than that of the forum, the charge should be such as, under the law of the state where the accident occurred, fairly presents the issues raised.[1]

§ 3323. Language and Terminology.—In a passenger's action for personal injuries, the charge may be substantially in the language of the statute imposing the liability.[2] The term used must be accurate. Thus, "may" should not be used for "shall,"[3] "excessive" or "improper," for "negligent,"[4] or "ample" or "plenty" for "reasonable,"[5] neither should "sufficient" be used instead of "rea-

cast on it to rebut such presumption and show "that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided." Held, that the instruction was not subject to objection on the ground that it too broadly stated the rule of law sought to be invoked. Price *v.* Metropolitan St. R. Co., 119 S. W. 932, 220 Mo. 435.

Degree of care.—See post, "Degree of Care Required," § 3339.

98. Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961. See post, "Misleading Instructions," § 3326.

99. Must embrace facts essential to verdict authorized.—Where, in an action for injuries to a passenger on a street car, it was a question for the jury whether the motorman was negligent in failing to guard against collision with a wagon, though it was conceded that after the wagon left the track it halted, swerved, or even backed a few inches, an instruction that, if, after the wagon had left the track a sufficient distance to permit the car to pass in safety, and after the forward end of the car had passed the rear of the wagon, without notice to those in charge of the car, the horse suddenly backed the wagon so that it came in contact with the side of the car and plaintiff was thereby injured, the jury should find defendant not guilty, was properly refused. Chicago Consol. Tract. Co. *v.* Schritter, 78 N. E. 820, 222 Ill. 364, affirming judgment 124 Ill. App. 578.

1. Law of state where accident occurred.—In a passenger's action for personal injuries by being struck by some hard substance while riding in the coach in Pennsylvania, so that the law of that state governed, the court charged that the carrier was bound to exercise the highest care usually exercised by ordinarily careful and prudent persons, engaged in transportation for hire, for plaintiff's protection, and if the trainmen in charge of plaintiff's train or of another train passing it failed to exercise such care whereby a chain or other hard substance was caused to strike plaintiff, injuring him, the jury should find for plaintiff, but unless the jury so believed they should find for defendant, and if they found for plaintiff they should award him such sum, etc. Held, that under the Pennsylvania law the instruction fairly presented the issues raised. Pittsburg, etc., R. Co. *v.* Grom, 133 S. W. 977, 142 Ky. 51.

2. Language of statute.—Louisville, etc., R. Co. *v.* Croxton, 63 Fla. 223, 58 So. 369.

3. "May" for "shall."—An instruction that if plaintiff and the agents of the company were both at fault, and though plaintiff may have contributed to the injury, if he could not have avoided the consequences of defendant's negligence, he "may" recover damages, is inaccurate in the use of the word "may" for "shall." Central, etc., R. Co. *v.* Brown, 138 Ga. 107, 74 S. E. 839.

4. "Excessive" or "improper" for "negligent" speed.—Where one of the theories of the plaintiff upon which he relied for a recovery for injuries caused by a derailment was that the railroad company was guilty of negligence in running its cars over the switch where the injury occurred at an unusual and dangerous rate of speed, and the court charged that if the company ran upon the switch at an excessive or improper rate of speed and thereby contributed to and caused the accident, then the defendant would be liable, the words "excessive or improper" might be treated as the equivalent of the word "negligent;" but it would be decidedly better for the court to use the latter word when charging in such connection. Central, etc., R. Co. *v.* Johnston, 106 Ga. 130, 32 S. E. 78.

5. "Ample" or "plenty" for "reasonable."—Instructions in action for injuries to passenger boarding moving train as to time allowed for going to ticket office, using the terms "plenty of time" and "ample time," were inaccurate; "reasonable time" being all that was required. Southern R. Co. *v.* Nichols, 74 S. E. 268, 137 Ga. 670.

sonable."[6] But there is no substantial difference in effect between the terms "ordinary care" and "reasonable care" in such a charge.[7]

"Knowing," "Knew," "Know," "Reasonable Grounds to Suspect."—The words "not knowing" or "having no reasonable grounds to suspect," or "knew" or "know," or "had reasonable grounds to suspect," when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train, relating to the knowledge or want of knowledge of the conductor in starting the train before the passenger had boarded it, are legal equivalents.[8]

"Brakes" as Including All Mechanism Employed to Control Motion of Train.—Though the evidence in an action for injury to a passenger from the slipping of a work train against a passenger train was that the work train was equipped with a Westinghouse brake and machinery, as well as with a steam brake, the instruction as to defendant being negligent if the train could not be held on the track by its "brakes" is not open to the criticism that with "brakes" should be included "braking appliances and machinery;" the term "brakes," as ordinarily understood, including all the mechanism employed to control the motion of the train, and the jury undoubtedly having so understood it.[9]

§ 3324. Clearness and Definiteness.—Although each party to a passenger's action for personal injuries is entitled to have instructions given that will fairly present his theory of the case, such instructions must contain a clear and definite statement of the law applicable to the evidence.[10]

§ 3325. Argumentativeness.—In a passenger's action for personal injuries, the charge of the court should not be argumentative. But where an action against a carrier for assault and battery committed by its conductor upon a passenger, the court charged that, "even though it be the duty of the conductor to keep [plaintiff] out of that part of the car for white people, yet it was the duty of the conductor not to use any more force than was necessary for that purpose, and, if no force was necessary, then it was the duty of the conductor not to use any force to injure plaintiff;" the giving of such charge was not reversible error, even if it be conceded that it is argumentative and abstract.[11]

§ 3326. Misleading Instructions.—The rule that it is error to give a charge which would mislead the jury and that a misleading request should be refused applies in passengers' actions for personal injuries. The courts applying this rule have held it error to give a charge which misleads the jury by diverting their attention from the question whether the passenger's act was negligence,[12]

6. "Sufficient" for "reasonable."—Anderson *v.* South Carolina, etc., R. Co., 81 S. C. 1, 61 S. E. 1096.

7. "Ordinary care" and "reasonable care."—Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 14 S. W. 760, affirming 13 S. W. 889.

8. "Knowing," "knew," "know," "reasonable grounds to suspect."—Choctaw, etc., R. Co. *v.* Hickey, 81 Ark. 579, 99 S. W. 839.

9. "Brakes" as including all mechanism employed to control motion of train.—Valenti *v.* Sierra R. Co., 153 Cal. 412, 111 Pac. 95.

10. Clearness and definiteness.—Chicago Consol. Tract. Co. *v.* Schritter, 222 Ill. 364, 78 N. E. 820, affirming judgment 124 Ill. App. 578.

"Degree of care required."—See post, "Degree of Care Required," § 3339.

11. Argumentativeness. — Birmingham R., etc., Co. *v.* Mason, 144 Ala. 387, 39 So. 590. See post, "Applicability to Evidence," §§ 3330-3332.

12. Misleading instructions.—A boy twelve years old was thrown from a street car, and injured. He was standing on the step of the front platform, and testified that he was thrown from the car by a sudden jolt, after the driver had put his team in a rapid run. Held, that a charge that if the boy was injured, as charged in the petition, by the negligence of defendant, the verdict should be for the boy, but, if he was injured by his own carelessness in jumping from the car while in motion, the verdict should be for defendant, was misleading, and liable to divert the jury from the question whether it was neligence for the boy to stand on the platform. Willmott *v.* Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490.

by leading the jury to believe they could not find for plaintiff unless the accident was foreseen or anticipated by the defendant,[13] by including the proposition that a carrier by permitting passengers to alight for lunch or refreshments, permitted them to go where they pleased, and must give them a sufficient time to board the train after warning that it was about to depart,[14] or by seemingly justifying a wanton and willful assault by the carrier's servant by proof of the passenger's negligence.[15] And it has been held proper to refuse a misleading requested charge, which was confined to only one of the alleged acts of negligence.[16]

Use of Superfluous Words or Phrases.—An instruction that if plaintiff was injured "by the result of an accident pure and simple—that the railway company was not negligent through its agents and employees—then plaintiff would not be entitled to recover," was not erroneous because of the words "was not negligent through its agents and employees."[17] The idea of accident excludes responsibility because of negligence. The court might have omitted the words complained of, but their addition could not have mislead the jury.

Confusion of Different Principles Charged.—In a passenger's action for personal injuries the different principles with which the charge of the court deals must not be so confused and connected with each other as to be misleading. That a judge in instructing a jury in an action for injuries to a passenger charged that defendant was bound to use extraordinary care, and then defined this degree of diligence, and stated that if defendant failed to exercise it, plaintiff could recover, if he could not by ordinary care have prevented the injury, and then charged the law as to contributory negligence, separating it from the other charges by the word "again," the different numbers were not so connected as to be misleading.[18]

Conflicting and Contradictory Statements of Law.—In a passenger's action for personal injury, it is error to give in the charge conflicting statements

13. In an action for injuries to a passenger, caused by a table handled by a porter of a Pullman car falling on her hand, a charge that if the jury believed that the table fell because of an unforeseen accident, and one that could not have been anticipated by reasonable care and foresight on the part of the railroad company or the Pullman Company, the jury must find for the railroad company, was misleading, as leading the jury to believe that they could not find for plaintiff unless the accident was foreseen or anticipated by the railroad company or the Pullman Company, regardless of the acts or omissions of their servants. Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

14. Passenger permitted to alight for refreshment.—An instruction, in an action for injuries to a passenger while attempting to board a moving train which had been stopped to permit the passengers to alight for lunch, held erroneous as including a proposition that the passenger was not given sufficient time in which to board the train after warning that it was about to depart which the carrier was not bound to do. Larson *v.* Chicago, etc., R. Co. (S. Dak.), 141 N. W. 353.

An instruction, in an action for injuries to a passenger while attempting to board a moving train, held erroneous as leading the jury to believe that the carrier, permitting passengers to alight for refreshment, permitted them to go where they pleased, and that the carrier must give them sufficient time to reach the train before starting. Larson *v.* Chicago, etc., R. Co. (S. Dak.), 141 N. W. 353.

15. Charge seemingly justifying willful assault if plaintiff negligent.—A charge that, if a passenger in attempting to board a train was without negligence and used ordinary care, and the injuries were sustained by him from the unlawful, wanton, or malicious conduct of the carrier's servant, the carrier would be liable, is misleading as seeming to justify a wanton and willful assault by proof of the passenger's negligence. Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296.

16. Charge confined to one of alleged acts of negligence.—In a suit against a railroad for injuries from failure to provide a safe place for passengers to alight, refusal to charge that plaintiff can recover only upon the specific acts of negligence set out in the petition, and that, if the jury find that the landing was not lower than the tops of the cross ties, as alleged, plaintiff could not recover, was not error. Central, etc., R. Co. *v.* Brown, 138 Ga. 107, 47 S. E. 839.

17. Use of superfluous words or phrases.—Seaboard, etc., R. Co. *v.* Bradley, 125 Ga. 193, 54 S. E. 69, 114 Am. St. Rep. 196.

18. Confusion of different principles charged.—Western, etc., R. Co. *v.* Burnham, 123 Ga. 28, 50 S. E. 984.

of law; the jury can not be expected to decide correctly between such statements;[19] and it is impossible to tell whether they obeyed the correct or erroneous part of the charge.[20] An instruction that contributory negligence barred recovery does not conflict with one explaining the rule of the last clear chance.[21]

Charge Taken as a Whole.—In determining whether or not an instruction in a passenger's action for personal injury is misleading, the charge of the court must be considered as a whole, and if when so taken there is nothing calculated to mislead the jury, it will be sustained although some unqualified part by itself might seem to be misleading.[22] It has been so held as to a charge in respect to the degree of care required of the carrier[23] and a charge which did not expressly

19. Conflicting statements of law.—Patee *v.* Chicago, etc., R. Co., 5 Dak. 267, 38 N. W. 435.

Where, in an action against a carrier, plaintiff alleges several specified injuries, an instruction that, if the jury find that one specified injury was not caused or aggravated by the accident, then they shall find for the defendant, is erroneous, although in other instructions they are told that, if they find for plaintiff, they shall award damages sufficient to compensate him for all the injuries received. Moore *v.* Des Moines, etc., R. Co., 69 Iowa 491, 30 N. W. 51.

Duty to protect passenger awaiting train.—Where a passenger was injured by the explosion of a burning oil tank while waiting for a train, a charge that it was "the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train," was reversible error, though the court correctly stated elsewhere that the duty to protect plaintiff from injury from the burning tank was "only that of ordinary care and prudence." The charge was contradictory and misleading. Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486.

Standard for determining reasonable cause to jump from train.—Where the jury are told that the company was liable if the misconduct of the conductor gave the passenger reasonable cause to jump from the train, it is error to charge that reasonable cause was a cause sufficient to have induced the act, having regard to the passenger's intelligence and experience in life, and his situation and surroundings at the time, the company being liable only for the natural and probable consequences of the misconduct of the conductor, who was not chargeable with knowledge of the passenger's "intelligence and experience in life." The instructions are conflicting and can not be harmonized. Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880.

20. Moore *v.* Des Moines, etc., R. Co., 69 Iowa 491, 30 N. W. 51.

21. Hoffman *v.* Cedar Rapids, etc., R. Co. (Iowa), 139 N. W. 165.

22. Charge taken as a whole.—In an action for injuries to a passenger, an instruction that the declaration sets out the claims of plaintiff and states the ground of negligence, and, if the evidence sustains any or all the grounds, plaintiff could recover, is not erroneous when qualified by the charge that "if you think the railroad company was not in the exercise of extraordinary care and diligence." Georgia R., etc., Co. *v.* Tice, 52 S. E. 916, 124 Ga. 459.

23. Degree of care required.—In an action for personal injuries, while an instruction that: "The defendant was not the insurer of the safety of the passengers upon its train; and unless you find that the accident resulting in the injury complained of by the plaintiff resulted from one of the defects alleged in the complaint, and which the defendant could not prior thereto have discovered by the usual and ordinary methods of inspection adopted and exercised by railroad companies as ordinarily operated, then your verdict should be for the defendant" —considered in the abstract, is objectionable, yet, when taken in connection with that portion of the charge immediately following, where it is said that "it was the duty of the defendant to use the utmost care and skill which prudent men" in the same kind of business would use under similar circumstances, the instruction is not misleading. Major *v.* Oregon Short Line R. Co., 59 Pac. 522, 21 Utah 141.

In an action against a carrier for injuries to a passenger the court instructed that carriers are not absolute insurers of the safety of passengers, and that, if defendant exercised reasonably practical care, diligence, and skill, and the accident could not have been prevented by the use of such skill, plaintiff could not recover. Held, that the instruction was not erroneous on the theory that from the word "absolute" it might have been inferred that in a sense short of absolute defendant was an insurer, the degree of care exacted from the carrier having been accurately defined in other instructions. Cronk *v.* Wabash R. Co., 98 N. W. 884, 123 Iowa 349.

Charge as to degree of care to avoid collision.—See post, "Collisions," § 3348; "Derailment," § 3349.

instruct the jury that if the plaintiff received no injury he can not recover.[24]

§ 3327. Requests for Instructions.—Necessity.—It is not the duty of the court in a passenger's action for personal injuries to instruct on questions of law unless the desired instructions are tendered. Where the court has given a general charge if a party desires further or more definite and specific instructions he should make a request therefor.[25] Thus, the court in the absence of a proper request need not define the phrases "extraordinary care and diligence" and "ordinary care and diligence," used in its charge.[26]

Modification and Correction by Court.—The court may modify the instructions tendered in a passenger's action for personal injuries, so as to make them correctly state the law,[27] and make them applicable to the evidence in the case,[28] but not so as to divert the minds of the jury from the point

24. Necessity for proof of fact of injury.—In an action by a passenger for personal injuries alleged to have been sustained through the carrier's negligence, the failure of the court to expressly instruct the jury that if the plaintiff received no injury he can not recover is not error, where construing the charge of the court fairly, and taking all its terms together, the jury were sufficiently informed that in order to recover the plaintiff would have to prove that he was injured as alleged in his declaration. In such case there is no assumption by the court that any injury was in fact sustained. Richmond, etc., R. Co. *v.* Leathers, 92 Ga. 93, 18 S. E. 360. See post, "Assuming Facts," § 3332.

25. Necessity.—An instruction that a street railway company undertaking to transport passengers for hire, is a common carrier, and bound to exercise a high degree of care in the operation of its road and in providing cars, in order to prevent accident and injury to passengers, was sufficient, in the absence of a request from plaintiff for a more definite and specific instruction. Denham *v.* Washington Water Power Co., 80 Pac. 546, 38 Wash. 354.

A charge of the court to the effect that sneers, looks and contemptuous gestures will not justify an assault by a conductor upon a passenger, and that a railroad company is not released from its contract guaranteeing polite and courteous treatment to a passenger because the passenger does not smile upon the conductor or because he wears a frown, is not erroneous. Failure to charge that such conduct of the passenger could be considered in mitigation of the damages, is no cause for a new trial when no request to so charge was made. East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778.

26. On the trial of a case against a common carrier by a passenger for damages arising from personal injuries caused by the negligent operation of the car of the defendant; where the judge instructed the jury that the defendant was bound to exercise "extraordinary care and diligence" in carrying the plaintiff, and that the plaintiff was bound to the exercise of "ordinary care and diligence" for her own safety, it was not error requiring the grant of a new trial that the court did not, in connection with such instructions, define to the jury the meaning of the phrases "extraordinary care and diligence" and "ordinary care and diligence," in the absence of a timely written request for such instructions. Savannah Elect. Co. *v.* Bennett, 130 Ga. 597, 61 S. E. 529.

Modification and correction by court.—In an action for injuries to a passenger, it was not error to eliminate from a requested charge a direction that the carrier was not an insurer that the inspection of the derailed coach was perfect. St. Louis, etc., R. Co. *v.* Leflar (Ark.), 149 S. W. 530.

In an action against a street railway company for injury caused plaintiff in leaping from a street car after an electrical explosion on the front platform where she was riding, it was proper to modify the company's requested instruction that, if previous similar explosions were not of such violence as to actually endanger passengers riding on the front platform of the car upon which such explosions may have occurred, it was not negligent to permit plaintiff to ride upon the platform, by adding, after the word "occurred," "and were not of such character as to excite and frighten" such passengers, "whereby they would be likely to jump off the car while in motion." Williamson *v.* St. Louis Trans. Co., 100 S. W. 1072, 202 Mo. 345.

28. Modification to conform to evidence.—In an action for injuries to a passenger in a collision between cable trains, a portion of an instruction, requested by defendant, declared that if the jury believed from the evidence that the injuries sustained by plaintiff were merely the result of accident, no matter how produced, other than by negligence of defendant's servants "in charge of the train," then plaintiff can not recover, etc. Held, that there was no error in striking out the words quoted, as the proof not only covered acts of the serv-

asked. [29] Thus, the court may properly modify a requested charge as to the degree of care required of the carrier, so that it correctly states the law, and give the same,[30] although the modification was not asked by the opposite party.[31]

§ 3328. Duty to Explain Issues.—In a passenger's action for personal injuries it is not error to give a general instruction authorizing a recovery upon proof of the case stated in the declaration where the counts each state a cause

ants in charge of the train, but other acts which might have caused the accident. Price *v.* Metropolitan St. R. Co., 119 S. W. 932, 220 Mo. 435.

In an action against a street railway company for injury caused plaintiff in leaping from a street car on an electrical explosion in the controller box, it was proper to modify the company's requested instruction that, if the company exercised proper care in the inspection of the electrical appliances, and no defect was discovered, and the accident could not have been reasonably foreseen or prevented, and if the company exercised all the care the law imposed upon it, and discharged its full duty to plaintiff, he could not recover, his injuries being attributed to a legal accident, by adding "unless * * * defendant's agents * * * were negligent in permitting plaintiff to occupy a seat * * * in close proximity to said controller box;" the evidence showing that the company knew the danger incident to passenger's riding in such place. Williamson *v.* St. Louis Trans. Co., 100 S. W. 1072, 202 Mo. 345.

29. Must not divert mind of jury from point.—The addition to a requested charge that the company was not chargeable with negligence by reason of the position of the plank which struck plaintiff, unless defendant caused or permitted it to be placed in a dangerous position near the track, or failed to make diligent inspection, of the words, "or unless the motorman could, by the exercise of a high degree of care, have seen the plank in time to prevent the accident," can not be complained of, as diverting the minds of the jury from the point asked, especially where the court had at defendant's request charged that plaintiff must show that defendant's servants were negligent in guiding the car, or in placing the plank so as to strike plaintiff. Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411.

30. Correct statement of law.—The court instructed that, if the car was suddenly jerked forward when plaintiff was alighting, she could recover, unless guilty of negligence proximately contributing to her injury. On objection the court modified the charge, to the effect that the defendant did not owe plaintiff the absolute duty to deliver her safely; that they were not insurers—absolute insurers—of the safety of passengers; but that they owed to the passenger the highest degree of care in delivering him safely. Held that, as modified, the instruction was correct. Birmingham R., etc., Co. *v.* King, 149 Ala. 504, 42 So. 612.

31. Modification on court's own motion.—In an action for injuries resulting from a railroad accident caused by a broken rail in the track, an instruction that if the jury believed that the train was thrown from the track by reason of a fresh and contemporaneous break in a rail on the track, and that such break was caused wholly by frost or extreme cold, and that such cause was one which the highest degree of care or skill practicable could not have provided against, and that such train was not thrown from the track because of the mode and construction and repair of the track, and not because of any fault or neglect of defendant, its agents or servants, that the jury should find for defendant, was properly modified by an instruction that, if the jury believed that the frost and extreme cold was not the "whole cause" of breaking such rail, but only contributed thereto, and that the track where the rail broke was in an unsafe and dangerous condition, which might have been remedied or guarded against by the exercise of the highest degree of care and skill practicable, etc., plaintiff could recover, even though such modification was made by the court without any request by plaintiff therefor. Louisville, etc., R. Co. *v.* Fox (Ky.), 11 Bush 495.

Passenger by permission on special freight.—A requested charge that a passenger applying for permission to ride on a special freight train on which there are no accommodation for passengers assumes the extra risks incident to the train, provided the carrier uses such care as is required on usual passenger trains consistent with the purposes for which the train is made up, is properly modified by adding, "and the highest degree of care consistent with the practical and common use of the appliances and cars on a freight train is exacted * * * of a carrier * * * in the transportation of passengers when fare is taken" therefor, where the court also charges that a carrier must furnish its passengers a suitable and safe road and safely operate its trains, and where it charges that a carrier is required to use only such care as may be consistent with the practical operation of the road. Roberts *v.* Sierra R. Co., 14 Cal. App. 180, 111 Pac. 519, 527.

of action, and there is evidence tending to sustain each of them, but where there is a count or counts which there is no evidence tending to prove, the court should give requested instructions which explain the issues between the parties and give proper directions as to the requirements of the law concerning proof. Thus, where, in an action for death of a passenger while riding on the running board of a street car by his coming in contact with the sides of a tunnel, the declaration contained five counts, and there was no evidence in support of at least one of them, it was error to give a general instruction authorizing the jury to find for plaintiff, if they found he had made out his case as set forth in his declaration, and to refuse proper instructions, asked by defendant, explaining the issues, and that if the jury believed there was no negligence in the management of the train as alleged, or that the negligence alleged in the other counts had not been proved, their verdict should be for defendant.[32]

§ 3329. Conformity to Pleadings and Issues.—In a passenger's action for personal injuries, the charge must be justified by the issues raised by the pleadings and evidence. A charge on issues substantially variant from those raised by the pleadings is erroneous and ground for reversal.[33] Either party has the right to have the jury confined to the issue made by the pleadings and it is error to refuse a requested charge which does this;[34] or to so modify it as to

32. Duty to explain issues.—North Chicago St. R. Co. *v.* Polkey, 203 Ill. 225, 67 N. E. 793.

33. Conformity to pleadings and issues.—Pensacola, etc., R. Co. *v.* Haussman, 51 Fla. 286, 40 So. 196; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, 9 So. 696; Jacksonville, etc., R. Co. *v.* Neff, 28 Fla. 373, 9 So. 653; Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303; Wilkinson *v.* Pensacola, etc., R. Co., 35 Fla. 82, 17 So. 71; Louisville, etc., R. Co. *v.* Guyton, 47 Fla. 188, 36 So. 84; Walker *v.* Parry, 51 Fla. 344, 40 So. 69.

34. In an action for injuries to a passenger on a street car, the only theory on which plaintiff was entitled to recover under her pleadings and evidence was that the car had stopped, and was negligently started while the passenger was attempting to alight. Defendant's testimony was that the passenger attempted to alight from the car while it was moving, in disregard of a warning from the conductor. Defendant requested a charge that plaintiff could not recover if the passenger's injury was caused by her act in stepping from the car while in motion. The court modified the request by adding thereto the words "after being warned by the conductor not to do so." Held that, while the instruction as modified was proper, yet, as there could be no recovery, under defendant's evidence, regardless of the question of warning or no warning, the refusal to give the requests as asked was error. Behen *v.* St. Louis Trans. Co., 85 S. W. 346, 186 Mo. 430.

In an action for the death of a passenger by being thrown from the platform of a car as the train passed his destination, defendant held entitled to an instruction that to entitle plaintiff to recover, the jury must believe that his intestate was violently thrown from the car on which he was standing. Boston, etc., R. Co. *v.* Miller, 203 Fed. 968, 122 C. C. A. 270.

Failure to provide place in car—Only negligence alleged.—Where the sole act of negligence alleged was failure to provide a proper place for a passenger to ride in a car, thus causing him to ride on the platform from which he was thrown by the swaying of the train, and there was no allegation that such swaying was negligent, the presiding judge should have so instructed on request. Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

Two accidents alleged—Occurrence of first as claimed.—In an action against a street railway company for injuries, alleged to have been sustained while attempting to board a car, caused by the sudden starting of the car, throwing plaintiff to the pavement and across a parallel track, where he was left unconscious and run over by a car on such track, and the evidence on the issue whether plaintiff attempted to board the car was conflicting, the refusal to charge that plaintiff could not recover, unless the first accident occurred as claimed, was reversible error. Gilcher *v.* Seattle Elect. Co., 124 Pac. 218, 69 Wash. 78.

Allegation of negligence in boarding standing car—Charge as to attempt to board moving car.—The complaint in a passenger's action for personal injuries having averred that the car was standing still when plaintiff attempted to board it, and charged negligence in the starting of it with a sudden jerk while he was so attempting, and there having been no plea of contributory negligence, but only the general issue, requested instructions that plaintiff does not sue for damages from attempting to board a moving car,

amplify or enlarge the issue and then give it.[35] Where a requested instruction is predicated on a theory of the case in issue,[36] where it follows the allegations of the declaration or petition,[37] or when the predicate of the requested charge follows the predicate of the plea in every substantial particular,[38] it should be given. But a request which fails to state definitely the issue as raised by the pleadings, is properly refused.[39]

Giving Effect to Facts Not in the Case Generally.—In directing the jury as to the rules of law that shall guide them in reaching their verdict, the court must avoid leading them away from the issue made by the pleadings, and to giving effect to facts not in the case.[40] If extraneous and irrelevant facts have been disclosed by the evidence, which are likely to influence the jury, the latter should be admonished to disregard them; and a statement of the law relating to such irrelevant facts without limitation, and in such manner as to naturally lead the jury to believe such facts effective in the consideration of their verdict, will constitute reversible error, because inclined to mislead the jury.[41] Thus, the court should not charge as to the proximate cause where the only issue is which party was negligent[42] nor define ordinary and extraordinary care in an action

and if it was moving when he attempted to board it there can be no recovery in the action, should be given. Alabama, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578.

35. Error to enlarge issues.—Thus, where in an action for personal injuries by a passenger on an electric car, the declaration counted on the breaking of the trolley wire through negligence of defendant, and did not allege negligence in the operation of the car, an instruction asked by defendant, that a street railway company was not an insurer of the safety of its passengers, and, if it had constructed and maintained the trolley wire and car with every reasonable safeguard, it had performed its duty, and plaintiff could not recover, should have been given. Baltimore City Pass. R. Co. *v.* Nugent, 38 Atl. 779, 86 Md. 349, 39 L. R. A. 161.

Where plaintiff's only grievance was the negligence of the conductor, defendant's requested instruction that in order to find for plaintiff the jury must be satisfied that the accident causing her injuries was due solely to the negligence of defendant's conductor should not have been modified by striking out the final word "conductor." Krock *v.* Boston Elev. R. Co., 101 N. E. 968, 214 Mass. 398.

36. Charge predicated on theory of case in issue.—Where, in an action for injuries caused by suddenly increasing the speed of the car in the middle of a block where plaintiff was about to alight, it appeared that the usual custom was for cars to stop at street intersections, so that the conductor might have interpreted plaintiff's signal as a request to stop at the next street, it was error to refuse an instruction predicated on that theory. Cohen *v.* Sioux City Tract. Co., 141 Iowa 469, 119 N. W. 964.

37. Following allegations of petition.—Where a petition, in an action for injuries to a passenger received while boarding a train, alleged that the trainmen negligently gave the train a jerk, causing the injury, the carrier was not responsible, if the injuries were received by the starting of the train without a jerk, while the passenger was on the steps, so that an instruction following the allegation of the petition properly submitted the issue of negligence. Hurt *v.* Illinois Cent. R. Co., 140 S. W. 650, 145 Ky. 475.

38. Charge following predicate of plea.—Where, in an action by a passenger for an assault by the conductor, the carrier sought to show that the assault was in necessary defense of the conductor's person, a charge that if the passenger first struck the conductor, and the conductor only struck the passenger to protect himself from assault, the jury should find for the carrier, was proper. Alabama, etc., R. Co. *v.* Sampley, 169 Ala. 372, 53 So. 142.

39. Failure to state issue.—West Chicago St. R. Co. *v.* McCafferty, 220 Ill. 476, 77 N. E. 153.

Where a declaration against a street railroad for injuries to a passenger alleged that, while plaintiff was in the act of alighting from the car, defendant started the same before plaintiff had an opportunity to alight therefrom, a charge to find for defendant, if the preponderance of the evidence failed to show that plaintiff fell by reason of the car being started before she had an opportunity to alight therefrom, was properly refused, in that it failed to definitely state the issue presented by the pleadings. West Chicago St. R. Co. *v.* McCafferty, 77 N. E. 153, 220 Ill. 476.

40. Giving effect to facts not in case.—Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

41. Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

42. Proximate cause.—Where plaintiff alleged that, while alighting from defendant's train at a station, he was violently

for an assault upon a passenger by a servant of the carrier.[43]

Must Limit Carrier's Negligence to That Alleged.—The plaintiff is not entitled to instructions on any other theory than that of the declaration.[44] The plaintiff can recover only upon the complaint he makes; that is, he can not complain of one thing, and recover of another.[45] The allegations of the petition furnish the basis for recovery and are controlling on the trial, not only as to the evidence, but also as to the instructions of the court. The verdict and findings of the jury must be within the issues joined by the pleadings, and should not be influenced by considerations which are foreign to such issues. To authorize the jury to return a verdict in favor of the plaintiff, upon a ground entirely different from that laid in the petition, is error.[46] Hence, the charge must limit the consideration of the jury to the specific negligence alleged in the petition or declaration and not give the jury a roving commission to find negligence by defendant, whether within the issue or not.[47] It must not authorize a recovery

thrown down and injured by defendant's negligence in starting the train suddenly, and defendant alleged that plaintiff's injuries were due to his negligence in jumping from a moving train, the only issue raised was as to which party was negligent; rendering an instruction as to proximate cause erroneous, as misleading. Gulf, etc., R. Co. *v.* Rowland, 38 S. W. 756, 90 Tex. 365.

43. Defining ordinary and extraordinary care.—In an action against a street railway company for an assault upon a passenger by the motorman, where no negligence of the motorman or other employee of the defendant was alleged, the law relating to the extraordinary care due by carriers to passengers was not involved, and a charge defining ordinary and extraordinary care was improper. Savannah Elect. Co. *v.* Pritchard, 66 S. E. 952, 133 Ga. 747.

In an action against a street railway company by a passenger for an assault by the motorman, where no negligence of the motorman or of an employee of the company was alleged, a charge that when one becomes a passenger a carrier owes him extraordinary diligence, including protection from itself and its officers and employees, as well as from fellow passengers, and in some instances from the outside public, and that the conductor or other agents of the carrier must exercise to passengers a protecting attitude, must not lose their temper, but must use forbearance until, in the protection of other passengers or themselves, such forbearance ceases to be right, and that the jury should make the various gradations of duty to a passenger, first, extraordinary diligence, and with that forbearance, reasoning with a passenger before applying force, was error, being not applicable. Savannah Elect. Co. *v.* Pritchard, 66 S. E. 952, 133 Ga. 747.

44. Must limit negligence to that alleged.—The theory of the declaration and proof of plaintiff being that she was thrown from the steps of defendant's car by "a sudden and violent jerk" of the train after it had stopped, and while she was attempting to alight, and defendant's theory being that she was injured by jumping from the train while in motion, and without invitation, plaintiff is not entitled to an instruction on the theory of the injuries having resulted from an "express or implied invitation" to get off the train while in motion. Payne *v.* Nashville, etc., R. Co., 106 Tenn. (22 Pickle) 167, 61 S. W. 86.

45. Complaint bases for recovery.—Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

46. Chicago, etc., R. Co. *v.* Bell, 1 Kan. App. 71, 41 Pac. 209.

47. Johnston *v.* Cedar Rapids, etc., R. Co., 141 Iowa 114, 119 N. W. 286.

Where recovery is sought on the ground of specific negligence, alleged in the petition, that defendant so carelessly and negligently operated its cars that the car in which plaintiff was riding was caused to collide with another car of defendant, the court should limit the consideration of the jury to such specific negligence. Davidson *v.* St. Louis Trans. Co., 109 S. W. 583, 211 Mo. 320.

Where, in an action for injuries to a passenger while attempting to board a train, the sole issue raised by the evidence was whether there had been any such sudden movement or jerk of the train as alleged, the court properly refused to charge that, if plaintiff was a passenger and was injured while she was in the exercise of ordinary care, such facts were prima facie evidence of defendant's negligence and liability; the rule of res ipsa loquitur being unavailable to create a liability not within the issues as made. Irvine *v.* Delaware, etc., R. Co., 184 Fed. 664, 106 C. C. A. 600.

Where, in an action for injuries to a passenger by an alleged premature start of the train throwing her to the ground, the jerk of the train was denied, and the court charged that, if there was no jerk, there was no negligence, in which event

whether the injury occurred in the manner set forth in the declaration or not,[48]

defendant was not bound to show how plaintiff's hip was broken, whether she fell from the platform or caught her skirt, etc., there was no error in granting defendant's further request to charge that if plaintiff accidentally slipped from the steps of the car to the ground, or stumbled and fell before reaching the steps, she could not recover. Irvine *v.* Delaware, etc., R. Co., 184 Fed. 664, 106 C. C. A. 600.

An instruction, in a personal injury action against a street railway company, that, if it could have avoided the collision by exercising the highest degree of care consistent with the practical operation of the road, plaintiff could recover, was erroneous for not limiting the company's negligence to that charged in the declaration. Ratner *v.* Chicago City R. Co., 84 N. E. 201, 233 Ill. 169, reversing judgment 133 Ill. App. 628.

In an action for injuries to a passenger, a request to charge that plaintiff must recover on proof of the acts of negligence set out in the declaration, and that proof of any other act or acts of negligence of defendant's employees would not authorize recovery, unless the jury was satisfied from the evidence that the negligence alleged had been satisfactorily proven, was properly refused, as liable to mislead the jury to believe that plaintiff would be entitled to recover, if defendant was guilty of negligence other than that pleaded, if the jury further believed that the acts of negligence charged had been proven. Wrightsville, etc., R. Co. *v.* Joiner, 136 Ga. 149, 71 S. E. 126.

48. Authorizing recovery for injury in manner other than that declared on.— Louisville, etc., R. Co. *v.* Croxton, 63 Fla. 223, 58 So. 369.

In an action by a passenger for injuries received while alighting from a moving train, where he does not base his right to recover on the negligence of the company in failing to afford him a safe landing place and a safe means of egress from the point where he alighted, nor upon their negligence in not leaving him at a place where he would be safe after alighting but upon the failure of the employees to obey the rules of the company requiring the train to come to a full stop at the point where he alighted so that he could alight in safety, it is not error for the court to fail to instruct that it is the duty of the company not only to land the passenger safely but to leave him at a place where he will be safe after landing. Sanders *v.* Southern R. Co., 107 Ga. 132, 32 S. E. 840.

Under a petition charging the negligent starting of the street car which plaintiff was boarding, by the carrier's invitation, at a point where passengers were discharged and received, it was error to give an instruction allowing a recovery, under the humanitarian or last clear chance doctrine, and without the relation of passenger and carrier necessarily existing. Peterson *v.* Metropolitan St. R. Co., 111 S. W. 37, 211 Mo. 498.

The instruction, in an action counting on negligence in starting up a car while plaintiff was attempting to board it when it was standing still, that if plaintiff attempted to board it when it was dangerous to do so because of its rapid speed, and because of this plaintiff fell and was injured, then, if the injury was so caused by defendant's negligence, verdict should be for plaintiff, is erroneous, as, under the facts hypothesized, plaintiff's negligence, and not that of defendant, certainly not that counted on, caused the injury. Alabama, etc., R. Co. *v.* Bullard, 157 Ala. 618, 47 So. 578.

Where the petition alleged that, while plaintiff was attempting to walk from the rear vestibule into the car, he stepped one foot upon the metallic cover of the sand receptacle, and the other upon the metallic part of the door sill, and was injured by an electric shock, an instruction to find for plaintiff if he stepped upon said metallic cover and upon the metallic sill, and received from them "or either of them" an electric shock, was erroneous as being broader than the allegations, and authorizing a recovery if he was shocked by stepping on either the sand cover or the sill. Black *v.* Metropolitan St. R. Co., 117 S. W. 1142, 217 Mo. 672.

In an action against a street railway company, where the only cause of action alleged was willful, unjustifiable assault by the motorman upon plaintiff, who was a passenger, a charge that the carrier must furnish safe appliances to passengers while traveling, which must be in good condition, and inspected with reasonable care, and that the carrier must use ordinary care in the selection of proper officials upon their cars, having in view the business they are to perform, was erroneous. Savannah Elect. Co. *v.* Pritchard, 66 S. E. 952, 133 Ga. 747.

After the giving of an instruction that plaintiff could recover if the car stopped in response to his signal, and that it was then negligently started with a jerk, causing him to fall, it was error to give another instruction that plaintiff could recover though the car was not stopped, and that plaintiff was warned by the motorman not to get on, and plaintiff was injured in attempting to board the car while running at full speed by being dragged an unnecessary distance, and this contributed to the cause of his injury; the two causes of injury being so inconsistent

and it is proper to refuse a request which has that effect.[49] In other words, a charge which takes the case outside of the issues therein and by which the jury is informed or given to understand that they may deal with or inquire in regard to acts of negligence on the part of the carrier, other than those which were alleged in the complaint, is error.[50] But it is not an objection to an instruction that it binds the carrier for liability against which it did not defend.[51]

Instances Where Charge Authorized Recovery on Grounds Not within Pleadings.—There are many instances in which an instruction has been held to present a question not made by the pleadings and evidence, to divert the attention of the jury from the issues in the case, and to authorize a recovery upon a ground entirely different from that laid in the pleadings. It has been so held as to a charge which authorized a recovery upon a claim that the porter misdirected plaintiff as to which train to take,[52] a claim as to defects in the roadbed or ties or other material used in the road,[53] a claim of a breach of duty to keep passenger trains, cars and appliances in safe condition,[54] and competent employees.[55]

that they could not contribute with each other to produce the injury. Graefe *v.* St. Louis Trans. Co., 123 S. W. 835, 224 Mo. 232.

49. In an action against a street car company for injury to a passenger, where the action was based on negligence in suddenly starting the car as plaintiff was about to alight, it is proper to refuse a tendered instruction relating to negligence in failing to properly stop the car. Chicago Union Tract. Co. *v.* Hanthorn, 71 N. E. 1022, 211 Ill. 367.

50. Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935.

51. Liability against which carrier did not defend.—In an action against a carrier for injury to a passenger caused by a car window sash falling, an instruction that, if she raised the sash for reasonable cause until it was latched, and the sash fell and injured her, because of a defective lock, the carrier was liable, was not objectionable as binding the carrier for breaks of the most recent occurrence, as well as latent defects, where the carrier did not defend on such ground, nor offer evidence of an inspection of the car or its appliances before the accident, but insisted upon the trial that the window catch was in good condition. Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A., N. S., 527, 16 Am. & Eng. Ann. Cas. 1, rehearing denied in 84 N. E. 13.

52. Recovery authorized on ground not within the pleadings.—In an action against a railroad company for injuries to a passenger from stepping off a moving train, the petition charged negligence in failing to direct plaintiff what train to take. An instruction stated that if plaintiff got on the wrong train through failure of defendant to have any one there to direct him, being told by a porter on that train that it was the train he desired to take, and afterwards, on further explanation, told that it was not and directed to jump off, etc., he was entitled to recover. Held not objectionable on the ground that it authorized a recovery upon the misdirection of the porter, when the petition alleged a failure to give any direction. Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

53. Defects in road bed, ties, or other material.—Where a petition in an action against a railroad company for personal injuries alleged, as the ground of plaintiff's claim, negligence on the part of the company in running its train over a part of its track which had been undermined by a flood of water, an instruction permitting a recovery for defects in the roadbed or ties or materials used on the road is erroneous. Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34.

54. Failure to keep appliances, cars, etc., safe.—Where the complaint in an action for injuries to a passenger alleged negligence in the operation and management by defendant of its passenger and freight trains, an instruction as to the duty of a carrier of passengers "in keeping its passenger trains and appliances in a safe condition" is erroneous. Maynard *v.* Oregon R., etc., Co., 78 Pac. 983, 46 Ore. 15, 68 L. R. A. 477.

Where, in an action against a carrier for the death of a drover, the complaint charged only a negligent inspection of the axle, by the breaking of which the train was derailed, an instruction that the utmost care in running and managing the train, and in all the subsidiary arrangements necessary to the safety of the de-

55. Competent servants.—An instruction in an action for injury to a passenger should not charge that it was defendant's duty to have cars free from defects endangering the lives of passengers, and competent men to operate the train; there being no claim of defective cars and incompetent men, and the attention of the jury being thus diverted to questions not relied on. Illinois Cent. R. Co. *v.* Vinson, 74 S. W. 671, 25 Ky. L. Rep. 38, rehearing denied in 76 S. W. 167, 25 Ky. L. Rep. 652.

a claim as to negligent operation of the train,[56] a claim that the bell on a car on a parallel track was not sounded,[57] a claim as to liability where a passenger attempted to leave car before it came to a stop,[58] a claim as to a breach of the duty of the conductor to render assistance to alighting passengers,[59] a claim that a jolt or jerk of the car was due to another cause than going over an old or worn frog or switch,[60] a claim of negligence in not having a special officer on board a

ceased, was required, was erroneous, as requiring care with regard to appliances as to which no negligence was alleged. Western Maryland R. Co. *v.* State, 53 Atl. 969, 95 Md. 637.

Defective cars.—Illinois Cent. R. Co. *v.* Vinson, 25 Ky. L. Rep. 38, 74 S. W. 671, rehearing denied in 25 Ky. L. Rep. 652, 76 S. W. 167.

An instruction, in an action against a street railway for personal injuries, to find for plaintiff if the accident was caused by a faulty construction of the car, is properly refused where the writ did not allege that the injury was caused by a defect in the car, and there was no evidence of a defect, and no claim till the closing argument, that there was one. Douyette *v.* Nashua St. Railway, 44 Atl. 104, 69 N. H. 625.

56. Negligent operation of train.—Where no negligence was complained of or shown by the evidence, except the failure to maintain the track in a safe condition, it was reversible error to charge that if the injuries were caused by the carelessness of defendant in the maintenance of its track "or the operation of its train," without the passenger's fault, the jury should find for plaintiff. St. Louis, etc., R. Co. *v.* Sweet, 40 S. W. 463, 63 Ark. 563.

57. Car on parallel track—Failure to ring bell.—In an action for the death of a passenger while riding on the inside running board of a car from contact with a car from the opposite direction on the other track, after a statement by the court that the only question that would be submitted was whether deceased was forced into his position by the pressure of passengers permitted to board after deceased, or whether he voluntarily assumed such position, it was error to instruct that, if the bell on the car that struck him was not sounded, plaintiff might recover. Kalis *v.* Detroit United Railway, 119 N. W. 906, 155 Mich. 485.

58. Alighting from moving car.—In an action by a passenger against a street car company, where the only issues were whether the defendant had negligently started its car as the plaintiff was about to alight, or whether the plaintiff had attempted to leave the car before it came to a full stop, an instruction upon the liability of the defendant, if plaintiff attempted to leave the car while it was slowing down, and before it came to a full stop, and while so moving it was suddenly started, was improper, not being applicable to the issues. Lexington R. Co. *v.* Lowe, 136 S. W. 618, 143 Ky. 339.

Where, in an action for injuries to a passenger on a street car, the issues are whether plaintiff was injured by the careless starting of the car after it had stopped or by her own negligence in attempting to board it before it had stopped, it is error to instruct that if the car, even if not quite at a standstill, was moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it, so that it moved forward with a jerk, defendant's negligence would be established. Metropolitan St. R. Co. *v.* Hudson, 113 Fed. 449, 51 C. C. A. 283.

59. Failure to assist passenger from car.—Where the sole allegation of negligence in an action for injuries was the untimely starting of a street car before plaintiff had time to alight, an instruction that, if defendant's employees failed to assist plaintiff in leaving the car, defendant would be guilty of negligence, was error, though evidence on such issue was received at the trial without objection. Indiana R. Co. *v.* Maurer, 66 N. E. 156, 160 Ind. 25.

Where the only negligence alleged, in a railroad passenger's action for personal injuries in alighting, was the absence of a footstool on the platform and of proper station lights, instructions as to the duty of the conductor to render other assistance to alighting passengers than the placing of the footstool and having proper lights were inapplicable. Singletary *v.* Seaboard Air Line Railway, 71 S. E. 57, 88 S. C. 565.

60. Cause of jerk or jolt.—Where the complaint in an action by a passenger against a street railroad for negligent injuries alleged that plaintiff was thrown off the car and injured by reason of a severe jolt or jerk of the car, caused by its going over a switch or a frog which was old and worn, it was error to instruct the jury that they might inquire not only whether the jolt of the car was caused by the old and worn frog or switch, but also whether the jolt was due to "any other cause, which the defendant could have guarded against by the exercise of the highest degree of skill and foresight." Citizens' St. R. Co. *v.* Jolly, 67 N. E. 935, 161 Ind. 80.

boat to protect the passengers,[61] and a claim of negligence in permitting plaintiff to remain in the car after it reached its destination.[62] Other instances will be found in the footnotes to the preceding text paragraph.

Charges Held to Confine Recovery to Grounds Alleged.—There are many instances where a charge in a passenger's action for personal injuries has been held not to enlarge the issues and permit a recovery on grounds not set forth in pleadings. It has been so held as to a charge reciting the negligence pleaded and charging that no other acts or conduct on defendant's part would authorize a recovery,[63] a charge to find for defendant if the injury occurred in any other way than set out in an instruction based on plaintiff's contention,[64] and as to a charge that the carrier was liable for injuries caused by a collision if the injury was the result of slight negligence.[65] Also, it was so held where it was claimed that a charge in a suit for negligence in managing and controlling a car authorized a verdict for the plaintiff, if the cable machinery was defective,[66] and as to

61. Failure to have police officer on car.—The plaintiff was injured by being attacked by a stranger while a passenger on the defendant's steamboat. The sole issue made by the pleadings in the case was "that the master and crew, disregarding their duty in the premises, made no effort to stop and quell said brawl and fight, or to protect the passengers from assaults," etc. The trial judge submitted to the jury the question as to whether the defendants were not negligent in not having a special officer on the boat to protect the passengers. Held, that such submission was so clearly outside the issue as to be reversible error. Patridge *v.* Woodland Steamboat Co., 49 Atl. 726, 66 N. J. L. 290.

62. Permitting passenger to remain in car after reaching destination.—Where the petition in an action for personal injuries alleged that the injury was caused by the negligent management of a train, which was violently backed into a car on which plaintiff was a passenger, it was error to instruct that the jury might find for plaintiff if defendant was negligent in permitting plaintiff to remain in the car after it reached its destination, regardless of the negligent handling of the train, though there was evidence that defendant's employees negligently failed to notify plaintiff to leave the car after it reached its destination. Chicago, etc., R. Co. *v.* Bell, 1 Kan. App. 71, 41 Pac. 209.

63. Charges held to confine recovery to grounds alleged.—Where, in an action for injuries to a street car passenger, the petition, which was unamended, alleged that the car was started suddenly and rapidly, and that defendant's servants should, or by diligence could, have known that plaintiff was in the act of boarding, an instruction correctly reciting the negligence pleaded, and charging that no other acts or conduct on defendant's part would authorize a recovery, and if plaintiff failed, by a preponderance of the proof, to show that she received her injuries as alleged, she could not recover, was not error. Sterrett *v.* Metropolitan St. R. Co., 123 S. W. 877, 225 Mo. 99.

64. Where, in an action for injuries to a passenger alleged to have been occasioned by a lurch of the train as he alighted, defendant claimed that the injury was caused by plaintiff falling from the train at another place while drunk, an instruction to find for defendant, if plaintiff received his injury in any other way than set out in an instruction based on plaintiff's contention, sufficiently precludes recovery, if plaintiff fell from the train at such other place. Louisville, etc., R. Co. *v.* Deason, 96 S. W. 1115, 29 Ky. L. Rep. 1259.

65. In an action for the death of a street car passenger from injuries caused by the car in which he was riding colliding with an obstruction on the track while the passenger was riding on the footboard of the car preparatory to getting off, the charge being negligence, in that the collision could have been avoided with ordinary care, an instruction that the carrier is liable if the injury was the result of even slight negligence in the management of the train, is not erroneous as enlarging the issue. Sweeney *v.* Kansas City Cable R. Co., 51 S. W. 682, 150 Mo. 385.

66. In an action against a carrier for injuries to a passenger, the declaration alleged negligence in managing and controlling the car and in causing it to start suddenly and violently, and the court instructed that in order to entitle plaintiff to recover he must prove by a preponderance of the evidence that he was in the exercise of ordinary care, and if the injury resulted from an accident, and not from the negligence of defendant, the verdict should be for defendant, and the court also instructed that it was the duty of defendant to do all that human care, vigilance, and foresight could reasonably do to prevent an accident to plaintiff. There was no evidence introduced to prove any negligence, except that charged in the declaration. Held, that the instructions were not erroneous, on the ground that the jury might have understood that they could find for defendant, if they believed the cable machinery was

a charge in an action for injury received by the starting of a car which was claimed to authorize a verdict for other negligence.[67]

Permitting Defense Not Relied on.—In a passenger's action for personal injuries the charge should not permit a defense on grounds not relied on by the carrier.[68] There are also many instances in which instructions have been held to present a defense not tendered by the plea or answer, to wit, a defense that the carrier had a right to exclude plaintiff from its train because of intoxication,[69] that the car started from a cause beyond the carrier's control,[70] that the car stopped for a purpose other than to take on passengers,[71] and a defense that the car stopped a sufficient time to enable the plaintiff by the use of ordinary care to alight before the jar occurred.[72]

Narrowing or Withdrawing Issue.—The question of negligence arising from defective platform and lights, having been submitted to the jury, was not withdrawn from their consideration by a charge that "this case must be treated precisely as though this suit had been brought directly against the conductor and

defective or out of repair. Chicago Union Tract. Co. *v.* Lowenrosen, 78 N. E. 813, 222 Ill. 506, affirming judgment 125 Ill. App. 194.

67. In an action for injuries received by the starting of a street car while plaintiff was boarding it, an instruction that if the jury believe from a preponderance of the evidence that certain facts enumerated as set forth in the general allegations of the complaint occurred, and that such conditions resulted solely from the negligence of the servants of defendant carrier as charged, then plaintiff was entitled to recover, confined the jury to a consideration of the facts and circumstances relating to plaintiff's attempt to board the car, and the manner of its starting, and the injury sustained as alleged in the complaint, and was not objectionable either as failing to confine the jury to a consideration of the acts of negligence charged and sustained by the evidence, or as withdrawing from the jury the question whether defendant's act in starting the car under the circumstances was negligent. Denver City Tramway Co. *v.* Cowan, 51 Colo. 64, 116 Pac. 136.

Where the injury complained of was alleged to have been caused by the premature starting of a street car while plaintiff was trying to get off, an instruction defining the duties of railroad companies to passengers leaving trains or cars, and then stating that any breach of these duties would be such negligence as the jury might take cognizance of, was not erroneous, as authorizing a recovery for negligence not charged in the complaint. Gilmore *v.* Seattle, etc., R. Co., 69 Pac. 743, 29 Wash. 150.

68. Permitting defense not relied on.—Payne *v.* Springfield St. R. Co., 203 Mass. 425, 89 N. E. 536.

69. Defendant, in its answer and on the trial, having justified the action of its employee in seizing plaintiff, in order to prevent him from boarding a train, exclusively upon the ground that such action was taken for plaintiff's safety, in view of the facts that he was intoxicated, and that the train was already in motion, the court properly refused to instruct the jury that defendant had a right to exclude plaintiff from the train on the ground that he was an unfit passenger because of his intoxication, as not being applicable to the issues tendered by the answer. Harrold *v.* Winona, etc., R. Co., 47 Minn. 17, 49 N. W. 389.

70. In an action for injuries to a passenger alighting from a street car, there was no necessity for instructions on the care to be exercised by defendant in preventing the sudden starting of the car, where there was no claim by defendant that the car had started from a cause beyond its control, but its defense was a denial that the car had stopped for the passenger to alight, but was moving at a speed rendering it dangerous for her to so do. Reagan *v.* St. Louis Trans. Co., 79 S. W. 435, 180 Mo. 117.

71. In an action for injuries while boarding a street car, where defendant's theory was that no invitation had been given to plaintiff to become a passenger, because the car was stopped for other purposes and plaintiff was not seen by the conductor or motorman, requests based on the theory of the withdrawal of an invitation which had been held out by the carrier were properly refused. Payne *v.* Springfield St. R. Co., 89 N. E. 536, 203 Mass. 425.

72. Where, in an action for injury to a passenger on a freight train, the sole issue was whether or not there was an unusual jar of the train at the time the passenger attempted to alight, and whether or not he was thrown forward and down in the caboose and thereby injured, an instruction that, if the train stopped a sufficient time to have permitted the passenger by the use of ordinary care to alight before the jar occurred, there could be no recovery, was properly refused. St. Louis, etc., R. Co. *v.* Jackson, 93 Ark. 119, 124 S. W. 241.

engineer, if the accident happened through the fault of the conductor and engineer." [73]

Hypothesizing Verdict on Less than Law Requires.—In a passenger's action for personal injuries, where the jury might, under the pleadings and evidence, have found for the opposite party on less than is hypothesized in the request, it is proper to refuse it. Thus, where, in an action against a railway company, negligence was charged in one count in starting the car with a jerk, and in another with suddenly stopping, an instruction that if the jury "believe from the evidence that by the starting of the car the plaintiff was not jerked, slung, or thrown one way, and by the stopping of the car she was not jerked, slung, or thrown the other way, the verdict must be for the defendant," was properly refused.[74] And in an action for an injury plaintiff received while riding without a ticket, but ready to pay fare, on the steps of a baggage car, where the declaration was based on the hypothesis that he was a passenger, and that was a fact in issue, an instruction which permitted a recovery if the carrier was grossly negligent, although plaintiff was not a passenger, was erroneous.[75]

Manner of Injury Specifically Declared.—Where the pleader does not content himself with the general allegations of injury through negligent operation of the train or car, but declares the specific manner of the injury in separate counts, the action should be tried upon that theory and the charge of the court confined thereto. Where the declaration alleges specifically that plaintiff was injured by being thrown from a car, it is error to charge on the theory that he was compelled to jump therefrom.[76]

Singling Out One of a Combination of Circumstances.—In a passenger's action for personal injuries where the accident was alleged to have been caused by a combination of circumstances, an instruction which singles out one of the causes of defendant's alleged negligence, and makes a recovery dependent on it alone, is objectionable.[77] In an action for injuries to a passenger, an instruction that, if the jury believed from the evidence that the station platform and all its parts was not lighted, but that such lack of light did not cause plaintiff's injury, or that there was sufficient light where plaintiff alighted, then it was immaterial whether other portions of the platform were sufficiently lighted or not, was not objectionable as singling out one of the causes of defendant's alleged negligence, and as charging that, if the conductor and brakeman had lanterns, that was sufficient to relieve the carrier from its duty to have its platform sufficiently lighted.[78]

Complaint Composed of More than One Count.—Where the complaint in a passenger's action for personal injuries is composed of more than one count

73. **Narrowing or withdrawing issue.**—Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264.

74. **Hypothesizing verdict on less than law requires.**—Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

75. Chicago, etc., R. Co. *v.* Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17; S. C., 44 Ill. App. 124.

"The above-mentioned instruction required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render a carrier liable only in case of injury to a passenger. This, in effect, took from the jury all consideration of the questions presented by the evidence, which tended to show that the plaintiff, at the time of his injury, was attempting to obtain a free ride without the consent of the defendant, or its agents. If such was the fact, the defendant can be held liable only for the consequences of gross negligence amounting to willful or wanton misconduct; and such is not the negligence charged in the declaration." Chicago, etc., R. Co. *v.* Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17.

76. **Manner of injury specifically declared.**—Pensacola, etc., R. Co. *v.* Haussman, 51 Fla. 286, 40 So. 196.

77. **Singling out one of a combination of circumstances.**—Harvey *v.* Chicago, etc., R. Co., 221 Ill. 242, 77 N. E. 569.

78. Harvey *v.* Chicago, etc., R. Co., 221 Ill. 242, 77 N. E. 569, affirming judgment 116 Ill. App. 507, and 123 Ill. App. 442.

and the cause of action set out in one of them in no way depends upon a state of facts alleged in another, an instruction that plaintiff can not recover upon the former count without proof of the state of facts alleged in the latter count, is properly refused.[79] Where one count of a complaint is based on a collision of trains and another on an injury received by plaintiff in attempting to escape from a threatened collision, an instruction that plaintiff could not recover without proof of collision is properly refused.[80] And where a declaration charges the defendant with liability in one count because of its failure to make up its train and to couple its cars, sufficiently, and in another count because of its moving its engine and cars without sufficiently coupling the cars, it is proper to instruct the jury that plaintiff may recover if he was injured by defendant's negligence in making up its train and failing to couple its cars sufficiently, or in moving its engine and cars without sufficiently coupling the cars.[81]

Separate Causes of Action Blended—Surplus Allegations.—Where in a passenger's action for personal injuries two causes of action are blended in the petition, or separately stated, the instructions need not cover both causes, or surplus allegations not necessary to the statement of a cause of action. They must, however, cover the allegations which go to make up at least one cause of action, and the other may be disregarded or abandoned by the plaintiff. But where the two negligent acts alleged in the petition are not independent of each other, the instructions must cover all of the allegations.[82] Thus, where a petition stated that defendant railroad company, by negligently permitting a hole to remain in its depot platform, and by the negligence of its servants in extricating plaintiff from said hole, injured plaintiff, it is not error to embody in an instruction the ground of recovery based alone on the negligence in permitting said hole to be in the platform.[83] This instruction covers the first cause of action and is not bad because it ignores the other.

All Counts on Same Cause of Action and Supported by Evidence.—Where the declaration, in an action for injuries to a passenger, alleged in separate counts the same cause of action, and merely varied the statement to meet the possible phases of the evidence, and the evidence supported all the counts, the refusal to charge that, unless the essential elements of negligence alleged in some count were established, no recovery could be had, and that no recovery could be had on a state of facts formed by a combination of all the counts, was proper.[84]

Charge as to Nonobservance of Statutory Requirements.—The court may authorize consideration of nonobservance of a statutory requirement, as an element going to make up negligence alleged as nonobservance of a statutory requirement as to brakemen[85] or such requirement as to appliances for

79. Complaint composed of more than one count.—Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

80. Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747.

81. Hannibal, etc., R. Co. *v.* Martin, 111 Ill. 219.

82. Derailment, excessive speed, defective tracks.—Where a count in the complaint in an action against a carrier of passengers for personal injuries caused by derailment of a car alleges that defendant was negligent in running its train at too great speed, and also in maintaining a defective track at the place of derailment, a request to find for defendant on such count, because there is no evidence of negligence as to the speed of the train is properly refused. Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

83. Robertson *v.* Wabash R. Co., 152 Mo. 382, 53 S. W. 1082.

84. All Counts on same cause of action and supported by evidence.—Parker *v.* Boston, etc., Railroad, 84 Vt. 329, 79 Atl. 865.

85. Charge as to nonobservance of statutory requirements.—In an action for injuries alleged to have been caused by the negligent starting or stopping of a train, an instruction that, if the lack of the statutory number of brakemen helped on the accident, the jury might consider that fact in determining whether defendant railroad was negligent, was not erroneous as allowing the jury to predicate liability on the separate substantive

elevators.[86]

Sufficiency of Pleadings and Allegations.—A petition, in an action for personal injuries sustained in a railway collision, which alleged that the servants in charge of the car on which plaintiff was riding ran it at a dangerous rate of speed, and that defendant negligently ran a car in the opposite direction on the same track, thereby causing the collision, sufficiently charged defendant with negligence in allowing the collision, so as to warrant an instruction on that theory.[87] But an allegation that plaintiff was not given "reasonable opportunity to fully board and enter" defendant's car did not imply a negligent starting of the car while plaintiff was boarding it, so that an instruction that plaintiff was entitled to a reasonable opportunity to board the car was not required.[88]

General Denial as Raising Issue Whether Plaintiff Trespasser.—In an action against a carrier for personal injuries alleged to have been received while a passenger on defendant's train, an instruction that no recovery could be had if plaintiff was a trespasser on the train is warranted by defendant's plea of denial.[89]

Sufficiency of Charge That Evidence Must Conform to Allegations.—In an action by a passenger to recover for injuries received in a collision with a wagon, where the declaration alleged that defendant negligently operated its car, a request that plaintiff's proof must conform to the allegation of his pleadings was sufficiently complied with by a charge that under the declaration, "which is founded purely on the negligent operation of the car," and not on the construction of the roadbed, the question was, ought the motorman to have apprehended that the rear of the wagon would be likely to slide towards the car by reason of the cross-over or the condition of the pavement at which the accident happened, and that an accident might then occur? and that, if the motorman ought to have apprehended such danger, then it was his duty to act with reference to it, and that if he failed to guard against a danger he ought to have anticipated, and because thereof the accident occurred, then he was negligent, etc.[90]

§§ 3330-3332. Applicability to Evidence—§ 3330. In General.—Abstract and Argumentative Instructions.—In a passenger's action for personal injury, an instruction which states a rule of law correctly, but which does not relate to any facts of the case, is improper, as is also an argumentative in-

ground of nonobservance of the statutory requirement as to brakemen, but merely authorized consideration of that fact as an element going to make up negligence in the starting or stopping of the train. Comerford *v.* New York, etc., R. Co., 63 N. E. 936, 181 Mass. 528.

86. In a passenger's action for personal injuries where the manner in which the accident happened is clearly set forth in the complaint, but there is no reference to a statute the noncompliance with which was the conducing cause of the accident, which is, the very thing alleged as that causing the accident which a compliance with the statute would have prevented; it is proper to charge the jury that if they find that noncompliance of the statute was the conducing cause of the accident, such noncompliance is evidence of negligence, and that it is for the jury to determine its weight. Thus, where, in an action by an elevator passenger for injuries, the declaration did not refer in terms to Gen. Laws, c. 108, § 16, requiring passenger elevators to have appliances to prevent them from being started while their doors are open, but the manner in which the accident occurred was clearly set out, and it appeared from such statement that, if the statute had been complied with, the accident could not have happened, there was no error in charging the jury that, if they found that noncompliance with the statute was the conducing cause of the accident, such noncompliance would be evidence of negligence, sufficient, perhaps, and that it was for the jury to determine its weight. Bullock *v.* Butler Exch. Co., 52 Atl. 122, 24 R. I. 50.

87. Sufficiency of pleadings and allegations.—Magrane *v.* St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158.

88. Samuels *v.* Louisville R. Co., 151 Ky. 90, 151 S. W. 37.

89. General denial as raising issue whether plaintiff trespasser.—Pfaffenback *v.* Lake Shore, etc., R. Co., 142 Ind. 246, 41 N. E. 530.

90. Sufficiency of charge that evidence must conform to allegations.—Walsh *v.* North Jersey St. R. Co., 71 N. J. L. 641, 60 Atl. 335.

struction.[91] The propriety of an instruction should be determined, not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial.[92] In other words, an instruction in such action should not be given without some evidence to support it.[93] The court should withdraw from the consideration of the jury charges of negligence in the complaint which were unsupported by the evidence,[94] and may conform requested instructions to the evidence in the case and allow them. Thus, where, in an action against a street railway company by a passenger to recover for injuries sustained while alighting from a car, the conductor in charge of the car confessed to actual

91. Abstract and argumentative instructions.—Chicago Union Tract. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341.

In an action for injuries against a railroad caused by a train striking a mule which hit plaintiff, who was standing on a station platform preparatory to boarding the train, an instruction which declared that it was the duty of a railway company to provide all things necessary for the security of their passengers and exercise the highest degree of care practicable was erroneous, as abstract and inapplicable to the facts of the case. St. Louis, etc., R. Co. *v.* Woods, 96 Ark. 311, 131 S. W. 869.

An instruction that a motorman should have given decedent warning not to attempt to enter his car at a certain place was not called for, where it did not appear that the motorman knew he was attempting to enter. Hoffman *v.* Cedar Rapids, etc., R. Co. (Iowa), 139 N. W. 165.

A requested instruction, in an action by a passenger against a railroad company for personal injuries, which, in effect, holds that it is incumbent on plaintiff to prove that the proximate cause of the injury was the want of something which, as a general rule, it was bound to keep out of the way, is properly refused where the liability, if any, is for the positive misconduct of an employee, and not any defect in appliances, machinery, or equipment. Railroad *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554.

92. Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156.

Qualifying assumption.—In an action for injuries to a passenger attempting to board a train, in which action plaintiff claimed that the negligence by the defendant respecting the management of a movable platform in relation to the train which he attempted to board had created a particular danger apart from those naturally to be apprehended, where an instruction was given that the act of an employee of the defendant in calling to passengers to "Step lively" would not be negligence, assuming that every thing was in proper condition for the people to step lively; the qualifying assumption must not be taken abstractly, but in connection with the claim that negligence of defendant had created a particular danger, and must be confined to acts of the defendant, and not construed as applying to permanent conditions. Plummer *v.* Boston Elev. R. Co., 84 N. E. 849, 198 Mass. 499.

93. Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

Where, in an action for injuries to a passenger while alighting from a car, there was evidence that the brakeman jerked the passenger and caused her to fall, but there was no evidence that the train did not stop a sufficient time to give the passengers a reasonable opportunity to alight, the instructions should be confined to the question whether the brakeman negligently jerked the passenger from the steps of the car, and the court should not submit the issue of a negligent failure to stop the train a sufficient length of time. Louisville, etc., R. Co. *v.* Lee, 130 S. W. 813, 140 Ky. 91.

It was not error, as against plaintiff, in an action against a railway and bridge company and a street railway company, to fail to give instructions as to liability of the railway and bridge company; the case being tried on the theory that the street railway company was operating the car on which plaintiff was riding when injured by its running off the track, and the mere fact of ownership of the track by the railway and bridge company not tending to show such negligence on its part as to render it liable. Marcus *v.* Omaha, etc., Bridge Co., 142 Iowa 84, 120 N. W. 469.

94. An instruction, that the only allegation of negligence supported by the evidence and to be determined as a fact by the jury was whether the car which plaintiff attempted to board at the time he was injured was stopped and started again while plaintiff was attempting to board it, sufficiently withdrew charges in the complaint that the carrier was responsible for the injury because it had manned the car with servants who were reckless, inexperienced, and inattentive to their duties, and that, in trusting such servants to operate the car, defendant was negligent, etc. Denver City Tramway Co. *v.* Cowan, 116 Pac. 136, 51 Colo. 64.

knowledge of the facts, it was not error to omit from an instruction a phrase with reference to what the conductor might have known by the exercise of due care.[95] But the giving of an instruction not supported by the evidence is not reversible error, where it was not calculated to mislead the jury.[96]

Instances Where Evidence Sufficient to Support Charge.—There are many instances in which the evidence has been held to justify the instructions given. It has been so held as to a charge as to the existence of the relation of passenger and carrier,[97] as to a charge as to the presumptions from proof that plaintiff was injured by the running of the train,[98] as to a charge as to the degree of care required of the defendant's servants to provide for the safety of its passengers,[99] having in view the character and mode of conveyance,[1] or to provide a reasonably safe track,[2] although there is no evidence of what practical

95. Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

96. Instruction not calculated to mislead jury.—In an action against a railroad company for personal injuries received while in a car with horses under plaintiff's charge, the defendant having offered an instruction to the effect that, if the plaintiff was riding in the car with the horses without the knowledge or permission of the trainmen, he could not recover, the court modified the instruction by adding to it, "unless defendant or its servants are guilty of gross or willful negligence, causing such injury." Held, that, although there was no evidence to support the amendment, yet, as it was not calculated to mislead the jury, it did not constitute reversible error. Chicago, etc., R. Co. *v.* Dickson, 143 Ill. 368, 32 N. E. 380.

97. Relation of carrier denied.—In an action for injuries to a passenger, an instruction as to the duties of a carrier of passengers for hire is not unwarranted though that the relation exists is denied by the carrier, where the facts alleged in the declaration, if proved, would establish such a relation. Chicago Union Tract. Co. *v.* O'Brien, 76 N. E. 341, 219 Ill. 303, affirming 117 Ill. App. 183. See ante, "Existence of Relation of Carrier and Passenger," § 3337.

98. Rebuttal of prima facie case.—Where a passenger claimed that he was injured by his foot catching on a stool, from a sudden jerk of the train as he was passing from one car to another, an instruction that, if plaintiff was injured by the running of the train, he had made a prima facie case of negligence, but that, if it appeared from plaintiff's evidence that the injury did not result from defendant's negligence, the prima facie case was rebutted, was applicable to the facts under Kirby's Dig., § 6773, making railroads liable for injuries resulting from the running of trains. St. Louis, etc., R. Co. *v.* Pollock, 93 Ark. 240, 123 S. W. 790.

99. Evidence that brake defective.—An instruction that a railroad company should exercise the highest degree of care, consistent with the practical operation of the road, to provide for the safety of passengers, is applicable in an action by a passenger of a grip car for injuries sustained by the sudden flying back of a brake lever, where there was evidence that the brake was in bad order. Judgment 77 Ill. App. 142, affirmed in West Chicago St. R. Co. *v.* Johnson, 54 N. E. 334, 180 Ill. 285.

1. Where, in an action for injuries to a passenger in a rear end collision, the evidence showed that a heavy fog prevailed which prevented the motorman of the rear train from seeing the forward train in time to prevent the collision; that the fog had existed for about two hours; that the superintendent of the carrier had observed it, and, concluding that it was unsafe to run trains as was the custom under ordinary conditions, took extra precautions to avoid accidents by giving orders to disregard the schedule and to run safe by posting extra men at different points, and by directing the motormen to run their cars at such speed that they could be stopped within the length of their vision—instructions that a carrier of passengers must do all that human vigilance could reasonably do to avoid injury to a passenger, having in view the character and mode of conveyance, consistent with the practicable operation of the road, and that, if the carrier did not exercise such degree of care and plaintiff was injured, a recovery was authorized, etc., was not erroneous. Sandy *v.* Lake, etc., R. Co., 85 N. E. 300, 235 Ill. 194, affirming judgment 137 Ill. App. 244.

2. Where the evidence showed that a passenger was injured by a fall because of a sudden jerk of the train, an instruction was proper that a carrier must use the highest degree of care which a prudent man would exercise, reasonably consistent with the mode of conveyance, to provide a reasonably safe track, and if plaintiff was injured by reason of the train running over a low place in its track, which the company negligently permitted, he could recover. St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 602, 113 S. W. 794.

railroad men would do under the circumstances,[3] and as to a charge as to duty as to platforms,[4] as to duty to furnish seats,[5] as to liability for negligent management of the car and negligence in maintaining the machinery and appliances,[6] as to the fact that the car was not equipped with electric brakes,[7] as to negligence in starting while plaintiff's clothing was caught on car,[8] and as to a charge that speed could not be considered.[9] The evidence has also been held to support the charge where, under the evidence, it was a question for the jury whether the speed of the train, together with the position of the engine to the train, was negligence, without respect to whether it was backing;[10] where the court re-

3. In an action against a street railway company for injuries caused by suddenly starting a car on which plaintiff was a passenger after slowing it down to enable him to alight, it is not error to instruct that defendant's employees were chargeable with a high degree of care, such as practical and skillful railroad men would have exercised under similar circumstances, though there is no evidence showing what practical and skillful railroad men would do under such circumstances. Grace *v.* St. Louis R. Co., 56 S. W. 1121, 156 Mo. 295.

4. Duty as to platform.—In a street car passenger's action for personal injuries by stepping from an unlighted platform in the street, an instruction that the company's duties as to platforms were to keep them in a reasonably safe condition for the purpose intended was applicable to evidence that plaintiff was discharged from the car in the dark without warning as to danger from stepping off the platform. Harris *v.* Seattle, etc., R. Co., 117 Pac. 601, 65 Wash. 27.

Faulty construction.—Where, in an action on account of an injury received on alighting from a car, the only evidence as to the faulty construction of the platform is as to the space left between the car door and the platform, it is not prejudicial error to instruct the jury that it is the duty of the company "to keep in safe condition all portions of its platforms and approaches thereto." Missouri Pac. R. Co. *v.* Long, 81 Tex. 253, 16 S. W. 1016, 26 Am. St. Rep. 811.

5. Duty to furnish seats.—In an action for injuries to a passenger, where plaintiff testified that she was compelled to sit on the floor of the car for want of a suitable seat, it was proper to instruct as to the duty of defendant to furnish suitable seats for its passengers. Caldwell *v.* Northern Pac. R. Co., 113 Pac. 1099, 62 Wash. 420.

6. In an action against a street railway company for injuries to a passenger, where the evidence disclosed that defendant's servants in charge of the car applied the brake and reversed the power in their efforts to stop it before reaching a railroad crossing, but were unable to do so, and in consequence it was struck by a railroad engine and derailed, it was proper to charge that if defendant was negligent in the management of the car, and negligently maintained the car, machinery, appliances, brakes, and running gear thereof, and that in consequence thereof he was injured, the jury should find for plaintiff. Beave *v.* St. Louis Trans. Co., 111 S. W. 52, 212 Mo. 331.

7. Car not equipped with electric brakes.—Where, in an action for injury to a street car passenger, there was evidence that if there had been braking power, as required by Loc. acts 1901, p. 485, No. 439, requiring cars to be equipped with electric air brakes, there would have been no difficulty in stopping the car and preventing the injury, an instruction that the fact that the car did not have electric brakes would make no difference unless the accident was caused or contributed to by lack of braking power was sufficiently favorable to defendant. Fortin *v.* Bay City Tract., etc., Elect. Co., 117 N. W. 741, 154 Mich. 316.

8. Starting while plaintiff's clothing caught on car.—An instruction that if, while alighting from a street car, plaintiff's clothing caught on the car, and the conductor saw or might have seen it in using ordinary care, the conductor would be negligent in starting the car while plaintiff was thus entangled, was warranted by pleading and evidence that the car was negligently started while she was alighting after the car stopped. Morrison *v.* Seattle Elect. Co., 115 Pac. 1076, 63 Wash. 531.

9. Speeed not to be considered.—The accident causing plaintiff's injury was due to the breaking of machinery on defendant's locomotive, but there was no evidence to show that defendant or its employees were guilty of negligence in providing or caring for the machinery. It did not appear that the speed of the train at the time was unusual. Held that the court properly charged that the speed could not be considered on the question of negligence. Beery *v.* Chicago, etc., R. Co., 73 Wis. 197, 40 N. W. 687.

10. In an action for the death of plaintiff's husband who was killed while riding on defendant's train, which was backing at the rate of twelve or fifteen miles an hour around a curve grown up with weeds to such an extent that the view was largely cut out, and which was derailed by running over a cow, charges to the jury, which said nothing about the backing of the train, but submitted only

ferred to plaintiff's getting off trailer to get on rear platform of car ahead, and to time cars were stopped;[11] and a charge as to the acts of passenger in an elevator placed in imminent peril by its starting downward while there was no one to operate it.[12]

Instances Where Evidence Did Not Support Charge.—There are many instances in which the request or instructions were not supported by the evidence or were inapplicable to the facts of the case. It has been so held as to a charge on the theory of negligence where the evidence showed a direct wrong,[13] as to a charge that plaintiff who was injured in a collision was not entitled to recover, if he was so infirm that a prudent man in his condition would not have run the risk of travelling,[14] a charge that plaintiff could not recover if the carrier's servant was conducting his business in the usual and ordinary way,[15] a charge

the question as to the manner of running the train with reference to its speed and the position of the engine in the train, were not erroneous, even though there was no question for the jury under the evidence as to whether the backing of the train was an act of negligence, for in determining whether there was negligence in operating the train the jury had to consider the speed, together with the position of the engine. St. Louis, etc., R. Co. *v.* Kitchen, 98 Ark. 507, 136 S. W. 970.

11. Plaintiff, a boy of nine years, was riding on the front platform of a trailer of one of defendant's street cars, the cars being crowded, and when the car stopped at a street crossing he stepped off into the street to get on the rear platform of the car ahead; there being no passageway between the cars. The train started while he had hold of the railing, dragging him some distance and throwing him under the car. Held, that the court in its charge might have properly referred to the length of time the cars were stopped and the plaintiff's rather unusual conduct in getting off to change places, and it would have been error to refuse to do so if requesed. Keeley *v.* City Elect. R. Co. (Mich.), 133 N. W. 1085.

12. Imminent peril of passenger in elevator.—In an action for injuries received while plaintiff was a passenger on defendant's elevator, the court instructed that if, when plaintiff approached the elevator, the door was open; and plaintiff believed the elevator was in service and entered it, and the elevator started downward and there was no person operating the elevator; that if plaintiff attempted, on its starting down, to leave said elevator, and in attempting to do so was injured, and if the hydraulic machine operating the elevator was defective and was so known to defendant, or by ordinary care might have been so known, and the descent of said elevator was directly caused by the hydraulic machine being defective, and if plaintiff, after the elevator started to descend and by reason thereof, was seized with alarm for her safety and had reasonable cause to apprehend peril, and the appearance of danger was imminent, leaving no time to deliberate, then their verdict must be for plaintiff. It was undisputed that the elevator was an hydraulic elevator, and that the apparatus controlling the lever for starting and stopping the elevator had been removed or so fixed as to be ineffective, thereby permitting the elevator to ascend and descend without hindrance according to the weight or load on the car and the counterweight or hydraulic pressure on other parts of the elevator, and that the operator had been operating the elevator for some time prior to the injury without such apparatus. Held, that there was evidence sufficient to justify the instruction. Cooper *v.* Century Realty Co., 123 S. W. 848, 224 Mo. 709.

13. Instances where evidence did not support charge.—Where, in an action against a railway company for injuries to a passenger, the evidence showed a direct wrong on the part of the conductor, instructions predicating a recovery on his negligence were properly refused. Louisville, etc., R. Co. *v.* Quinn, 39 So. 616, 145 Ala. 657.

14. A passenger, who had been suffering from rheumatism of the hip, was thrown from his seat by a collision of the train, and his hip broken. In a suit for damages, counsel for the railroad asked the court to instruct the jury: "Although the jury believe from the evidence that the injury * * * was inflicted * * * upon the plaintiff, * * * yet the plaintiff is not entitled to recover if * * * he was in a feeble and infirm state of health, and such as would have prevented a prudent man from running the risk of travel, and that but for his diseased and helpless condition * * * would not have suffered the injury. * * *" Held, that the instruction, not being relevant to the evidence in the case, was properly refused. Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796.

15. In an action against a street car company for injuries sustained by a passenger in alighting from the car, it was error to instruct that plaintiff could not recover if "the driver of the car was conducting his business in the usual and ordinary way," in view of the testimony

which assumed that plaintiff was a cripple,[16] a charge as to the carrier's duty to keep its platforms in a safe condition,[17] a charge assuming that the car was in motion when plaintiff attempted to get off,[18] a charge as to reasonable time to alight where the conductor saw or should have seen the plaintiff,[19] and a charge on the theory that an employee had authority to consent to plaintiff's riding on a hand car.[20] And it has been so held where there was no evidence as to precautions in aiding passengers to alight,[21] or that a broken trolley wire could not by reasonable care have been kept from being dragged upon the platform of the car.[22]

that he started the horses suddenly and violently with a whip. Britton *v.* Street R. Co., 90 Mich. 159, 51 N. W. 276. See post, "Assuming Facts," § 3332.

16. Plaintiff entered defendant's car, and before he was seated the car suddenly lurched forward. Plaintiff testified that he did not know whether the driver saw him after he got inside, and there was no testimony that the driver knew that plaintiff was crippled, or had means of knowing that fact. There was no evidence that plaintiff used a cane or crutches at the time, though there was some testimony that at times plaintiff used them. Held not to warrant a charge that, if the jury should believe that it was apparent to the driver that plaintiff was crippled, it was the former's duty to use greater care than ordinarily. Jacksonville St. R. Co. *v.* Chappell, 21 Fla. 175.

17. Unsafe platforms.—In the absence of evidence that station platforms were unsafe, an instruction that it was a railroad company's duty to keep its platforms in safe condition was misleading in an action for death to a waiting passenger crushed between a moving train and an elevated platform. Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, 2 S. W. 505.

18. Assuming car in motion.—In an action for personal injuries sustained while leaving a horse car, plaintiff's evidence tended to show that the car was standing still when she attempted to get off, and was started with a jerk as she was stepping to the ground, while the evidence of defendant showed that plaintiff was entirely free from the car before it was again started. Held, that defendants' requests for instructions which based its right to a verdict upon the assumption "that the moment plaintiff started to get off was simultaneous with the starting of the car," and that the car was in motion when she attempted to get off, were properly refused. Birmingham Union R. Co. *v.* Smith, 90 Ala. 60, 8 So. 86, 24 Am. St. Rep. 761.

19. Reasonable time to alight.—In an action against a street car company for injuries to an alighting passenger, where undisputed evidence showed that the conductor was on the rear platform, and saw or should have seen, plaintiff when he was alighting, requests to charge that if the car was stopped for a period reasonably sufficient for plaintiff in the exercise of ordinary care to alight, and the car was then started by defendant's servants without their knowing or having reason to believe that plaintiff desired to alight or was in the act of alighting, then the starting of the car was not the proximate cause of the injury, and that if, when the car started, plaintiff was not in a position reasonably calculated to inform defendant's servants, had they exercised due care, that plaintiff would probably be injured by starting the car, then the starting of the car was not the proximate cause of the injury, were properly refused as not applicable to the evidence. Jirachek *v.* Milwaukee Elect. R., etc., Co., 121 N. W. 326, 139 Wis. 505.

20. Right to consent to plaintiff's riding on hand car.—Where plaintiff was injured by being thrown from a hand car on which he was riding at the invitation of one of defendant's servants, the evidence being conflicting as to the latter's authority, it is error to charge on the theory that he had the right to give defendant's consent to plaintiff's riding on the hand car. International, etc., R. Co. *v.* Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

21. Aiding passenger to alight.—Where, in an action by a passenger for injuries received in alighting from a train, there was no evidence as to precautions which might have been taken by defendant in aiding plaintiff to alight, it was not error to refuse to charge that "passengers are not entitled to have every precaution to insure safety which is possible to suggest after an accident has occurred." Brodie *v.* Carolina Mid. R. Co., 46 S. C. 203, 24 S. E. 180.

22. Broken trolley wire.—Where in an action for injuries to a passenger on an electric street car, the evidence showed that the trolley wire broke, and was dragged on the back platform, and against a passenger, by the momentum of the car, whereby he was injured, an instruction to find for plaintiff, unless the jury should find "that defendant's employees could not by the exercise of reasonable care have prevented the trolley wire from being dragged up on the platform," was

Undue Prominence to Portions of Evidence.—Such instructions must not give undue prominence to certain portions of the evidence.[23]

Charge as to Breach of Duty Inferrable from Facts in Testimony.—Where plaintiff claims that his injuries were caused by a jerk of the car, and testifies as to the jerk and how he fell, etc., an instruction on negligence in jerking the car is properly given, though by plaintiff's own testimony there was nothing to show that the operatives of the car had breached their duty, and the doctrine of res ipsa loquitur did not apply, since the jury might infer breach of duty from the facts testified to by plaintiff.[24]

Charge as to Particular Duties of Employee Alleged to Have Been Negligent.—In a passenger's action for personal injuries the proper practice is for the court to instruct the jury as to the duty of the employee whose negligence is alleged, instead of giving general instructions as to the duty of carriers of passengers, the charge given being directly applicable to the facts of the case on trial.[25]

Directing Jury to Consider Circumstances—Evidence Conflicting.—An instruction in an action for injuries to a passenger directing the jury "to take into consideration all the circumstances surrounding the case," and specifically pointing out the circumstances, is not erroneous, though the evidence was conflicting.[26]

§ 3331. Ignoring Evidence or Facts in Case.—In a passenger's action for personal injuries, the charge of the court should not ignore evidence in the case or questions raised thereby or inference arising therefrom.[27] Hence, it is

error, there being no evidence to support such hypothesis. Baltimore City Pass. R. Co. *v.* Nugent, 38 Atl. 779, 86 Md. 349, 39 L. R. A. 161.

23. Undue prominence to portion of evidence.—In an action for the death of a passenger an instruction that in the application of the rules relating to liabilities of the defendant to the evidence before the jury, they might consider, in addition to the evidence of the facts and circumstances attending and immediately preceding the killing, any evidence, etc., might be calculated to give in some degree undue prominence to certain facts developed in the evidence which were therein referred to and called specially to the attention of the jury. International, etc., R. Co. *v.* Ormond, 62 Tex. 274.

Where the evidence was conflicting as to whether plaintiff was injured in getting off the train, or was subsequently injured at her own home, and the court charged that, if she was injured in getting off the train, the jury should find such damages as she may have sustained, a further instruction that, unless she was so injured, they should find for defendant, no matter what the other facts were, was not objectionable in laying too much stress on whether plaintiff was in fact injured in getting off the train, or in suggesting the weight of evidence upon that point. Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017.

24. Charge as to breach of duty inferrable from facts in testimony.—Setzler *v.* Metropolitan St. R. Co. (Mo.), 127 S. W. 1.

25. Charge as to particular duties of employee alleged to have been negligent.—Plaintiff was riding in a street car, and was injured by a blow from a stick in the hands of the driver, who was attempting to drive away some boys from the platform by striking at them with the stick. The court instructed the jury as to the duty of the car driver to his passengers, instead of giving general instructions as to the duty of carriers of passengers. Held that, being directly applicable to the facts of the case on trial, it was the proper practice. Allen *v.* Galveston City R. Co., 79 Tex. 631, 15 S. W. 498.

26. Directing jury to consider circumstances.—Evidence conflicting.—Chicago, etc., R. Co. *v.* Otto, 52 Ill. 416.

27. Ignoring evidence or facts in case.—In an action against a railroad company for injuries to a passenger, alleged to have been caused by the negligence of defendant in failing to have servants at a station to direct plaintiff to his train, so that he got on the wrong train, and, in attempting to leave it while in motion, slipped on a platform which defendant had negligently allowed to become greasy, there was evidence in support of both allegations of negligence, and defendant requested an instruction that, if there was no grease at the point where plaintiff fell, his fall was due to some other cause than grease, the verdict must be for defendant. Held, that this instruction was properly modified, so as to state that under such circumstances the verdict must be for defendant "as to this speci-

proper to refuse and error to allow a request to charge that there is no evidence of some element in the case, where there is slight evidence of it.[28] Thus, it has been held proper to refuse a request to charge that there was no evidence that the carrier was negligent in a given particular,[29] that there was no evidence that the conductor was negligent,[30] that there was no evidence of an external injury,[31] that there was no evidence that the platform was defective,[32] or that the platform had been used a great length of time,[33] that there was no evidence of want of proper equipment or appliances[34] and a charge that there was no evidence that the injuries were caused by the descent of the elevator,[35] that the descent

fication of negligence." If it had been given or requested it would have limited the question of defendant's negligence to the subject of grease on the platform which the court had no right to do under the evidence. Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

Duty to know passenger's peril.—There being evidence that a street car passenger was injured, while alighting, by a sudden increase in the speed of the car, it was proper to refuse to charge that it was not the conductor's duty to know of the passenger's position of peril at the time the speed of the car was increased. Birmingham R., etc., Co. *v.* Girod, 164 Ala. 10, 51 So. 242.

Whether injury caused by assault or previous physical effort.—A passenger was injured, as alleged, by an assault committed by the conductor. The chief injury was to the spine. There was evidence that it might have resulted from a violent twist or wrench. The passenger, when he attempted to board the train in motion, was swung around with his back to the guard rail, and regained his balance only by a violent effort. Held, that instructions ignoring the question whether such effort, rather than the assault, caused his injury, were erroneous. Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296.

28. Roscoe *v.* Metropolitan St. R. Co., 202 Mo. 576, 101 S. W. 32.

29. Where a passenger, suing for injuries, counts on negligence generally, or several kinds together, constituting general negligence, and the doctrine of res ipsa loquitur is applicable, it is improper to instruct that there is no evidence that defendant carrier was negligent in a given particular. Tobin *v.* Pittsfield Elect. St. R. Co., 92 N. E. 887, 206 Mass. 581.

30. The trial court is not bound to grant an instruction which assumes that there is no evidence of negligence on the part of the conductor of a street car toward a passener attempting to alight therefrom, and that the negligence, if any, was wholly that of the motorman, where the whole case as to the alleged negligence of the company was properly submitted to the jury, leaving them to determine whether, under all the evidence, the injury was caused by the negligence of its employees or any of them. Judgment, City, etc., R. Co. *v.* Svedberg, 20 App. D. C. 543, affirmed in 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935.

31. External injury.—Where it appeared that a passenger on a car was, by a collision, thrown against a door, the knob striking her in the back and leaving a black and blue spot the size of the palm of the hand, it was erroneous to charge that there was no evidence of an external injury. Lewis *v.* Portland R., etc., Co., 117 Pac. 423, 59 Ore. 314.

32. Defect in platform.—The petition alleged that the platform was not safe nor long enough, and that there was no platform where plaintiff's wife got off. There was no evidence that the platform was defective, but there was evidence that the steps of the car were just beyond the end of the platform. The company requested a charge that there was no evidence of any defect in the platform. Held, that there was no error in refusing to give the charge. Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

33. In an action for injuries sustained by a passenger after alighting from a train at a station by slipping down an incline on the platform leading to the waiting room, a requested instruction which ignored entirely the fact that the platform upon which the injury occurred had been used for a great length of time by passengers in going to and from the train, and which made the liability of the railroad company depend upon whether or not the appearance of the passway taken by the passenger was such as to mislead her and induce her to go that way, was properly refused. Judgment 103 S. W. 695, affirmed in Missouri, etc., R. Co. *v.* Criswell, 101 Tex. 399, 108 S. W. 806.

34. Want of equipment or appliances.—In an action for injuries to a passenger, an instruction that there is no evidence that defendant failed to provide proper means to hold the grip of the cable train firmly attached to the cable, and to stop the same when not attached thereto, was properly refused, where there was slight evidence of the first element of negligence named. Roscoe *v.* Metropolitan St. R. Co., 101 S. W. 32, 202 Mo. 576.

35. Elevator accidents.—In an action for injuries to plaintiff while she was a passenger on an elevator, the evidence showed that there was no operator on

of the elevator was due to any defect in the machinery,[36] or that the lever of the elevator was caused to move by jarring caused by plaintiff's stepping into the elevator.[37] And it has been held proper to refuse a request which disregarded an inference that a Pullman porter was the agent of the railroad;[38] or which disregarded an inference that the car was in motion when plaintiff undertook to board it.[39] Also it has been so held as to a request which omitted any reference to the injured passenger's going on to the platform preparatory to alighting from the car.[40]

the elevator; that the door was open and plaintiff and a companion stepped into the elevator, not knowing of the absence of the operator; that the elevator began immediately to descend; that plaintiff was alarmed for her safety and attempted to get out of the elevator and was injured. Held, that the court properly refused to instruct the jury that there was no evidence to show that the injuries complained of by plaintiff were caused by the descent of the elevator. Cooper *v.* Century Realty Co., 224 Mo. 709, 123 S. W. 848.

36. In an action for injuries to plaintiff while a passenger on an elevator, there was evidence to show that it was an hydraulic elevator; that the elevator and the counterweights balanced; that the apparatus around the lever operating the elevator to hold and control it had been removed or rendered inoperative; that in order to stop the elevator and keep it at a standstill the lever must be constantly kept in motion. Held, that a requested instruction that there was no evidence that the descent of the elevator was due to any defect or defects in the machinery by which said elevator was controlled was properly refused. Cooper *v.* Century Realty Co., 123 S. W. 848, 224 Mo. 709.

37. In an action for injuries while a passenger on an hydraulic elevator, there was evidence that the car and its counterweights and the hydraulic pressure were evenly balanced, and that to keep the car stationary, the operating lever had to be kept in constant motion back and forth; that the elevator was stationary when plaintiff and another person stepped into it; that there was no operator in the elevator and that immediately upon their stepping into it it began to descend. Held, that a requested instruction that there was no evidence that the lever of the elevator, on account of any jarring caused by plaintiff and her companion stepping into the elevator, was caused to move sufficiently to allow the elevator to descend, or that the lever moved at all on account of such jarring, was properly refused. Cooper *v.* Century Realty Co., 123 S. W. 848, 224 Mo. 709.

38. Where, in an action for injuries to a passenger while in a Pullman car, caused by the negligence of a porter of the car, there was nothing to show that the porter was not the servant of the railroad company, and he might have been the servant of the railroad company, or employed and controlled jointly by it and the Pullman Company, the refusal to charge that the jury could not find that the railroad company's agents were guilty of any negligence proximately causing the injuries was proper. Louisville, etc., R. Co. *v.* Church, 155 Ala. 329, 46 So. 457.

39. Disregarding inference that car in motion.—In an action against a carrier for injuries received while plaintiff was attempting to board a car, there was evidence that plaintiff tried to catch the first car, and was injured by the last car catching his leg. Held, that a request to charge that plaintiff can not recover unless the jury are satisfied that, when the train was signaled to go forward, plaintiff was in the act of boarding the car and was injured by the train starting while he was in that position, was properly refused as disregarding the inference from the evidence that the car was in motion when plaintiff undertook to board it, and as disregarding the duty resting on the conductor to know before causing the train to be started that plaintiff was not in the act of getting aboard thereof, provided that permission had been granted to plaintiff to leave the car temporarily, as claimed by him. Birmingham R., etc., Co. *v.* Jung, 161 Ala. 461, 49 So. 434, 18 Am. & Eng. Ann. Cas. 557.

40. In an action for injury to a passenger, the negligence charged was that the conductor or other trainman failed to announce that a stop the train was then making was not at a station which had been called. The court charged that, if the conductor or other trainman called a station and very soon thereafter the train stopped, and such announcement and stopping were reasonably calculated to lead an ordinarily prudent man to believe the train at the station, and if plaintiff did so believe and attempted to alight, and in so doing, without negligence, fell from the trestle, then defendant was liable. Held, that the instruction was erroneous as omitting any reference to plaintiff's position on the platform and its effect on his conduct in stepping off, also as omitting any reference to testimony in regard to announcement by the conductor to passengers inside the car that the stop was not at the station, and

§ 3332. Assuming Facts.—A charge in a passenger's action for personal injuries which assumes the existence of facts not in the case is error.[41] But a fact about which there was no real dispute and which was conceded at the trial may be assumed, although the general denial meets every fact stated in the petition in issue.[42]

§ 3333. Invading Province of Jury.—A charge in a passenger's action for personal injuries, which invades the province of the jury, taking from it the determination of questions of fact, is error. It is error for the judge, on the trial of an action to recover damages against a railroad company for personal injuries occasioned by the running and operation of its trains, to charge the jury that acts not falling within the class below indicated constitute negligence. Only the commission of those acts which are prohibited by statute, or the omission to do those things which are prescribed by statute, constitute, under such circumstances, negligence per se. Whether the commission of acts other than those so inhibited, or the omission to perform acts other than those required, constitutes negligence, is a question of fact, and must be determined by the jury, and not by the judge.[43] A charge in such action which takes from the jury the question

as withdrawing the pivotal question of the proximate cause of plaintiff's injury whether he had placed himself where he could not have heard the announcement if it had been given loudly enough to be heard by those inside the car. Wagner *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 171.

41. Assuming facts.—Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425. See ante, "In General," § 3330.

In an action for injuries to a passenger in a collision caused by the backing of cars against a standing caboose in which plaintiff was sitting, plaintiff testified that he obtained permission to ride on the caboose from the conductor, who said, "If you will wait, I will pull the train a little further up," to which plaintiff replied: "No. Much obliged. I will not put you to that trouble," after which, while the conductor was facing him, he went into the caboose. Defendant introduced a written statement signed by plaintiff shortly after the injury, in which the conductor, after having given him permission to ride in the caboose, told him "to wait a few minutes, and he would pull the caboose up to the station." Plaintiff also testified that when he signed the statement he was in great pain, and did not take time to read it. Held, that an instruction that plaintiff "admits that he asked the conductor if he could ride on the train * * * and was told by him that he could, but to wait until he got through his work, and he would pull the caboose up to the station," was error, as implying that plaintiff admitted that he was forbidden to enter the caboose until it was drawn up to the station, excluding from the jury plaintiff's right to have them pass upon his testimony, and adopt his version if found correct. Miller *v.* Atlanta, etc., R. Co., 55 S. E. 439, 143 N. C. 115.

Failure to stop in response to signal.—Where the uncontradicted evidence showed that the bell of a street car was rung as a signal by one desiring to get off, the court could properly assume that the defendant company was guilty of negligence in failing to stop in response to the signal. Dallas Rapid Trans. Co. *v.* Payne, 98 Tex. 211, 82 S. W. 649, reversing 78 S. W. 1085.

Assuming defendant negligent.—An instruction that, "if the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, as charged in the declaration, or in either one of the counts thereof, then you should find the defendant guilty," does not assume that the defendant was negligent. Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406.

42. Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

43. Invading province of jury.—Central etc., R. Co. *v.* McKinney, 116 Ga. 13, 42 S. E. 229; Atlanta, etc., R. Co. *v.* Bryant, 110 Ga. 247, 34 S. E. 350; Alabama Mid. R. Co. *v.* Hatcher, 116 Ga. 791, 43 S. E. 49; Wright *v.* Georgia R., etc., Co., 34 Ga. 330; Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120; Holly *v.* Atlanta, etc., Railroad, 61 Ga. 215, 34 Am. Rep. 97; Central R., etc., Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397.

When, by statute, a specific duty is imposed on a railway company, in regard to the running and management of its train, a breach of such duty, by which one receives personal injury, may be declared, in a charge of the court, as matter of law, to be wrongful or negligent. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

of what constitutes negligence,[44] of what constitutes extraordinary diligence and ordinary care,[45] or the question whether the carrier is guilty of negligence proximately causing the plaintiff's injury,[46] is error. Also a charge which takes from them the question as to the condition of the roads,[47] whether the employees should have seen stones piled near the track,[48] whether the failure to open the end door of the car was negligence,[49] whether it was negligence to keep locked the closet in the passenger coach,[50] whether the failure to stop the train for plaintiff to alight was negligence,[51] or whether plaintiff's fall was caused by the moving of a stool placed for passengers to alight on,[52] is error and requires a reversal. But a portion of an instruction which is neither pertinent to the balance of the charge nor to any evidence in the case and which takes no question of fact from the jury, does not necessarily require a reversal as it is a mere abstraction.[53]

44. What constitutes negligence.—It is error for the court to charge the jury that certain enumerated facts, if proven, would constitute negligence. Negligence is a question of fact of which the jury are to judge from the evidence, and not a question of law. Montgomery, etc., R. Co. *v.* Boring, 51 Ga. 582.

45. Extraordinary care.—Stiles *v.* Atlanta, etc., Railroad, 65 Ga. 370.

46. Whether carrier's negligence proximate cause.—Mills *v.* Missouri, etc., R. Co., 59 S. W. 874, 94 Tex. 242, 55 L. R. A. 497.

47. In Texas, etc., R. Co. *v.* De Milley, 60 Tex. 194, the court instructed the jury as to the duty of a railway company to construct its road with good and suitable material, and to maintain it in good order, and informed the jury that a failure to do so was negligence. This was not an invasion of the province of the jury; for the whole question as to the condition of the road was left to the finding of the jury.

48. In an action against a railroad company for injuries to a passenger caused by the negligence of defendant in allowing stones to be piled so near the track as to strike plaintiff's arm, the defense was contributory negligence on plaintiff's part in allowing his arm to protrude from the window of the car. Held, that an instruction that plaintiff was entitled to recover if the servants in charge of the train were in a position to see the pile of stone, or might have seen it, by the use of ordinary care, and could thereby have prevented the injury by stopping the train, and failed to do so; and that it was immaterial whether said servants did see the stones, it being their duty to do so, was erroneous, since it was for the jury to say whether the servants should have seen the stones; and for the further reason that it ignored the evidence of contributory negligence. Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

49. Failure to open end door of car.—In an action for injury to a passenger received while attempting to enter the middle door of a car caused by falling into a space between the door and the station platform, an instruction charging that if defendant could have opened the end doors of the car and taken in the passengers in safety, but failed to do so because it was not paying attention to the safety of the passengers, its failure to do so would be negligence was erroneous because of the statement that the failure to open the end doors would be negligence, since the most the court would have been justified in saying, even if there had been evidence touching the subject, was that it would be possible for the jury to find negligence on the evidence. Plummer *v.* Boston Elev. R. Co., 84 N. E. 849, 198 Mass. 499.

50. Locking closet in passenger coach.—Thus it is for the jury to determine whether it was negligence to keep locked the closet in the passenger coach, leaving no place for passengers to attend to calls of nature, and for all of the company's servants to remain away from the coach so that the closet could not be unlocked, and to stop the coach over a cut twenty feet deep without notice to passengers of the danger to which they would be exposed if they attempted to go out. Wood *v.* Georgia R., etc., Co., 84 Ga. 363, 10 S. E. 967.

51. Failure to stop train.—An injury having occurred while plaintiff was seeking to leave a moving train, after being informed that it was not a passenger train, under an order from the agent in charge to get off, it was error to charge that before putting a person off the train it must be stopped, or the railroad would be responsible for damages. The existence of negligence is for the jury, not the court to decide. Southwestern Railroad *v.* Singleton, 67 Ga. 306.

52. Movement of stool.—St. Louis, etc., R. Co. *v.* Johnson, 97 S. W. 1039, 100 Tex. 237.

53. In an action against a street railway company, the court charged that if the conductor was engaged in collecting fare or making change for a passenger, and, after the car had stopped, and before starting the same, was in a position where he could see the rear entrance of

Charging Conclusions of Fact as Conclusive Instead of Prima Facie Evidence of Negligence.—An instruction that, "when the track and machinery are in perfect condition and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars, and whenever a car leaves the track and goes down an embankment it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated," is erroneous, as making such an accident conclusive, instead of prima facie, evidence of negligence, and the error is not cured by afterwards stating that these conditions "presumptively prove" negligence.[54]

§ 3334. Harmless Error.—Immaterial or harmless error in the charge in a passenger's action for personal injuries is not ground for reversal before a party to such action can complain of error in the charge therein, it must be one prejudicial to his rights.[55] For instance, it has been so held as to harmless error in a charge as to the degree of care required of the carrier,[56] or of the

the car, and, before giving the signal to start, looked to see if there were any other persons about to board the car, and exercised reasonable care under the circumstances, and did not see plaintiff approaching the car or attempting to board the same, he was not negligent. Held that, while the matter relating to the making of change for a passenger was not pertinent to the balance of the instruction, nor to any evidence in the case, the instruction was not objectionable as taking from the jury the question as to what is and what is not a proper time to take up fares. Foster *v.* Seattle Elect. Co., 76 Pac. 995, 35 Wash. 177. See ante, "Applicability to Evidence," §§ 3330-3332.

54. Charging conclusions of fact as conclusive instead of prima facie evidence of negligence.—Pattee *v.* Chicago, etc., R. Co., 5 Dak. 267, 38 N. W. 435.

55. Harmless error.—Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278, 18 N. W. 17.

56. Defining degree of care.—Defendant carrier can not complain of an instruction erroneously defining the duty which he owed to a passenger, where the plaintiff was entitled to an instruction to the effect that the injury was the result of defendant's negligence. Felton *v.* Holbrook, 56 S. W. 506, 21 Ky. L. Rep. 1824.

An instruction that the law "wisely" requires extraordinary diligence on the part of railroads and their employees in transporting passengers, etc., and that for slight negligence they are and ought to be responsible, is not such error as requires a reversal. Central R. Co. *v.* Thompson, 76 Ga. 770.

Omission to charge that negligence of driver that of carrier.—It is the duty of a carrier by stage to employ a competent driver, and of the driver to use the "utmost care" for the safety of passengers; and an omission to charge, in an action for personal injuries, that the negligence of the driver is that of the carrier, can not prejudice the carrier. Gallagher *v.* Bowie, 66 Tex. 265, 17 S. W. 407.

As to duty of conductor and motorman.—In an action against a street railway company, a charge, without further qualification, that the duty of the conductor and motorman towards the passengers on the car is to exercise the highest degree of care consistent with the proper discharge of all their other duties, while incorrect, was not reversible error, where there was no evidence to the effect that the injury to plaintiff was caused by the fact that the conductor or motorman was engaged in the performance of another duty, and therefore could not look out for plaintiff. Foster *v.* Seattle Elect. Co., 76 Pac. 995, 35 Wash. 177.

Omission of phrase "must exercise to that end a reasonable degree of skill."—In an action against a railroad company for injuries received by a passenger on a mixed train through the alleged negligence of the trainmen in coupling the parts of the train, the court instructed, in the lanuage of Civ. Code, § 2100, that "a railroad carrying passengers paying fare must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose," but omitted the concluding words of the section, "and must exercise to that end a reasonable degree of skill." Held, that the omission did not injure defendant, as the omitted part simply added to the requirement of diligence, skill in using it, and the instruction as given did not ignore or take from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence. Fisher *v.* Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894.

Under Georgia Code.—In an action by a passenger against a railroad company for personal injuries, it is harmless error to define the care which the company should exercise as "an extra high degree

passenger.[57] Thus, where, in an action against a street railway company for injuries to a police officer while regulating the movement of cars and vehicles at a street corner, the court submitted the case to the jury on ordinary negligence of the company, it could not complain of the failure to charge that there was no evidence warranting a finding that the company was guilty of willful negligence.[58] Other instances will be found in the footnotes.[59]

Harmless Modification of Request.—Thus, an erroneous modification added by the court to a required instruction which is not clear but which clearly could not prejudice the party asking it, is not grounds for reversal.[60]

Hypercritical Criticism.—Where the court instructed that it was the motorman's duty to stop the car to avoid injury to decedent after his peril was apparent, and the plaintiff asked an instruction as to the failure of the motorman to stop or "slow down," a criticism of the court's instruction will be held hypercritical.[61]

§§ 3335-3336. Curing Error—§ 3335. Obviating Error by Other Instructions.—Where an instruction in a passenger's action for personal injuries standing alone is defective but that defect is fully supplied by another instruction, it will not be supposed that the jury disregarded the latter, but the error in the first will be deemed to have been obviated by the latter. It has been so held as to error in an instruction as to the presumption arising from the fact of plaintiff's injury,[62] as to the effect of want of skill and care on part of the con-

of care," though not the definition of "extraordinary diligence" as given by the Code. Central, etc., R. Co. *v.* Johnston, 32 S. E. 78, 106 Ga. 130.

57. Where, in an action for injuries to a police officer boarding a street car while in the performance of his duty of regulating the movements of cars and vehicles at a street corner, plaintiff claimed that it was necessary for him to board the car in consequence of the negligence of the operator of the car, and the court charged that plaintiff could not recover, unless he was in the exercise of due care, the refusal to charge that the street railway was required to do with regard to a trespasser was to abstain from wantonly exposing him to danger was not reversible error. Ahern *v.* Boston Elev. R. Co., 97 N. E. 72, 210 Mass. 506.

58. Ahern *v.* Boston Elev. R. Co., 210 Mass. 506, 97 N. E. 72.

59. Where, in an action against a street railway for injury, it was determined by the jury that plaintiff had no time to descend from the steps of the car, the refusal to instruct as to a verdict in case he had time was immaterial. Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278, 18 N. W. 17.

Rate of speed.—In an action against a railroad company for injuries received by a passenger in consequence of the derailment of the train, the preponderance of the evidence showed that at the place of the accident the ties were rotten, and the spikes loose, so as to endanger a train running over it rapidly, and the jury were instructed that plaintiff, in order to recover, must prove that the train was run at a high and reckless rate of speed over a track where defendant had negligently suffered the ties to become decayed until the spikes were loose. Held, that it was harmless error to instruct the jury, further, if the train was being run at a speed so high and dangerous as to become a negligent management of the train, and the accident resulting in the injury to the plaintiff was in consequence, then the jury should find for plaintiff. Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960.

60. Modification.—In an action for injuries to a passenger in a railroad collision, the defendant requested an instruction that the fact that the switch at which the car left the track was not locked did not constitute negligence if the purpose of the lock was not to prevent spreading of the rails, which in fact caused the car to leave the track. To this the court added, "if defendant used due care and diligence to otherwise fasten and secure the switch." Held, this modification was not prejudicial when there had been a prior instruction that, if defendant had negligently failed to secure the switch, and the accident was liable to plaintiff for the injuries sustained. Flanagan *v.* Baltimore, etc., R. Co., 83 Iowa 639, 50 N. W. 60.

61. Hypercritical criticism.—Hoffman *v.* Cedar Rapids, etc., R. Co. (Iowa), 139 N. W. 165.

62. Obviating error by other instructions.—The defect in an instruction, in an action for injuries to a passenger while boarding a train, that, if the passenger fell from the train by reason of the moving thereof and was injured thereby, the presumption was that the passenger received the injury through the negligence

ductor which pretermitted the effect of plaintiff's negligence,[63] and as to error in omitting the effect of plaintiff's going onto the platform of the car preparatory to alighting.[64] Also it has been so held as to error in using the terms "sufficient accommodations" for "reasonable accommodations," [65] and as to error in making the passenger's intelligence and experience the standard for determining whether the misconduct of the conductor was "reasonable cause" for the act of the passenger.[66] It has been held, however, that where an instruction imposes

of the carrier, was obviated by an instruction that if the passenger was thrown to the ground by the movement of the train, and the carrier was not negligent in starting the train the time it did, there could be no recovery, unless the movement of the train was negligent and unnecessary in the handling thereof. Choctaw, etc., R. Co. *v.* Hickey, 81 Ark. 579, 99 S. W. 839.

63. In an action against a railroad company for injury to a passenger, it appeared that the train was stopped before the car in which plaintiff was riding reached the depot platform, and she was required by the conductor to jump to the ground, resulting in injury. Held, that an instruction by the court to the jury in such a case, to the effect that, if the want of proper skill or care on the part of the conductor caused the injury, the defendant would be liable, was not erroneous, taken in connection with another instruction to the effect that, if the plaintiff was guilty of negligence in jumping from the car, she could not recover. Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441, 92 Am. Dec. 322.

64. Omitting effect of plaintiff's going onto platform preparatory to alighting.—In an action for injury to a passenger, the negligence charged was that the conductor or other trainman failed to announce that a stop the train was then making was not at a station which had been called. The court charged that, if the conductor or other trainman called a station and very soon thereafter the train stopped, and such announcement and stopping were reasonably calculated to lead an ordinarily prudent man to believe the train at the station, and if plaintiff did so believe and attempted to alight, and in so doing, without negligence, fell from a trestle, then defendant was liable. The instruction omitted any reference to plaintiff's position on the platform and its effect on his conduct in stepping off, also any reference to testimony in regard to announcement by the conductor to passengers inside the car that the stop was not at the station, and withdrew the question of the proximate cause of plaintiff's injury whether he had placed himself where he could not have heard the announcement if it had been given loudly enough to be heard by those inside the car. It was held that the instruction was not cured by another instruction that it might be that plaintiff heard the station called and still not be entitled to recover, in that the statute (Revisal 1905, § 2628) provides that, if a passenger shall be injured while on the platform in violation of regulations posted in the car, the railroad shall not be liable, if there was sufficient room inside, that it was plaintiff's duty to be inside, and that, if he was on the platform and heard the station called, yet, if the conductor announced that the stop was not at the station loud enough for those inside to hear, and plaintiff being outside did not hear, then defendant was not liable; such instruction having been given on the independent contention advanced by defendant that, in compliance with the statute, notices warning passengers not to ride on the platform had been posted, and having no relation to the erroneous instruction. Wagner *v.* Atlantic, etc., R. Co. (N. C.), 61 S. E. 171.

65. "Sufficient" accommodations "reasonable" accommodations.—In an action by a passenger against a railroad company for injury, caused by the negligent and wanton breach of duty by the defendant to provide for the safety of its passengers, an instruction requiring the carrier to use "sufficient" accommodations, instead of "reasonable" accommodations, as required by statute, was not erroneous, where from another instruction given it was manifest that the court did not intend to convey to the jury by use of the word "sufficient" any meaning beyond that intended by "reasonable" as used in the statute, and in that connection read to the jury the section of the statute requiring railroad companies to furnish "reasonable" accommodations. Anderson *v.* South Carolina, etc., R. Co., 61 S. E. 1096, 81 S. C. 1.

66. "Reasonable cause" and "intelligence experience of passenger as" standard.—Where the charge of the court was conflicting in that the jury were charged that the company was liable if the misconduct of the conductor gave the passenger "reasonable cause" to jump from the train, and also that reasonable cause was a cause sufficient to have induced the act, having regard to the passenger's intelligence and experience in life, and his situation and surroundings at the time, the company being liable only for the natural and probable consequences of the misconduct of the conductor, who was not chargeable with

too high a degree of diligence on the carrier, the fact that the judge in another portion of his charge gave a correct statement of the law upon the subject does not necessarily cure the error complained of, the judge having failed to call the jury's attention to the mistake he made in defining extraordinary diligence.[67]

Request Covered by Other Instructions.—Where in a passenger's action for personal injuries a request for an instruction, which might have been given, is covered by other instructions given in the case, its refusal is not reversible error. It has been so held as to a refusal to instruct that plaintiff has the burden of proof of the carrier's negligence,[68] and as to a refusal to charge that if the sole cause of a derailment was a cause other than the one alleged there could be no recovery.[69] But a refusal to charge as to the care and diligence the carrier is required to use to keep its grip irons and brakes free from defects is not cured by a charge relating to negligence in the use of such appliances as they had.[70]

Request Omitting Reference to Acts of Negligence Relied on.—In a passenger's action for personal injury a requested charge which omits any reference to the specific acts of negligence, alleged and relied on, although it states a sound proposition of law, is subject to criticism, and where the charge of the court is explicit upon the subject of the defendant's negligence, the refusal to give such request can not be prejudicial. Thus, refusal to instruct that if the plaintiff was a passenger on defendant's log train, and the accident which caused his injury occurred while the train in question was being operated in the usual manner in which log trains are operated upon well-managed railroads, and the train was such a train as is usually run for the purpose of carrying logs on well-managed railroads, the plaintiff could not recover, was not prejudicial error, in view of explicit instructions given on defendant's negligence, and the jury being

knowledge of the passenger's "intelligence and experience in life," the error was not cured by an instruction requiring the cause to be such "as reasonably to have induced a man of ordinary prudence to believe his life in danger, or that he was in danger of great bodily harm," nor by an instruction that the company was not liable unless the misconduct of the conductor and the others "was such as to convince a reasonable man that the threats would be carried into immediate execution." Spohn *v.* Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880.

67. Florida, etc., R. Co. *v.* Lucas, 110 Ga. 121, 35 S. E. 283.

68. Burden of proof of negligence.—In an action for injuries to a railroad passenger by the derailment of a coach, it is not reversible error to refuse to instruct that negligence was the gist of the action, and plaintiff had the burden of proving it by a preponderance of the evidence, where the court charged that defendant was not required to show want of negligence, but plaintiff must establish her case by a preponderance of the evidence, and, unless she showed by a preponderance that she was injured by defendant's negligence, the verdict should be for it. Southern Pac. Co. *v.* Hogan, 108 Pac. 240, 13 Ariz. 34, 29 L. R. A., N. S., 813.

69. Cause of derailment.—Where, in an action for personal injuries to a passenger occasioned by the derailing of a train, the evidence is conflicting as to how the accident occurred, whether from the rotten condition of the ties, or from ice which had been forced by the high waters of a creek upon or near the track, and had either come in actual contact with the train, or occasioned some disturbance which produced the accident, and the court charges that no recovery can be had unless the accident arose from negligence in failing to repair, it is not error to refuse to charge that, if the ice was the sole cause of the accident, there could be no recovery, although such a charge might have been given. Andrews *v.* Chicago, etc., R. Co., 86 Iowa 677, 53 N. W. 399.

70. Where, in an action for injuries on a street car, the plaintiff is entitled to an instruction requiring defendant to use the utmost practicable care and diligence with reference to its cars, including its brakes and grip irons, for the safety of its passengers, and entitling him to recover if the injuries complained of were received by reason of the defective grip or brakes, without fault on plaintiff's part directly contributing thereto, the refusal of such instruction was not cured by an instruction relating to the alleged negligence of the persons in charge of the trains in the use of such appliances as they had, and not to negligence in furnishing or keeping the appliances in repair. Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93.

told that if the logs were properly loaded, or were liable to fall off when so loaded, plaintiff could not recover.[71]

Subsequent Correct Instruction Given at Request of Party Complaining.—In an action for damages for injuries to a passenger caused by the derailment of a car, an instruction that, "before defendant can excuse itself it must show * * * that its track and machinery and appliances were the best of the kind, and in perfect condition," though objectionable without qualification, can not be complained of by defendant, where at its request, the law on the same subject is afterwards correctly stated to the jury.[72]

§ 3336. Subsequent Explanation of Charge.—In a passenger's action for personal injuries an error in an instruction as to the cause of the accident may be cured by a subsequent explanation which removes all ground for the objection;[73] as, for instance, where the injuries complained of were received in a derailment.[74]

§ 3337. Existence of Relation of Carrier and Passenger.—The charge, in an action for injuries to a passenger, must be explicit as to whether the relation of passenger and carrier existed, and the jury must fully understand that plaintiff can not recover if he was not a passenger.[75] In other words, the charge must require the jury to find that the person injured was a passenger. This need not be done in express terms where finding of facts which would establish the relation of passenger and carrier are required.[76] For the same reason, the charge

71. Request omitting reference to acts of negligence relied on.—Greenfield *v.* Detroit, etc., R. Co., 95 N. W. 546, 133 Mich. 557.

72. Subsequent correct instruction given at request of party complaining.—Eureka Springs R. Co *v.* Timmons, 51 Ark. 459, 11 S. W. 690.

73. Subsequent explanation of charge.—Harriman *v.* Reading, etc., St. R. Co., 173 Mass. 28, 53 N. E. 156.

74. Injury received in derailment.—At the trial of an action against a street railway corporation for personal injuries occasioned to the plaintiff by a car running off the track, the judge instructed the jury: "If you say that either the track was not in proper condition, or the car was not in proper condition, that it was not being run, in view of the track and the car, at a proper rate of speed, and that that was the negligence that caused this accident, then the plaintiff has made out his right to recover." Upon objection by the defendant, the judge said: "Well, I did not mean to say just that. I meant to say that I want the jury to understand that the running off the track must have been due to some one or the other of those different things. Suppose the track was not perfect, or the car was not perfect, or the speed was too rapid, yet if this car did not leave the track because of some of those things, then I do not mean to say that you would say the plaintiff had the right to recover. It must be due to some one or the other of those things, as I said to you. It must be due to some imperfection, and that imperfection must be due to some negligence on the part of the person who had charge of the track, or the car, or the running of the car." Held, that the defendant had no ground of exception. Harriman *v.* Reading, etc., St. R. Co., 173 Mass. 28, 53 N. E. 156.

75. Existence of relation of carrier and passenger.—Lockwood *v.* Boston Elev. R. Co., 200 Mass. 537, 86 N. E. 934, 22 L. R. A., N. S., 488.

76. In an action for injuries to an alleged passenger, an instruction setting out facts which, if established, would authorize a verdict for plaintiff, is not erroneous because not in terms requiring a finding that he was a "passenger," where it requires finding of facts which would establish the relation of passenger and carrier. East St. Louis, etc., R. Co. *v.* Zink, 82 N. E. 283, 229 Ill. 180.

Where, in an action against a railroad for wrongful death resulting from injuries received by deceased in a collision occurring after the train whereon he was a passenger had left the station to which he had purchased transportation, it was conceded that up to the time of reaching the station he was a passenger, an instruction, requiring the jury to find for paintiff if they believed that deceased at the time of the accident was a passenger on defendant's train, and further charging that if they believed, from all the facts and circumstances in evidence, that deceased determined to continue his journey to the station whereat he resided, and remained on the train for that purpose, the fact that he had only paid his fare to the former station was no defense to the suit, sufficiently required the jury to find that deceased was a passenger at the time of the accident. Anderson *v.* Missouri Pac. R. Co., 93 S. W. 394, 196 Mo. 442, 113 Am. St. Rep. 748.

need not expressly negative the defense that plaintiff was not a passenger.[77] Thus, where, in an action against a carrier, the declaration was drawn on the theory that the relation of passenger and carrier existed, and stated a good cause of action, an instruction that if the jury believed the defendant guilty of the negligence charged in the declaration, and that the injury resulted therefrom, plaintiff was entitled to recover, was not erroneous, on the ground that it did not require the jury to find that plaintiff was a passenger.[78] So, also, the question of the existence of the relation of passenger and carrier is not ignored in an instruction that the court instructs the jury that if they find from the evidence that the plaintiff has made out his case by a preponderance of the evidence, as alleged in the certain named counts of the declaration, or in either of said above named counts, then the jury should find the defendant guilty.[79] And where an instruction requires a finding that plaintiff was on the train with the knowledge and consent of the agent in charge of it, it can not be objected that it does not submit the question whether he was rightfully on the train.[80]

What Constitutes Relation.—Submission of the question whether the injured person was an actual or intending passenger is erroneous without instructions as to what constitutes such relation.[81]

The charge in respect to the commencement and termination of the relation need not be an exhaustive statement of all possible instances. Where the charge correctly states the law relevant to the facts of the case, it is not objectionable.[82]

Signal to Stop Street Car.—An instruction that street car company owed only ordinary care until a person had given a signal of his intention to become a passenger is improperly modified by adding, "provided the person is not attempting to board at a usual stopping place," as making the necessity to stop at all crossings absolute, whether there was any signal or not.[83]

Attempting to Board Car.—But an instruction defining a passenger as "one who is boarding a car, or who is attempting to board a car, or at the station of a company operating a car, for the purpose of being carried on the cars from one point to another," is erroneous, as is also a statement therein that "he becomes a passenger when, with the intention of boarding a train, he attempts to board for the purpose of riding."[84]

Boarding Moving Street Car.—In an action for injuries while boarding a street car, a charge that, where a person goes towards a street car after it has

77. Alabama, etc., R. Co. *v.* Dear, 87 Miss. 339, 39 So. 812.

78. Southern R. Co. *v.* Cullen, 77 N. E. 470, 221 Ill. 392, affirming judgment 122 Ill. App. 293.

79. Petersen *v.* Elgin, etc., Tract. Co., 142 Ill. App. 34, judgment affirmed in 238 Ill. 403, 87 N. E. 345.

80. Whitehead *v.* St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409.

81. What constitutes relation.—In action for death of a beer wagon driver attempting to board street car for the alleged purpose of lodging a complaint at the car barns, the outcome of an altercation, submission of question whether decedent was an actual or intending passenger, without instructions as to what constituted such, held error. Geiger *v.* Pittsburg R. Co., 83 Atl. 367, 234 Pa. 545.

82. Creation and termination.—While the charge of the court touching the continuance and termination of the relation of passenger and carrier between the parties may not have included all possible cases, either as to the commencement of such relation or its termination, yet, as applied to the facts of the case on trial, there was no error in charging that, if the plaintiff boarded one of the cars of the defendant and paid her fare, under the law she became a passenger of the defendant, and the relation of passenger would exist from the time she boarded the car until she had reached the place of her destination and had been allowed a reasonable time and opportunity to alight from the car in safety, and that during the continuance of such relation, the law imposed upon the company the duty of exercising for the protection of her person extraordinary care. McBride *v.* Georgia R., etc., Co., 54 S. E. 674, 125 Ga. 515.

83. Signal to stop street car.—Wise *v.* Columbia R., etc., Co., 77 S. E. 924, 94 S. C. 254.

84. Attempting to board car.—Alabama, etc., R. Co. *v.* Bates, 149 Ala. 487, 43 So. 98.

stopped at a regular stopping place and takes hold of it in the process of entering it, he is a passenger, is deficient, in not stating that if the person undertook to take hold of the car after it had started, and without having been seen either by the motorman or conductor, he was not a passenger.[85] Requests that if plaintiff approached the car somewhat from the rear, and did not come into view of the conductor, or any competent person who might have been in the rear vestibule and on the lookout for passengers, until after the signal to start had been given, he could not recover, though he took hold of the car before it had started, unless defendant was negligent in not stopping the car the second time, or stopped it improperly, were properly refused, since they did not exclude the motorman's having seen him.[86]

Payment of Fare[87]**—Riding on Freight Train.**—The charge in an action for injuries received while riding on a freight train should submit the question whether the carrier had waived a rule requiring persons riding on freight trains to have permits, where there is evidence to warrant it,[88] but should not authorize a presumption that a brakeman had authority without knowledge of the conductor to receive fares for transportation, certainly where there is evidence tending to show that the plaintiff knew the brakeman was acting without authority.[89] Such instruction is erroneous for excluding from consideration evidence that such course of conduct was difficult to suppress, and was pursued in spite of efforts to suppress it.[90]

Reasonable Time to Alight.—In an action against a railway company for injuries to a passenger while alighting from a train at a station, an instruction that it was the duty of the company to stop its train long enough for the passengers to alight, and if plaintiff was a passenger, and the train stopped at the station, and before he had a reasonable time to get off and while he was getting off the train was started, the company was negligent, was not bad for failing to expressly negative the defense that plaintiff was not a passenger.[91]

Passenger Remaining on Train after Departure from His Destination.—In an action against a railroad company, as a common carrier of passengers, for personal injuries, there being evidence from which the jury might have found that the relation of common carrier had ceased before the accident,

85. Boarding moving street car.—Payne *v.* Springfield St. R. Co., 203 Mass. 425, 89 N. E. 536.

86. Payne *v.* Springfield St. R. Co., 203 Mass. 425, 89 N. E. 536.

87. Credibility of witnesses.—See post, "Credibility of Witness," § 3361.

88. Riding on freight train.—In an action for injuries received while riding on defendant's freight train, plaintiff testified that at one time he knew permits were required, but did not know that imperative instructions were given to require such permits; that he frequently rode without them, and had so ridden when defendant's train master was aboard; that others rode without them; that he had not obtained a permit for a year and a half before the accident, and had never been refused passage. Others testified that it was customary to ride without them on payment of fares. The fares and mileage collected were reported to the company. Held to warrant instructions as to whether the company had waived a rule requiring persons on freight trains to have permits. Greenfield *v.* Detroit, etc., R. Co., 95 N. W. 546, 133 Mich. 557.

89. In an action for personal injuries, the court instructed that if a carrier of passengers was using for its purposes the kind of freight train which plaintiff boarded, and if plaintiff paid his fare to a brakeman, and was authorized by him to board the train, though the brakeman had no express authority, and if the conductor had no knowledge of plaintiff's presence, but the carrier's brakemen had been exercising such authority for so long that the carrier should have known it, then "plaintiff had the right to presume that such servant was authorized to perform such duties." Held erroneous, for authorizing such presumption, especially in view of evidence tending to show that plaintiff was informed that the brakeman was acting without authority. Judgment 78 S. W. 249, reversed in Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110.

90. Judgment 78 S. W. 249, reversed in Missouri, etc., R. Co. *v.* Huff, 81 S. W. 525, 98 Tex. 110.

91. Reasonable time to alight.—Alabama, etc., R. Co. *v.* Dear, 87 Miss. 339, 39 So. 812.

a judgment for the plaintiff was reversed because the jury were instructed (by a distinct proposition in writing) that defendant was liable if the injury was caused by its negligence, without negligence of the plaintiff contributing thereto; although by a subsequent written instruction they were told that "if a reasonable time had elapsed for the plaintiff to get out of the cars, the relation of common carrier ceased, and the defendant could not be held liable as a common carrier," and were orally instructed that in such a case the plaintiff could not recover at all in this action.[92]

§ 3338. Definition or Explanation of What Constitutes Negligence.—In a passenger's action for personal injuries the charge must correctly state the criterion of the negligence of the carrier's servants under the circumstances of the particular case.[93] Although it is not error to fail to instruct in express terms as to what would constitute negligence where the standard of the case is clearly indicated,[94] a charge that negligence is the failure to do what a reasonable and prudent person would have done under the circumstances or the situation, or doing that which a prudent person under existing circumstances would not have done, is not erroneous when applied to a carrier of passengers.[95]

Wantonness and Willfulness.—In an action against a carrier for willful injury to a passenger, a charge that to do a thing wantonly, recklessly and willfully is doing it either with knowledge that the doer is invading another's rights, or doing it under circumstances raising that inference, or doing it under circumstances that would cause an ordinarily careful person to realize he was invading the rights of another, is not error,[96] and a refusal to charge that defendant can not be guilty of wantonness or willfulness unless he has been guilty of misconduct or malice, is not prejudicial, where the court charged that it takes more than gross negligence to show willfulness or wantonness.[97]

Gross Negligence.—In an action to recover for personal injuries to a passenger, it is not error to refuse to instruct that gross negligence means willful or intentional negligence, as negligence may be gross without being willful or intentional.[98] It is error to charge that gross negligence is that degree which indicates intentional wrong, or such a reckless disregard of the security or rights of the passengers as to imply bad faith.[99] A request to charge that the duty of exercising the highest degree of care is incumbent on the defendant, and any failure on the part of its servants to exercise that degree of care is "gross negli-

92. Passenger remaining on trains after departure from his destination.—Imhoff *v.* Chicago, etc., R. Co., 20 Wis. 344.

93. Definition or explanation of what constitutes negligence.—An instruction, in an action against a street railway company for injuries to a passenger thrown from a car running at an excessive rate of speed over a sharp curve, that it was not sufficient to show that the car was going at such speed as to make it probable that there would be a lurch, nor sufficient to show that there was an unusual lurch of the car sufficient to thrown a passenger off, but that it must be shown that the speed was so unusual that the servants in charge thereof ought to have realized that the car was likely to lurch more violently than incident to the ordinary operation of cars on curves, was properly refused; the question of negligence being whether the servants were running the car at a rate of speed which, under the circumstances, involved unnecessary dangers. Partelow *v.* Newton, etc., St. R. Co., 196 Mass. 24, 81 N. E. 894.

94. There is no error in submitting a question whether a brakeman "negligently" pulled plaintiff forward, and thereby caused her to fall, without instructing them as to what would constitute negligence, where to her questions indicated the standard of care for such negligence, and covered the subject of proximate cause. Werner *v.* Chicago, etc., R. Co., 81 N. W. 416, 105 Wis. 300.

95. Alabama, etc., R. Co. *v.* Bates, 155 Ala. 347, 46 So. 776.

96. Wantoness or wilfulness.—Tolleson *v.* Southern Railway, 88 S. C. 7, 70 S. E. 311.

97. Hull *v.* Seaboard Air Line Railway, 57 S. E. 28, 76 S. C. 278, 10 L. R. A., N. S., 1213.

98. Gross negligence.—Jacksonville, etc., R. Co. *v.* Southworth, 32 Ill. App. 307.

99. Louisville, etc., R. Co. *v.* McCoy, 81 Ky. 403, 5 Ky. L. Rep. 397.

gence," was properly refused, as a failure to exercise the highest degree of care constitutes slight negligence only.[1] But an instruction that gross negligence is that which evinces a reckless disregard of or indifference to the safety of others is favorable to the carrier, as "gross negligence" is the absence of slight care.[2]

Gross Negligence—Defined by Statute.—Where gross neglect, as defined by statute, "is the want of that care which every man of common sense, how inattentive soever he may be, takes of his own property," a court in undertaking to give to a jury this definition, should not omit the words, "how inattentive soever he may be." [3]

Comparative Negligence.—In a passenger's action against a carrier for personal injuries where the jury were instructed that for plaintiff to recover there must have been negligence on defendant's part, and ordinary care on plaintiff's part, there was no error in refusing further instructions as to comparative negligence.[4]

Contributory Negligence.—See ante, "Instructions," §§ 2922-2967.

§ 3339. Degree of Care Required.—In a passenger's action for personal injuries, the court should give an instruction defining the degree of care and diligence required in the carriage of passengers,[5] and it is proper to refuse an instruction which ignores the fact that carriers must use the highest degree of care,[6] or which limits the duty to a time short of the termination of the relation of carrier and passenger.[7]

Form and Requisites.—Such instruction must set out the degree of care required of the carrier under the circumstances of the particular case,[8]

1. Dolphin *v.* Worcester Consol. St. R. Co., 75 N. E. 635, 189 Mass. 270.

2. Lexington R. Co. *v.* Johnson (Ky.), 122 S. W. 830.

3. **Gross negligence—Defined by statute.**—Seaboard, etc., R. Co. *v.* Cauthen, 115 Ga. 422, 41 S. E. 653.

4. **Comparative negligence.**—North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672.

5. **Degree of care required.**—South Covington, etc., R. Co. *v.* Riegler, 26 Ky. L. Rep. 666, 82 S. W. 382.

The jury were thus instructed: "Ordinary care is such care as person usually engaged in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty." Held, that the instruction was erroneous, in that it did not define defendant's duty to exercise the highest degree of skill and care which might reasonably be expected of prudent persons engaged in that business. Payne *v.* Spokane St. R. Co., 46 Pac. 1054, 15 Wash. 522.

Reasonable care.—An instruction that, "defendant being a carrier of passengers for hire, the law imposes upon it a reasonable degree of care and foresight to prevent injuries to persons lawfully traveling in its cars," is defective in not defining what a reasonable degree of care is. Dickert *v.* Salt Lake City R. Co., 59 Pac. 95, 20 Utah 394.

Extraordinary care.—In an action by a passenger for personal injuries, an instruction that defendant should have exercised extraordinary care is sufficient without any explanation of the phrase. Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

6. Douglass *v.* Sioux City St. R. Co., 91 Iowa 94, 58 N. W. 1070.

7. Where the evidence shows that plaintiff was injured in attempting to leave defendant's boat, and while on the gang plank, a request for an instruction that defendant did not owe him so high a degree of care "after he had left the steamer and was out upon the 'slip' as it owed him while he remained upon or within the steamer," is properly refused. Dodge *v.* Boston, etc., Steamship Co., 148 Mass. 207, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83.

8. **Form and requisites of charge generally.**—In an action against the owner of an omnibus for injuries in collision with a street car an instruction that if the driver of the omnibus "rightfully proceeded across the tracks" in front of the car "then you are instructed that he had a right to rely on the motorman to so manage and control the car as to avoid collision" was properly refused, as the use of the words quoted did not clearly set out the care that defendant as a common carrier was bound to use, even though rightfully driving across the tracks. Parmelee Co. *v.* Wheelock, 79 N. E. 652, 224 Ill. 194, affirming judgment 127 Ill. App. 500.

must not be too general[9] or too broad,[10] must be definite,[11] must not be contradictory,[12] conflicting, or misleading,[13] when considered as a whole.[14] Thus an instruction that the law imposes the "utmost" care on a common carrier

9. Stauffer *v.* Metropolitan St. R. Co. (Mo.), 147 S. W. 1052.

10. It is error to charge that "the responsibility of the railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried," and "if the passenger is lawfully on the cars, the company is bound to carry him safely," in an action for injuries received while riding on a freight train, as being too broad, and leading the average juror to understand that the company was an insurer of the safety of its passengers, and that the same degree of protection is requisite upon a freight train as upon the best equipped passenger train. Moore *v.* Saginaw, etc., R. Co., 72 N. W. 1112, 115 Mich. 103.

11. Clearness and definiteness.—In an action by a passenger for personal injuries an instruction that the utmost possible care is required of the carrier, and he is liable for the slightest neglect, is insufficient, being too indefinite. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

In an action by a passenger for personal injuries, an instruction that carriers are liable only for want of such care and diligence as is characteristic of cautious persons is insufficient, being too indefinite as indicating the degree of care required. Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

12. See ante, "Misleading Instructions," § 3326.

13. Misleading.—See ante, "Misleading Instructions," § 3326. See, also, Illinois Cent. R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627.

Instance where charge misleading—Reasonably practicable.—An instruction that, if the carrier exercised all the care and prudence that were reasonably practicable, it was not negligent, was erroneous; the word "reasonably" rendering it confusing. Benjamin *v.* Metropolitan St. R. Co., 151 S. W. 91, 245 Mo. 598.

Instance where charge not misleading—"Reasonable care."—The court having given an instruction on the duty of a motorman to use the highest practical care as to passengers, an instruction that he must use "reasonable care" to prevent injury to people using the street as well as passengers, was not erroneous as misleading the jury to think he should only exercise reasonable care as to passengers. Hoffman *v.* Cedar Rapids, etc., R. Co. (Iowa), 139 N. W. 165.

14. Major *v.* Oregon Short Line R. Co., 21 Utah 141, 59 Pac. 522.

Although a portion of the charge may have been rather confused or unhappily expressed, yet where its meaning was that, when a railroad company has done all the law requires it to do, it is enough, and it can not be made liable for unavoidable accident, it was not error. Central R. Co. *v.* Thompson, 76 Ga. 770.

In an action for injuries received by one who was caught between the car and a railing extending parallel with the track over a viaduct, the court instructed that, if the jury found that plaintiff was a passenger, defendant was bound to exercise the highest reasonable practicable degree of care of very prudent men engaged in the street railway business to carry and receive plaintiff in safety, and any failure on its part was negligence, and if the jury found that defendant negligently allowed the railing to remain dangerously close to the front of passing cars, and that defendant's servants controlling the car negligently failed to stop the car a reasonably sufficient time to permit plaintiff to get upon the car in safety, and that defendant's servants negligently started the car forward when they knew or should have known that plaintiff was getting on, and plaintiff was injured thereby, and if plaintiff was at all times exercising for his own safety, such care as a reasonably prudent man would exercise under the same circumstances, the verdict should be for plaintiff. Held, that while the jury might infer from the instruction that the same degree of care was required of defendant in the construction of its platform and railing as in receiving and carrying a passenger, yet, taken as a whole, it is not misleading. Joyce *v.* Metropolitan St. R. Co., 118 S. W. 21, 219 Mo. 344.

Where the jury have been instructed that carriers are not absolute insurers of the safety of their passengers, it is proper to add thereto the statement that they are required to use all means that care, vigilance, and foresight can reasonably do, in view of the mode of conveyance adopted, to prevent accidents to passengers. Chicago, etc., R. Co. *v.* Lewis, 145 Ill. 67, 33 N. E. 960.

Infant passenger.—In an action by an infant passenger for personal injuries receiver by jumping from a train while in motion, it is not error to point out in the charge that it was incumbent on defendant's part to exercise "the utmost care, diligence, and foresight" (this not being strictly correct), where it had just instructed the jury that defendant's negligence must be shown by a preponderance of evidence, and explained that in the case of an infant passenger, unattended, greater care was required of a carrier than in the case of adults. Hemmingway

of passengers, though not the most preferable form, is not erroneous, where followed by an instruction that the carrier is not an insurer of the safety of passengers, and that negligence on its part must be shown.[15] And an instruction that a railroad company owes a much higher degree of care to passengers than it does to the public generally, going upon its tracks at public crossings, is correct in law, and, taken in connection with other instructions defining the duties of the company and passenger as applied to the facts of the case, is not misleading.[16]

Meaning of Terms Not Appearing in Charge.—The court, however, may refuse to instruct as to the meaning of terms not appearing in its charge. Thus, where, in an action against a street railroad for injuries to a passenger, the court did not charge that a carrier of passengers must provide for their safety so far as human skill and foresight will go, it was not error to refuse to instruct as to the meaning of the terms "human skill and foresight." [17]

Must Be Consistent with Practical Operation of Business.—An instruction as to the care required of a carrier is erroneous which does not require it to be "consistent with the practical operation of the road." [18] An instruction which sets the standard of the carrier's care higher than this is erroneous.[19] The use of the words "practical prosecution" of its business instead of "practical operation of its road," [20] the words "so far as consistent with the practical operation of its road," [21] or the words "under the circumstances and in view of the character and mode of conveyance adopted," [22] is not objectionable.

v. Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

Duty to protect passenger against violence.—An instruction that "railroad companies are bound to exercise very great vigilance and care in maintaining order and guarding passengers against violence, from whatever source arising," is erroneous and misleading, and is not cured by other instructions, that reasonable care and diligence in that respect are sufficient. Illinois Cent. R. Co. *v.* Minor, 69 Miss. 710, 11 So. 101, 16 L. R. A. 627.

15. Smith *v.* Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971.

16. Union Pac. R. Co. *v.* Sue, 25 Neb. 772, 41 N. W. 801.

17. Meaning of terms not appearing in charge.—Nashville Railroad *v.* Howard, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

18. Must be consistent with practical operation of business.—Tri-City R. Co. *v.* Gould, 75 N. E. 493, 217 Ill. 317, reversing judgment 118 Ill. App. 602.

19. In an action against a street car company for personal injuries from the sudden starting of a car, an instruction that a common carrier has a duty, with reference to the passengers, which is to exercise the highest degree of care which can be exercised by human agency consistent with the operation of the road, it is not the care of ordinary prudence, it is the highest degree of care which a man can exercise with reference to running his car, and the failure of the conductor to exercise proper care is the negligence of the road, etc., was erroneous, as setting the standard of defendant's care too high, since the conductor was only required to exercise the highest degree of care consistent with the practical management of his car for the carriage of passengers. Gardner *v.* Boston Elev. R. Co., 90 N. E. 534, 204 Mass. 213.

20. Use of words "practical prosecution of business."—In an action for injuries to a passenger on a street car caused by a collision with a railroad train, an instruction that common carriers are required to do all that human care, vigilance, and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to passengers riding upon their trains, is not objectionable because it uses the words "practical prosecution of its business," instead of "practical operation of its road." Judgment 124 Ill. App. 627, affirmed in Chicago City R. Co. *v.* Smith, 80 N. E. 716, 226 Ill. 178.

21. In an action against a railroad company and a street railroad company for injuries to a passenger on a street car caused by collision with the railroad train, an instruction that, so far as consistent with the practical operation of its road, it is the duty of a railroad company to exercise the highest degree of care and caution for the safety and security of passengers, while being transported, was not erroneous as requiring a degree of care more or less than was "reasonably" consistent with the practical operation of the road. Judgment 124 Ill. App. 627, affirmed in Chicago City R. Co. *v.* Smith, 80 N. E. 716, 226 Ill. 178.

22. An instruction, stating the duty of common carriers to passengers, is not objectionable as omitting the element that it should do all it can consistent with "the practical operation of its vehicle and the exercise of its business as a common carrier," where it contained the

Standard of Care Required Must Not Be Too Great.—Such instruction must not state a stricter rule of liability and impose a higher degree of carefulness than the law warrants.[23] The charge must not make the carrier an insurer of its passenger's safety,[24] and does not do so by the use of the phrase, "so as to prevent injuries" [25] or the word "very" before

words "under the circumstances, and in view of the character and mode of conveyance adopted." Parmelee Co. *v.* Wheelock, 79 N. E. 652, 224 Ill. 194, affirming judgment 127 Ill. App. 500.

A charge that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, sufficiently and clearly covers the thought which would be expressed were the words "and consistent with the practical prosecution of their business" inserted after the word "adopted." Larkin *v.* Chicago, etc., R. Co., 92 N. W. 891, 118 Iowa 652.

23. Standard of care required must not be too great.—Stauffer *v.* Metropolitan St. R. Co. (Mo.), 147 S. W. 1032.

Instances where too high degree of care required.—In an action for a breach of duty as passenger carrier, the alleged negligence of the conductor of a horse car in starting it while the plaintiff was alighting, whereby her arm was broken, the following instruction, asked by the defendant, was held to have been properly refused: "The rule that passenger carriers are to be held to the exercise of the strictest diligence is not to be understood by the jury as requiring of such carriers those particular precautions as it is apparent after the accident might have prevented the injury." Wheaton *v.* North Beach, etc., R. Co., 36 Cal. 590.

In an action for an injury to a passenger it is error to charge that the want of the exercise of proper care to transport passengers safely is negligence for which the carrier is liable, as the charge is susceptible of the construction that the failure to exercise a degree of care which will actually result in the safe carriage of passengers is negligence for which the carrier would be liable. International, etc., R. Co. *v.* Underwood, 64 Tex. 463.

In a suit against a railway company to recover for personal injury to a passenger, occasioned by a train being thrown from the track in consequence of a broken rail, the proof seemed to show that the passenger jumped out of the car in the confusion, while, if he had remained, he would have received no serious injury. The court, at the instance of the plaintiff, instructed the jury "that the throwing of the train from the track, if they believe, from the evidence, it was thrown from the track, and that plaintiff was thereby injured, is prima facie evidence of negligence, and plaintiff need prove nothing more; but it then devolves upon the defendant to prove that the injury sued for was occasioned without the least negligence, or want of skill or prudence or vigilance on the part of defendant, its agents or servants." Held, that the instruction stated a stricter rule of liability, and imposed a higher degree of carefulness, than the law warrants. Heazle *v.* Indianapolis, etc., R. Co., 76 Ill. 501.

Instances where charge not objectionable.—In an action for death of a passenger on a railroad train by a collision, an instruction that the burden of showing that the collision occurred by no fault of defendant, and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent, was on the defendant, merely required the carrier to comply with Civ. Code, § 2100, providing that carriers shall use the utmost care and diligence for the safe carriage of passengers, and was not objectionable as requiring too high a degree of care. Valente *v.* Sierra R. Co., 91 Pac. 481, 151 Cal. 534.

24. An instruction that where a railroad company receives its passengers from a space between parallel tracks it is bound to provide such safeguards as will protect such passengers in the exercise or ordinary care from injury from passing trains; and if it fail to do this, whether by failure to provide a proper platform, or to notify passengers who have gone between its tracks to enter its cars of the approach of a train on a track parallel and near to that on which its passenger train is standing, and an injury results to a passenger who is about to enter its car, without negligence on his part, the company will be liable—does not make the company in such case an insurer of its passengers, and is correct. Union Pac. R. Co. *v.* Sue, 25 Neb. 772, 41 N. W. 801.

An instruction that when a carrier undertakes to carry a person it undertakes to carry him safely, and that he does not assume a risk because he knows of some defect which might cause an accident, is not objectionable, as meaning that a carrier is an insurer of its passengers' safety; the jury having been instructed that defendant carrier was bound to exercise the highest degree of care consistent with the nature of its business. Isbell *v.* Pittsfield Elect. St. R. Co., 196 Mass. 296, 82 N. E. 3.

25. An instruction that a carrier owes the duty to its passengers to use the highest degree of skill, care, and prudence in the operation of its cars, "so as to

the phrase "careful and prudent men." [26] An instruction to the effect that a carrier of passengers must exercise the care of a very cautious person, "surrounded by the same circumstances," [27] and one to the effect that a carrier owes to its passengers the duty to exercise the highest degree of diligence known to very diligent persons engaged in like business [28] is not objectionable as exacting too great a degree of care of a common carrier. But an instruction which charges that, as a carrier or passengers, a railroad company is bound to exercise more than all ordinary and reasonable care and diligence, and that too much diligence can not be required at the hands of public carriers employing steam for rapid transit, is erroneous, as imposing too great a liability upon defendant.[29]

Use of Word "Highest" or "Utmost."—The phrase "highest degree of care," in a charge defining the duty of a carrier to a passenger is proper; that being only the reasonable care demanded by circumstances.[30] It is usual to use the word "highest" in instructions upon the degree of care required toward passengers, instead of "utmost," and the former should be used, though there may be but slight difference in their meaning.[31] A charge that the degree of care required is the utmost care consistent with the running of defendant's business, is not incorrect or erroneous, though it might be amplified,[32] and where the pleading in an action for injuries to a passenger in a collision put in issue both the negligence of the company and of its servants, it was proper to charge that a carrier is bound to use the utmost care in transferring passengers, and that for any neglect thereof, either by itself or through its servants, causing injury to a

prevent injuries to those passengers," did not, by the last phrase used, make the carrier an insurer. Clukey *v.* Seattle Elect. Co., 67 Pac. 379, 27 Wash. 70.

26. In instruction, in an action against a carrier for injury to a passenger, which, after asserting that, if defendant's motormen exercised the highest degree of care to avoid the accident which was reasonably practicable under the circumstances, this enough, states that by the term "highest degree of care" is meant that degree of care which would be exercised under like circumstances by every careful, prudent, and experienced conductors and motormen generally, does not require too much by the use of the word "very." Connell *v.* Seattle, etc., R. Co., 92 Pac. 377, 47 Wash. 510.

27. Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682.

28. An instruction, in an action for injuries to a passenger on a freight train, that a carrier owes to its passengers the duty to exercise the highest degree of diligence known to "very" diligent persons engaged in like business, is not objectionable as requiring a standard of extraordinary care because of the use of the word "very." Southern R. Co. *v.* Burgess, 42 So. 35, 143 Ala. 364.

29. Florida, etc., R. Co. *v.* Lucas, 35 S. E. 283, 110 Ga. 121.

30. Use of word "highest" or "utmost."—Donahoe *v.* Boston Elev. R. Co., 214 Mass. 70, 100 N. E. 1033; Judgment, Chicago, etc., R. Co. *v.* Murphy, 99 Ill. App. 126, affirmed in 64 N. E. 1011, 198 Ill. 462.

An instruction that a carrier must use the highest degree of care, diligence, and skill which means the highest degree of diligence, care, and skill that a prudent and cautious man would exercise to prevent injuries to passengers, by providing a reasonably safe track, and handling its trains in a prudent manner in view of the condition of the track, though perhaps not as explicit as it might have been, when fairly interpreted, meant that the company must exercise the highest degree of care which a prudent man would exercise, reasonably consistent with the mode of conveyance and the practical operation of the road, to provide a reasonably safe track, etc., and was proper. St. Louis, etc., R. Co. *v.* Richardson, 87 Ark. 602, 113 S. W. 794.

A charge that it was the duty of defendant carrier to use the highest care, and if it did not use such care, and as a result plaintiff received his injuries, he should have verdict, predicates recovery on a result produced solely by defendant's fault. Southern R. Co. *v.* Roebuck, 31 So. 611, 132 Ala. 412.

The change of the word "high" to "highest" in the following requested instruction was not erroneous: "The court instructs you that, while it is the duty of a common carrier to exercise a high degree of care in the operation of its trains, yet it is not bound to exercise such care to guard passengers against their own acts of negligence." Chicago City R. Co. *v.* Foster, 128 Ill. App. 571, judgment affirmed in 80 N. E. 762, 226 Ill. 288.

31. Quinn *v.* Metropolitan St. R. Co., 218 Mo. 545, 118 S. W. 46.

32. Donahoe *v.* Boston Elev. R. Co., 214 Mass. 70, 100 N. E. 1033.

passenger, it is liable.[33]

Use of Words "Extreme Care and Caution."—It is not erroneous to instruct a jury that, relatively to passengers, it is the duty of a railway company to use "extreme care and caution," when, in connection with the words quoted, the court adds, "which very prudent persons exercise in securing and preserving their own property." [34]

Reference to Standard Observed by Prudent Carriers.—It is error to charge that such companies "are required by law to observe the utmost care and diligence" for the safety of the passengers, without any reference to the standard of diligence observed by "very prudent and thoughtful persons." [35]

Requiring Degree of Care Used by "Experienced" Men.—An instruction, declaring that the obligation of a carrier to a passenger was to use the highest practicable degree of care of very prudent, skillful, and experienced men engaged in that kind of business, is not rendered bad by the use of the words "and experienced." [36]

"All Care"—Sole Issue Whether Car Stopped before Passenger Attempted to Alight.—A general charge that a street car company must use "all care" to avoid injuring a passenger is not error, where the sole question is whether the car had stopped before the passenger attempted to get off.[37]

Jury's Ideal as Standard of Care.—Where plaintiff was injured, while boarding a street car, by reason of the sudden starting of the car, an instruction that, to warrant a finding that the injury was caused by the want of ordinary care on the part of the conductor, the jury must find that the accident might reasonably have been expected as a result of his conduct, by such conductor, in the exercise of ordinary care as "a man of intelligence, having the knowledge that may be reasonably expected and ought to have been had" in doing such work, was erroneous, since it permitted the jury to use as a standard their ideal of what a conductor ought to be, instead of what they usually are.[38]

Where Danger Apprehended.—Where it appears that the danger of injury to the passengers was apprehended by those in charge, it was proper to refuse to charge that the care to be exercised need not be commensurate with the danger, but only with the apprehension of danger.[39]

Care Due Passenger Injured by Ejectment of Another Person.—In an action for personal injuries by being thrown from a car as a result of the manner in which defendant was removing an intoxicated person, where the court instructed as to the care due to the person removed, its refusal to give a correct instruction as to the correlative care due to the plaintiff was error.[40]

Street Railway Companies Generally.—In an action against a street railway company for injuries to a passenger, the charge should define the kind of

33. Hamilton *v.* Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

34. Use of words "extreme care and caution."—Macon Consol. St. R. Co. *v.* Barnes, 38 S. E. 756, 113 Ga. 212.

35. Reference to standard of diligence observed by very prudent persons.—East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 22 S. E. 660.

Carriers of passengers for hire are required to exercise the greatest degree of care and foresight, "as compared with and limited by the care and diligence of a prudent man engaged in that business;" and it is error, in charging the jury as to the care required for the safety of a passenger leaving the train, to omit that limitation. Cincinnati, etc., R. Co. *v.* Vivion, 41 S. W. 580, 19 Ky. L. Rep. 687.

36. Requiring degree of care used by "experienced men."—Loftus *v.* Metropolitan, St. R. Co., 220 Mo. 470, 119 S. W. 942.

37. "All care"—Sole issue whether car stopped before passenger attempted to alight.—Jacksonville Elect. Co. *v.* Cubbage, 58 Fla. 287, 51 So. 139.

38. Jury's ideal as standard of car.—Dehsoy *v.* Milwaukee Elect. R., etc., Co., 110 Wis. 412, 85 N. W. 973.

39. Where danger apprehended.—Miller *v.* Ocean Steamship Co., 118 N. Y. 199, 23 N. E. 462.

40. Care due passenger injured by ejectment of another person.—Thayer *v.* Old Colony St. R. Co., 214 Mass. 234, 101 N. E. 368, 44 L. R. A., N. S., 1125.

care which defendant owed to plaintiff, and the kind of care which the passenger should exercise for his own safety.[41] An instruction that the street car company was required to exercise through its servants "a very high degree of care," [42] "extraordinary care and vigilance," [43] the "utmost care," [44] the "highest degree of care," [45] etc., in operating its cars is not erroneous, when taken in connection with other parts of the charge.[46] The degree of care specified amounts in realty to the highest degree of care consistent with the undertaking.[47] But an instruction stating that it was the duty of the conductor to exercise great care, without in any way limiting or defining that expression, is erroneous.[48]

Stage Coach Carrier.—In an action by a passenger on a stage coach for injuries received, an instruction, in substance, that to entitle plaintiff to recover the injuries must have resulted directly from the negligence of defendants' servants engaged in the scope of their authority, and that plaintiff did not omit to

41. Street railway companies generally.—Houghton *v.* Louisville R. Co., 26 Ky. L. Rep. 393, 81 S. W. 695.

An instruction that if the driver could have, by the exercise of reasonable care and prudence on his part, prevented the injury, the company is liable, is sufficient. Buck *v.* People's St. R., etc., Co., 46 Mo. App. 555.

Degree of care required of street railway company as to safety of means of transportation.—See post, "Sufficiency and Safety of Means of Transportation," § 3344.

42. Very high degree of care and skill.—In an action by a passenger against a surface railway company, the judge charged that defendant "was required to exercise, through its servants, a very high degree of care and skill in the operation of its cars." Judgment 52 N. Y. S. 1088, affirmed in. Koehne *v.* New York., etc., R. Co., 58 N. E. 1089, 165 N. Y. 603.

43. Extraordinary care and vigilance.—In an action against an electric street railway company for injury to a passenger from a plank on the track, the question of fact involved being, one, whether the company placed the plank there; two, whether it inspected its tracks with reasonable frequency; three, whether the motorman kept a sufficient lookout; and four, whether the brake was deficient, and it appearing that the company was in the habit of carrying on open cars more passengers than could be accommodated with seats, and that a speed of fifteen to twenty miles an hour was not considered unreasonable by it, and that it was customary to allow the car to run down grade by gravity, leaving it dependent for stoppage on the brake, an instruction can not be complained of the requiring of the company and its employees extraordinary care and vigilance. Cogswell *v.* West St., etc., R. Co., 5 Wash. 46, 31 Pac. 411.

44. Utmost care.—In an action against a carrier for injuries to a passenger on an electric car by an electric shock from the controller box, the court, instructed that the jury should find for plaintiff if defendant failed to use the utmost care to prevent the current from being in the box; and also instructed that, if defendant used the utmost care and skill ordinary used persons in the same business to guard against such injuries, plaintiff could not recover. Held, that taken together, the two instructions were proper. South Covington, etc., St. R. Co. *v.* Smith, 86 S. W. 970, 27 Ky. L. Rep. 811.

45. Highest degree of care.—Galligan *v.* Old Colony St. R. Co., 182 Mass. 211, 65 N. E. 48.

46. South Covington, etc., St. R. Co. *v.* Smith, 27 Ky. L. Rep. 811, 86 S. W. 970.

47. A charge that the degree of care required by a street railway company to prevent material falling from an embankment upon the track was different from "the highest degree of care consistent with the proper management of the road," but which describes the care required as a "reasonabe degree of care * * * commensurate with" * * * the danger," and a care to be "considered in connection with the business which is carried on," was not open to objection, as the degree of care specified amounts in reality to the highest degree consistent with the undertaking. Galligan *v.* Old Colony St. R. Co., 65 N. E. 48, 182 Mass. 211.

In an action against a street railroad for injuries to a passenger, the court instructed that a higher degree of care is imposed on street railways than on steam ones, and that if plaintiff, on giving her ticket to defendant's conductor, notified him that she wished to be put off at a certain regular stopping place, it was the duty of defendant to carry plaintiff safely there, and that its duty was not discharged until it had set her down as safely as the means of conveyance and the circumstances of the case would permit. Held, while the opening statement of the instruction was not commendable, the instruction was not erroneous. Wabash River Tract. Co. *v.* Baker, 78 N. E. 196, 167 Ind. 262.

48. Raymond *v.* Portland R. Co., 62 Atl. 602, 100 Me. 529, 3 L. R. A., N. S., 94.

exercise such caution to avoid the injury as a man of ordinary prudence would exercise; and also that defendants were not insurers against accident, that the law imposes upon them the utmost human care and foresight, that they were bound to furnish good coaches, and gentle and well-broken horses, and prudent and skillful drivers, and that any defect in such respects would make defendants liable, correctly states the degree of care required of such carriers, and could not have misled the jury.[49]

Passenger Riding on Platform.—An instruction that a street car company was bound to use a high degree of care for the safety of its passengers, which duty is somewhat modified by the fact that a passenger was standing on the platform when he could get inside, is not erroneous where the court correctly stated the extent of the modification of such rule.[50]

Contributory Negligence of Plaintiff.—In a passenger's action for injuries alleged to be due to the negligence of defendant, where the pleas were "not guilty" and "contributory negligence," it is proper to charge that the plaintiff could not recover unless his injuries were occasioned solely by negligence of the defendant.[51] And where the jury were instructed that for plaintiff to recover there must have been negligence on defendant's part and ordinary care on plaintiff's part, defendant was not injured by the refusal to charge that negligence of defendant was not of itself sufficient to justify a recovery.[51a]

Degree of Care in Making Coupling.—See post, "Management of Conveyances," § 3345.

Degree of Care to Avoid Collision.—See post, "Collisions," § 3348; "Derailment," § 3349.

Charge as to Burden of Proof.—See post, "Presumptions and Burden of Proof," § 3359.

§ 3340. Acts of Carrier's Servants, Fellow Passengers, or Third Persons.—In a passenger's action for damages for personal injuries by reason of the cruel or wanton and oppressive conduct of any of the carrier's employees, the court need not in its instruction define the terms "gross negligence," "fraud," "malice," and "cruel or wanton and oppressive conduct," used in its charge.[52] Nor in such case would it be necessary to state what acts would be within the scope of employment of the employees, the safety and proper treatment of the passengers being within the scope of employments and range of duties of each employee.[53] Thus, in an action for damages by reason of plaintiff's being pushed off a train by an employee of the railway company, a charge that, if the employee was acting within the scope of his employment, the company would be liable, and, if the act was done in a grossly negligent or oppressive manner, the company would be liable for punitive damages, is sufficient, without stating what acts would be within the scope of such employment.[54]

What Employees Required to Exercise Care.—A charge requiring a verdict for defendant on proof of due care of its trainmen is properly denied where the accident may have been caused by the negligence of other of its employees.[55]

49. Stagecoach carriers.—McClelland *v.* Burns, 5 Colo. 390.

50. Passenger riding on platform.—Nirk *v.* Jersey City, etc., St. R. Co., 68 Atl. 158, 75 N. J. L. 642.

51. Contributory negligence of plaintiff.—McDonald *v.* Montgomery St. Railway, 110 Ala. 161, 20 So. 317. See ante, "Degree of Care Required of Passenger," § 2936.

51a. North Chicago St. R. Co. *v.* Williams, 140 Ill. 275, 29 N. E. 672.

52. Acts of carrier's servants, fellow-passengers, or third persons.—Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554.

53. Necessity for defining scope of servant's employment.—Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554.

54. Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554.

55. What employees required to exercise care.—Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

Accidentally Striking Passenger.—Where, in an action for injuries to a passenger, there was no proof that the injury was an unavoidable accident, but the entire evidence was directed to the question whether the brakeman in fact struck the plaintiff with a footboard and fractured his elbow, an instruction that if the plaintiff was being carried as a passenger, and an employee of the defendant, while engaged in performing his duties, struck plaintiff on the elbow, thereby inflicting any injury, the jury should find for plaintiff in damages, was not objectionable on the ground that it made defendant liable for the injury without regard to the question of negligence.[56] And in an action for injuries to plaintiff, a passenger, through being struck by defendant's conductor while he was scuffling with plaintiff's husband, an instruction that, if plaintiff could have avoided the injury by the exercise of ordinary care, she could not recover, was properly refused as misleading; the only basis therefor being the argument that plaintiff should have kept her seat during the scuffle, and would not then have been injured.[57]

Passenger Struck by Truck Through Negligence of Truckman.—Where a passenger, while standing at a junction station, was jostled by an express truck so close to a train, then passing the station without warning, that he was struck and killed, instructions that, if the truck belonged to an express company, and was handled by its employees, and if deceased was knocked onto or near the railroad track and in front of the train by the truck operated by such employees, and on account thereof was run over and killed, the jury should find for defendant were erroneous, as placing the responsibility for the injury entirely on the act of the truckmen; it appearing that the train operatives were also negligent in running the train past the station without signal.[58]

Directing Passenger to Jump from Moving Train.—An instruction that, if plaintiff got on the wrong train through failure of defendant to direct him, plaintiff being told by a porter that it was the train he desired to take, and afterwards, on further explanation, told that it was not, and directed to jump off, he was entitled to recover was not objectionable on the ground that it declared the act of the porter to be negligence as a matter of law.[59] It was proper to instruct that the porter should be regarded as an employee of the company, so far as concerned the rights and duties of plaintiff and defendant towards each other, and that if, after plaintiff discovered he was on the wrong train, the porter told him to jump off, and the train was going at such speed that it was dangerous to do so, plaintiff being unaware of the fact, and not able to learn of it by the exercise of ordinary care, though the porter could by such care have known of the danger, and the porter by such conduct omitted to exercise ordinary care, defendant was guilty of negligence.[60]

Assaults on Passenger by Carrier's Employees.—In a passenger's action for injuries inflicted by a servant of the carrier, the charge should conform to a statute making it the duty of the carrier to use extraordinary diligence to protect the lives and persons of its passengers,[61] should define the

56. Accidentally striking passenger.—Louisville, etc., R. Co. *v.* Steenberger, 69 S. W. 1094, 24 Ky. L. Rep. 761.

57. McMahon *v.* Chicago City R. Co., 88 N. E. 223, 239 Ill. 334, affirming judgment 143 Ill. App. 608.

58. Passenger struck by truck through negligence of truckman.—St. Louis, etc., R. Co. *v.* Shaw, 94 Ark. 15, 125 S. W. 654.

59. Directing passenger to jump from moving train.—Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

60. Newcomb *v.* New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069, it appeared in this case that plaintiff had asked the porter if that was the train to New York, and, on being told that it was, had gotten on, only to discover that went by a different route from that over which his ticket entitled him to travel, though defendant railroad company operated both routes. On discovering the mistake, the porter told plaintiff to jump off, and in doing so plaintiff slipped on a greasy platform and was injured.

61. Assaults on passenger by carrier's employees.—In an action against a carrier for a battery committed by its con-

scope of the servants' employment,[62] should not seemingly justify an assault on the plaintiff if he was negligent,[63] or on account of sneers, looks and contemptuous gestures,[64] should not require a verdict for defendant if its servant used no more force than he deemed necessary,[65] should not eliminate the question whether the servant was dragged from the car or followed plaintiff to the ground and there attempted to preserve the peace,[66] and should not justify the servant's shooting the passenger to protect himself from a simple assault.[67]

Passenger Shot by Trainman Shooting at Another.—In an action by a passenger for injury from being shot by a trainman, who shot at another person, an instruction to find for defendant unless one of defendant's agents while attempting to shoot another person negligently shot plaintiff, should have stated that if defendant's trainman, when he fired the shot, believed and had reasonable ground to believe that it was necessary to fire the same to protect himself or associates from death or harm, and he so fired the shot to protect himself or associates, they should find for defendant.[68] Where the evidence was conflicting as to whether the shot injuring plaintiff was fired by a trainman or a passenger, the court should have instructed that defendant was not liable if the shot was fired by a passenger.[69]

Assault by Police Officer of Carrier.—In an action against a carrier for

ductor on plaintiff, a passenger, it was error to charge that carriers must treat their passengers respectfully and protect them so far as they reasonably can from injury and insult on the part of their employees, Civ. Code 1910, § 2714, expressly making it the duty of a carrier of passengers to use extraordinary diligence on behalf of itself and its agents to protect the lives and persons of its passengers. Mason *v.* Nashville, etc., R. Co., 70 S. E. 225, 135 Ga. 741, 33 L. R. A., N. S., 280.

62. Scope of employment.—In an action for death of an alleged passenger, it was error to leave it to the jury to say whether decedent's injury resulted from his being struck by the motorman without giving instructions as to the scope of the motorman's employment. Geiger *v.* Pittsburg R. Co., 234 Pa. 545, 83 Atl. 367.

63. Charge seemingly justifying assault if plaintiff negligent.—See ante, "Misleading Instructions," § 3326.

64. There is no error in an instruction that sneers, looks, and contemptuous gestures will not justify an assault by a conductor on a passenger, and that a railroad company is not released from its contract guarantying polite and courteous treatment to a passenger because the passenger does not smile upon the conductor, or because he wears a frown. East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778.

65. In an action against a carrier for injury inflicted by a brakeman upon a passenger, a requested charge to find for the carrier if the jury believed the brakeman exerted no more force than he deemed necessary under the circumstances was properly refused. Teel *v.* Coal, etc., R. Co., 66 S. E. 470, 66 W. Va. 315.

66. An instruction that if deceased cursed defendant's street car conductor while deceased was alighting from the car, and at that time the conductor had not struck deceased nor cursed him, such conduct constituted a breach of the peace; and if the conductor, in resenting such insult, engaged in a fight with deceased on the street, in the course of which deceased was shot, plaintiff was not entitled to recover from defendant—was error, as eliminating as immaterial whether the conductor was dragged from the car, as defendant's evidence tended to prove, or voluntarily followed deceased to the sidewalk, and there attempted to preserve the peace, according to plaintiff's evidence. O'Brien *v.* St. Louis Trans. Co., 84 S. W. 939, 185 Mo. 263, 105 Am. St. Rep. 592.

67. In an action for death of a passenger from injuries received in an altercation with the conductor there was evidence that, after deceased struck the conductor, the latter began "defending himself" by beating deceased with the butt end of the pistol as he was leaving the car, and followed him, still beating him, to the sidewalk. Defendant's evidence showed that the conductor was first assaulted by deceased, and then dragged off the car by him. Held, that an instruction that if deceased assaulted the conductor as he was alighting, the conductor was justified in defending himself, and if he did defend himself from such assault, and while so doing there was a fight on the street, off the car, between the deceased and the conductor, in which deceased was shot, plaintiff could not recover, should not have been given. O'Brien *v.* St. Louis Trans. Co., 84 S. W. 939, 185 Mo. 263, 105 Am. St. Rep. 592.

68. Passenger shot by trainman shooting at another.—Illinois Cent. R. Co. *v.* Gunterman, 135 Ky. 438, 122 S. W. 514.

69. Illinois Cent. R. Co. *v.* Gunterman, 135 Ky. 438, 122 S. W. 514.

assault and battery, in which there was evidence tending to prove that plaintiff while on defendant's station grounds for the purpose of taking passage on a train was assaulted by defendant's night officer, an instruction that if plaintiff was on one of the approaches to defendant's station, with the intention of taking passage on one of defendant's trains, he was then a passenger, and defendant was bound to exercise all reasonable care to protect him from insult, injury, and abuse, and if plaintiff, while behaving in an orderly manner, was, without reasonable cause, assaulted by defendant's officer, acting within the scope of his employment, the verdict should be for plaintiff, was proper.[70]

Where Question Whether Assailant Acting as Public Officer or Servant of Carrier.—Where, in an action for the death of a passenger, the capacity in which the person inflicting the injury acted, whether as a public officer or servant of the carrier, is uncertain, and dependent upon oral testimony and unconclusive facts, requested instructions to find for the carrier, if such person was at the time of the injury a public officer or performing the duties of such officer, and that the carrier was not responsible for his acts as such, are calculated to becloud the issue and mislead the jury, as the proper inquiry is the capacity in which he acted in the particular transaction, not the position he held or occupied in general at the time. Also a requested charge that the carrier was not responsible if the assault was committed by the actor when acting for himself and his own master was calculated to mislead the jury, and properly refused.[71] And the trial court may properly refuse, in such case, instructions telling the jury that, if the passenger left the defendant's train for the purpose of engaging in a quarrel or altercation with the servant or officer by whom he was killed, the carrier is not liable, and which tells the jury they should find for the defendant, if they believe the actor was the servant of the defendant and that the injurious act, incident to the particular transaction in which he was engaged, was not within the scope of his duty as such servant.[72]

Officer's Ejecting Passenger from Waiting Room at Instance of Station Agent.—Where a passenger having gone to carrier's station and purchased a ticket was lawfully in the waiting room waiting for his train, when he was assaulted in an attempt to eject him by an officer, acting at the request of the station agent, under a mistaken belief that he was a trespasser, the passenger was entitled to an instruction requiring the carrier to exercise the highest degree of care to protect him from assault.[73]

Assault on Person Who Has Ceased to Be a Passenger.—In an action against a street car company for injuries to a passenger by an assault upon him by the defendant's conductor, an instruction that if the plaintiff had alighted from the car before he was struck by the conductor, and after he alighted he used the abusive language toward the conductor, and the conductor then struck him, etc., then the company would not be liable, does not raise an inference that the street car company is liable for an assault by its conductors on a person who has ceased to be a passenger by leaving its car, unless the assault was provoked by abusive language.[74]

Injury Caused by Disorderly Conduct of Fellow Passenger.—In a passenger's action for injuries caused by disorderly conduct of fellow passengers, the charge must not be misleading and an instruction that the company was not an insurer and was only bound to exercise reasonable care is properly denied be-

70. Assault by police officer of carrier.—Philadelphia, etc., R. Co. *v.* Crawford, 77 Atl. 278, 112 Md. 508.

71. Where question whether assailant acting as public officer or servant of carrier.—Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

72. Layne *v.* Chesapeake, etc., R. Co., 66 W. Va. 607, 67 S. E. 1103.

73. Officer's ejecting passenger from waiting room at instance of station agent.—Whitlock *v.* Northern Pac. R. Co., 59 Wash. 15, 109 Pac. 188.

74. Assault on person who has ceased to be a passenger.—Johnson *v.* Washington Water Power Co., 62 Wash. 619, 114 Pac. 453.

cause misleading.[75] So, also, an instruction is properly denied which makes defendant's liability conditional upon anticipation of injury from the particular disorderly act causing the injury, instead of from the general disorderly conduct.[76]

Permitting Use of Abusive, Insulting and Profane Language in Presence of Passengers.—In an action by a prospective passenger against a railway company for injuries sustained at its depot waiting room by reason of annoyances and insults from persons at such depot, an instruction that it was the duty of a railroad company to protect prospective passengers, at its stations from annoyance and abuse, and if the company's agent used toward, about, or in the hearing of the plaintiff any profane, obscene, or boisterous language, thereby injuring plaintiff's feelings, defendant was liable, though making the duty of the company in this respect absolute, was not prejudicial, since it was limited in its application to the conduct of the company's agent.[77] And an instruction that a carrier owed a special duty to a female passenger to protect her from insult was not prejudicial to the carrier, as it owed such duty to every passenger.[78] But such instruction is erroneous in the absence of evidence of any improper language used by the agent toward plaintiff, or of what the language addressed to a third person was, and that the language was used with the intent of insulting plaintiff.[79]

Accidents Resulting from Negligence or Trespass of Third Persons.—Where the accident was the result of the willful criminal trespass of a stranger, for which the railroad company was not responsible, it was not reversible error for the trial court to fail to emphasize and reiterate the rule that the company was bound to use the highest degree of care, skill, and prudence that was humanly possible.[80]

Concurrent Negligence of Carrier and Third Person.—Where the complaint in an action for personal injuries alleged that defendant's car was negligently started, and that a chain with a hook at the end, which caught in plaintiff's dress and dragged her with the car, was negligently permitted to hang from the platform, near the steps, it was error to charge that defendant was not liable if the hook was displaced by a passenger, without charging that defendant was liable if the hook was caused to catch plaintiff's dress through the negligent starting of the car.[81]

Defects Caused by Third Person after Car Started on Run.—In an action for injuries to a postal clerk by a defect in the car, an instruction that defendant was not liable for defects resulting from negligence of some one other than a railroad employee, after the car started on its run, is not error, as it does not impose on defendant as great a duty as it is bound to bear.[82]

Assault by Fellow Passenger.—In an action against a carrier by a passenger because of a violent assault made upon him by another passenger in the sight of the conductor who failed to protect him, an instruction that the passenger must be in serious danger, before the duty of the conductor to protect him against assault arises, is erroneous.[83] It is also error to give in charge a statute making railroad companies liable for any damages done by the running of its cars,[84] or a

75. **Injury caused by disorderly conduct of fellow passenger.**—Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241.

76. Baltimore, etc., R. Co. *v.* Rudy, 118 Md. 42, 84 Atl. 241.

77. **Permitting use of abusive, insulting and profane language in presence of passengers.**—St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

78. Caldwell *v.* Northern Pac. R. Co., 105 Pac. 625, 56 Wash. 223.

79. St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

80. **Accidents resulting from negligence or trespass of third persons.**—Fredericks *v.* Northern Cent. Railroad, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306.

81. **Concurrent negligence of carrier and third person.**—Bowdle *v.* Detroit St. R. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366.

82. **Defects caused by third person after car started on run.**—Union Pac. R. Co. *v.* Whitney, 117 C. C. A. 392, 198 Fed. 784.

83. **Assault by fellow passenger.**—Hillman *v.* Georgia R., etc., Co., 126 Ga. 814, 56 S. E. 68, 8 Am. & Eng. Ann. Cas. 222.

84. Where in a difficulty between two passengers on a railroad train one cuts

charge that failure to provide separate accommodations for the races was the proximate cause of plaintiff's injury.[85] But the use of the word "might" instead of "would" in an instruction as to the duty of the conductors to protect the passengers from an anticipated assault is proper,[86] and a charge of the court that the fact that the conductor believed that the assaulting party was an officer was a circumstance that might be considered on the question whether the conductor had notice of the impending assault is favorable to the carrier and not misleading.[87]

Assault by White on Colored Passenger in Car for Colored People.—In an action by a colored passenger against a railroad company to recover for an assault committed upon him by a white passenger entering the car provided for colored people contrary to law, failure of the judge in his charge to make any reference whatever to the material issue as to the place where the alleged assault took place, or whether the assaulting party was allowed to remain in a car where he had no lawful right to be, and to assault the plaintiff who was lawfully therein, was erroneous.[88]

Assuming Want of Evidence of Negligence of Employees.—See ante, "Assuming Facts," § 3332.

Argumentative Instructions.—See ante, "Argumentativeness," § 3325.

§ 3341. Condition of Carrier's Premises.—A charge that "the law imposes the duty on railroad companies to keep in safe condition all portions of their platforms, approaches thereto, and exits therefrom, to which the public are invited or would naturally resort, and all portions of their station grounds reasonably near to the platforms where passengers take passage on or are discharged

the other with a knife, and the injured passenger sues the railroad company for damages, it is not error for the trial judge to refuse to give in charge to the jury § 2331 of the Civil Code which makes a railroad company liable for any damages done by the running of its cars, or by any person in its employment or service, unless the company shows due care on the part of its agents. Davis *v.* Georgia R., etc., Co., 110 Ga. 305, 34 S. E. 1001.

85. In an action for injuries received by plaintiff, a colored man, while a passenger on defendant's train, it appeared that he was requested to leave a car where he was seated, and go into another car, because of his boisterous conduct, but refused to go into the other car, and remained on the car platform, where he received the injuries sued for, from another passenger. Held, that instructions that, as the law required separate accommodations on railroad trains for white and colored people, if defendant's failure to provide such separate cars was the proximate cause of plaintiff's injuries, he could recover, were properly refused. Royston *v.* Illinois Cent. R. Co., 67 Miss. 376, 7 So. 320.

86. Use of "might" for "would."—In an action for assault on a passenger by fellow passengers, in an instruction stating the duty of the conductor to protect the party assaulted if he "anticipated that such assault might be made," it was not error to use the word "might" instead of "would," since the law requires that a carrier use the highest degree of diligence to protect passengers from assault which may be reasonably anticipated, and the word "might" is used in place of "may" when referring to past time or a past event. Louisville R. Co. *v.* Wellington, 126 S. W. 370, 137 Ky. 719, order reversed on rehearing, 128 S. W. 1077.

87. Plaintiff, a passenger, was ordered to stop smoking by another passenger, who falsely stated that he was a special officer of the carrier, and a difficulty ensued in which plaintiff was assaulted by the other passenger, the conductor making no effort to interfere, and in an action against the carrier the court instructed that if the jury believed that the conductor believed that the assaulting party was an officer, it was a circumstance that might be considered by the jury on the question whether the conductor had notice of the impending assault; but that though he might have believed that the party in question was an officer, still if he had reasonable ground to believe that such person was about to assault plaintiff, it was his duty to interfere. Held, that the instruction was favorable to defendant, and not misleading. Norfolk, etc., R. Co. *v.* Birchfield, 54 S. E. 879, 105 Va. 809.

88. Assault by white on colored passenger in car for colored people.—Hillman *v.* Georgia R., etc., Co., 126 Ga. 814, 56 S. E. 68, 8 Am. & Eng. Ann. Cas. 222.

from their cars," while too broad a statement, is not necessarily reversible error.[89]

Slight Imperfections.—Where nature, size, and character of the hole in the passage way from a station causing injury was varyingly stated, an instruction that defendant was not responsible for injuries caused by slight imperfections, etc., but that the jury should determine whether the defect and imperfection was slight or serious, was proper.[90]

Lighting Depots, Platforms and Approaches.—In a passenger's action for injuries alleged to have been received from the carrier's failure to light properly its car steps,[91] depot platform,[92] wharf,[93] means of egress,[94] or a temporary sidewalk, the jury should be instructed as to the carrier's liability for such failure [95] if proper requests are made.[96] But the instruction should not charge that it is the company's duty to provide a light [97] or that it is the carrier's duty to have its car steps and depot platform so lighted that plaintiff might clearly see them,[98] or present the issue whether the platform was sufficiently lighted to be entirely safe where the material question was whether there was sufficient light to enable a person exercising ordinary prudence to know on which side of the train the platform was.[99] It is not error, however, to charge that such failure constitutes "continuing negligence" if it continued during the delivery of passengers.[1] And a statement in the instruction which seems merely to fix the at-

89. Condition of carrier's premises.—Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306, certiorari denied in 17 S. Ct. 994, 166 U. S. 719, 41 L. Ed. 1186.

90. Slight imperfections.—Chesapeake, etc., R. Co. *v.* Mathews, 114 Va. 173, 76 S. E. 288.

91. Lighting depots, platforms and approaches.—Illinois Cent. R. Co. *v.* Cruse, 96 S. W. 821, 29 Ky. L. Rep. 914.

92. Hiatt *v.* Des Moines, etc., R. Co., 96 Iowa 169, 64 N. W. 766.

93. Ruffin *v.* Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86.

94. Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034.

95. Failure to light platform.—Where, in an action against a carrier for personal injuries, the complaint alleged that defendant was negligent in starting the train from which plaintiff had alighted; that the conductor carelessly abandoned plaintiff, a child of five years of age, and started the train while plaintiff was in a dangerous place; and that defendant failed to properly light its depot platform, and the only evidence of negligence was its failure to light the platform, the jury should be instructed as to defendant's liability for failure to light the platform. Hiatt *v.* Des Moines, etc., R. Co., 96 Iowa 169, 64 N. W. 766.

96. The court having charged that if the company furnished suitable means of egress at proper points, and properly lighted, and plaintiff did not exercise proper care, he could not recover, and defendant having failed to ask for such charge in a disjunctive form, it can not complain thereof. Texas, etc., R. Co. *v.* Brown, 78 Tex. 397, 14 S. W. 1034.

97. In an action against a street railway company for injuries sustained while crossing a temporary sidewalk erected by the company for the use of its passengers, an instruction that, if the walk was dangerous for passengers to cross at night without a light, it was the company's duty to provide a light, was erroneous, as it was for the jury to say what measures of protection should have been taken. Finseth *v.* Suburban R. Co., 51 Pac. 84, 32 Ore. 1, 39 L. R. A. 517.

98. Having its car steps and depot platform so reasonably lighted that the ordinary traveler can see sufficiently to alight in safety, being all that is required of a carrier, it is error to instruct that it was its duty to have them so lighted that "plaintiff" might clearly see them. Illinois Cent. R. Co. *v.* Cruse, 96 S. W. 821, 29 Ky. L. Rep. 914.

99. Lighting where passenger alights on side opposite station.—Where a passenger leaving a train at night got off on the side opposite the platform where there was no light, by reason of which he stumbled and fell under the train as it moved out, it was error to give instructions presenting the issue as to whether the platform was sufficiently lighted to be entirely safe; the material question as to the lighting of the platform being whether there was sufficient light to enable a person exercising ordinary prudence to know that the platform was on that side. Louisville, etc., R. Co. *v.* Ricketts, 52 S. W. 939, 21 Ky. L. Rep. 662.

1. Failure to light wharf—Continuing negligence.—An instruction, in an action against a railroad company for injuries to a passenger, that the failure of the carrier to have a sufficient light on its wharf constituted continuing negligence if it continued during the landing and delivering of passengers, and if the failure to keep such light was the proximate cause of the passenger's injury, etc., he

tention of the jury on the peculiar facts of the case is not error.[2]

Failure to Heat Waiting Room.—In an action by a prospective passenger against a railway company for its failure in midwinter to properly heat its waiting room at a station, an instruction making the company liable if it failed to keep a fire in its depot waiting room at a time when the weather required a fire there to make it comfortable, and a person waiting to become a passenger was in consequence injured, was not erroneous as eliminating the question of defendant's negligence, and making it an insurer, where it maintained that the waiting room was properly heated, and where it requested no instruction on the subject.[3]

Permitting Waiting Room Door to Be Locked.—In an action by a prospective passenger against a railway company for its permitting its waiting room at a station to be locked, an instruction that if plaintiff went to the company's depot to take passage on its train, and it knowingly permitted such depot to be or remain locked after notice that it was locked, the verdict should be for plaintiff, was not prejudicial where defendant denied all knowledge of the depot being locked.[4]

Car Stopped Near Dangerous Place.—Where the negligence alleged that the defendant carrier stopped its car near a dangerous precipice, without a light, and without giving plaintiff notice of the danger, it was proper to refuse to give unmodified an instruction for defendant, taken from the syllabus of the case in the report of a former appeal, to the effect that the road is not expected to make landings for passengers where none are expected to be.[5]

Alteration or Repair after Accident.—In a passenger's action for personal injury caused by being carried by a moving train between it and the railing of the station platform of an elevated railroad[6] or by the undermining of an embankment by an unprecedented rainstorm,[7] it is proper to instruct that the jury can not take into consideration the fact that since the accident the carrier has altered or repaired the structures which caused the injury.

would be entitled to recover, was not erroneous for using the words "continuing negligence;" the court having charged that the failure to keep sufficient lights would entitle the passenger to a verdict, provided such failure was the proximate cause of the injury, and the instructions showing that the negligence, though continuing, was actionable only if it was the proximate cause of the injury. Ruffin *v.* Atlantic, etc., R. Co., 55 S. E. 86, 142 N. C. 120.

2. The statement, in the instruction in an action for injury to a passenger at a station, claimed to be due to improper lighting, that light which would be sufficient at one station might be inadequate, serves merely to fix the attention of the jury on the peculiar facts of the case. St. Louis, etc., R. Co. *v.* Marshall, 81 Pac. 169, 71 Kan. 866.

3. **Failure to heat waiting room.**—St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

4. **Permitting waiting room door to be locked.**—St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

5. **Car stopped near dangerous place.**—Smith *v.* Central R., etc., Co., 80 Ga. 526, 5 S. E. 772.

6. **Alteration or repair after accident.**—Plaintiff's husband, while entering a car on defendant's elevated railroad, was carried along by the moving train, between it and the railing of the station platform, and dropped to the street below, and was killed. The railing was twelve inches from the car, and the only evidence of defect was that about three weeks after the accident defendant reduced the space between the car and railing to six inches. The railing was necessary, and reducing the space did not lessen the danger. Held, that an instruction that it was the duty of defendant to maintain a safe structure, and that, in determining whether the train was held for a reasonable time to enable deceased to get on, the jury could consider whether the railing was reasonably safe, was error. Evans *v.* Interstate Rapid Trans. R. Co., 106 Mo. 594, 17 S. W. 489.

7. In an action against a railroad company for injuries caused by the undermining of an embankment by a rainstorm of unprecedented violence, a refusal to instruct that the jury should not take into consideration the fact that the company had altered the embankment since the accident, so as to provide against a recurrence of such storms, was error. Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34.

§ 3342. Taking Up Passengers.—Degree of Care.—In an action for injuries to one attempting to board a car, a charge that defendant's servants were not required to exercise the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances, and consistent with the proper discharge of their other duties, and that by the term "highest degree of care" was meant the degree of care which would be exercised under like circumstances by careful and experienced employees, was not open to the objection of reducing the degree of care required of defendant's servants while looking after passengers to that of ordinary care, and of excusing the conductor from looking after plaintiff while he was engaged in performing his duties.[8]

Failure to Direct Passenger to Train.—Testimony by the plaintiff and a person who was with him, when he was looking for his train, that there were no ushers to direct him to his train, is sufficient to justify a charge that defendant is liable if it failed to make reasonable arrangements for directing him to his car.[9]

Failure to Look Out for Persons Signalling to Stop.—An instruction in a passenger's action for personal injuries, as to the motorman's duty to keep a lookout to discover persons signaling to stop in order that they may board the car, should not mislead the jury into considering his duty at places other than stopping places.[10]

Reasonable Time for Passenger to Board, and Assistance.—In a passenger's action for personal injuries, where the evidence raises the issue, the court should submit the questions as to whether the carrier stopped its car long enough to give the injured passenger a reasonable opportunity to board the train and whether defendant's agents saw that such passengers needed assistance and negligently failed to render it.[11] An instruction which denies the right to recover, though the jury might have found that the train did not remain standing a reasonable time for passengers to board it, is properly refused.[12] Thus, instructions,

8. Degree of care.—Foster *v.* Seattle Elect. Co., 76 Pac. 995, 35 Wash. 177.

9. Failure to direct passenger to train.—Newcomb *v.* New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687.

10. Failure to look out for persons signalling to stop.—In an action for injuries to a passenger waiting to take a street car, it appeared that she was within a few feet of the platform and within a foot or two of the track, and on a step as high or higher than the platform as well as at a point where the general public crossed the track, and, while standing in that position, she was struck by a car, which failed to heed her signal to stop. An instruction in her favor declared that it was the motorman's duty to keep a careful and constant lookout ahead to discover persons signaling to stop in order that they may board the car, and a person who signals in time for him to do so by exercising ordinary care has a right to assume that he is on the lookout for passengers, and will discover them if he exercises such care. Held, that the instruction was not calculated to mislead the jury into considering the motorman's duty at places other than stopping places. Harkins *v.* Seattle Elect. Co., 101 Pac. 836, 53 Wash. 184.

11. Reasonable time for passenger to board and assistance.—In an action for personal injuries sustained by a passenger in boarding a train, when it appeared that plaintiff was an infirm woman sixty-nine years of age, that she had her left arm in a sling, and besides a small grip slung from her shoulder she carried a telescope; that the railroad men saw her difficulties, and the conductor attempted to assist her in boarding the train, but it started as soon as she got on the steps, and there was a conflict in the testimony as to whether she fell on the steps—the court was justified in submitting to the jury the questions as to whether defendant stopped its train long enough to give her a reasonable opportunity to board the train with safety, and whether defendant's agents saw that she needed assistance and negligenty failed to assist her. Louisville, etc., R. Co. *v.* Arnold, 102 S. W. 322, 31 Ky. L. Rep. 414.

12. An instruction, in an action for injuries to a passenger while boarding a train which he had left to procure dinner, that the carrier was under no obligation to hold its train for the passenger to purchase cigars and attend to other private matters, and, if he stopped for such purposes, when, by going to the train, he could have boarded the same before it started, he was guilty of negligence and could not recover, was properly refused, because it denied a right to recover, though the jury might have found that the train did not remain standing a rea-

in an action for injuries to a passenger boarding a train, that, if the train was started without any jerk other than that incident to the proper handling of trains, the carrier was not liable for the injuries, and, if the passenger had reached the first or second step of the train and was injured by the starting thereof, he could not recover, if the train was started in a careful manner, were properly refused, because they denied a right to recover, though the train was started before a sufficient time had been allowed for passengers to get aboard.[13]

Safety of Place Where Passengers Taken on.—In an action for injuries to a passenger attempting to board a car, an instruction, standing alone, that plaintiff was not obliged to assume that there were dangerous places where he was invited to go into the car, would be erroneous.[14]

Falling in Effort to Board Train.—In one's action against a railroad company for injuries from falling from a car platform in attempting to enter as a passenger, an instruction that he was entitled to recover "if the fall could have been averted by the skill or care of the defendant or its servants" is erroneous.[15]

Pursuing a Moving Train.—In an action to recover for personal injuries caused by plaintiff's running into another train while pursuing defendant's train, which he had neglected to board before it left the station, where it was claimed by plaintiff that his failure to board the train was due to the fact that no signal for starting was given, it was proper to instruct that the company was not bound to keep its track clear to those who pursued its trains, and that the company was only bound to exercise ordinary diligence for the safety of a passenger needlessly neglecting its signals and trying unseasonably to board the train.[16]

Attempting to Board Moving Train at Invitation of Conductor.—An instruction, in an action against a carrier for injuries to a passenger while attempting to board a moving train, that, if the conductor invited the passenger to board the train while in motion, the jury must determine whether he was negligent, and in determining that question his conduct must be viewed in the light of his experience and the danger to be apprehended by a reasonably prudent man when confronted with the situation known to the conductor, properly submitted the issue of his negligence.[17]

Boarding Moving Train—Train Failing to Stop at Station.—It is not error to refuse to charge that failure to stop at a station "does not justify a person in attempting to board a train in motion," where the jury have already been told that plaintiff can not recover if he attempted to board the train while in motion, and where an ordinarily prudent man would not have made the attempt.[18]

Boarding Moving Street Car—Signal to Stop.—In an action for injuries received by being thrown from a street car, while plaintiff had boarded while it was in motion, an instruction that if plaintiff did not signal to stop, and the motorman did not slacken the speed or stop, to invite plaintiff to get on, the jury must find for defendant, was properly refused, where the evidence showed that a large number of people approached the cars and got on with the knowledge of the conductor and motorman, as, plaintiff being the last one to get on, they had notice of his intention.[19]

sonable time for passengers to board the same, and though there was evidence that he was thrown to the ground by the train starting with a jerk while he was on the steps leading to the platform of a coach. Choctaw, etc., R. Co. *v.* Hickey, 81 Ark. 579, 99 S. W. 839.

13. Choctaw, etc., R. Co. *v.* Hickey, 81 Ark. 579, 99 S. W. 839.

14. **Safety of place where passengers taken on.**—Plummer *v.* Boston Elev. R. Co., 84 N. E. 849, 198 Mass. 499.

15. **Falling in effort to board train.**—Chicago, etc., R. Co. *v.* Trotter, 61 Miss. 417.

16. **Pursuing moving train.**—Perry *v.* Central Railroad, 66 Ga. 746.

17. **Attempting to board moving train at invitation of conductor.**—Arkansas Cent. R. Co. *v.* Bennett, 82 Ark. 393, 102 S. W. 198.

18. **Boarding moving train—Train failing to stop at station.**—Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108, 10 S. W. 711.

19. **Boarding moving street car—Signal to stop.**—South Chicago City R. Co. *v.* Defresne, 200 Ill. 456, 65 N. E. 1075.

Attempt of Conductor to Protect Person Boarding Moving Street Car.—In an action for injuries to plaintiff's thumb by it being wrenched when the conductor attempted to pull her on to the street car after she had caught hold of a rod to assist herself upon the steps, there being evidence that the car was in motion when plaintiff reached it, and that the conductor assisted her to prevent her from falling off in going around a curve, an instruction is proper that if plaintiff attempted to board the car while in motion, and the conductor had reasonable ground to believe that she was in danger of falling off, he was bound to take such steps for her protection as the circumstances required, and if, in jerking her to prevent her from falling off, he used no more force than appeared to be reasonably necessary for her protection, and she was accidentally injured, the company was not liable.[20]

Charge as to Making Change for Passenger.—See ante, "Invading Province of Jury," § 3333.

§ 3343. Starting or Moving Car While Passenger Boarding Same.—In a passenger's action for personal injuries caused by the starting or moving of the car, while the injured passenger was boarding the same, the instructions need not define what constitutes a boarding of a car,[21] must not permit a recovery without a finding that the car had stopped when the injured passenger attempted to enter it,[22] must not pretermit or disregard the duty resting on the conductor to know before causing the train to be started that plaintiff was not in the act of getting aboard thereof,[23] or hold the carrier liable if the conductor or persons in charge of the car exercised due care to see or hear persons who wished to board the car and did not see or hear the plaintiff when attempting to board it or when on the platform,[24] must not be to the effect that it was not necessary to keep the car standing till the passenger reached the inside,[25] and must not lay too much stress

20. Attempt of conductor to protect person boarding moving street car.—South Covington, etc., R. Co. *v.* Raymer (Ky.), 116 S. W. 281.

21. Defining what constitutes boarding car.—Where, in an action for injuries to a street car passenger, plaintiff showed that while boarding the car it started forward with a jerk, throwing him to the ground, and defendant showed that plaintiff had boarded the car in safety and fell from the rear platform while engaged in a friendly scuffle with companions or by an unexplained movement of the car, and the court charged that a passenger must be offered a reasonable opportunity to come to a place of safety on the car after boarding it, the refusal to define what constituted a boarding of a car was not erroneous. Formiller *v.* Detroit United Railway, 130 N. W. 347, 164 Mich. 653.

22. Finding that car had stopped.—A general instruction for plaintiff, which, among other things, charged that, if defendant's servants in charge of the car received plaintiff as a passenger thereon, and if while she was on the run-board thereof, etc., they caused or suffered the car to start and move forward, etc., in the absence of contributory negligence, plaintiff could recover, in effect requires the jury to find that plaintiff was invited to enter the car, and had accepted the invitation, and is not open to the objection that it permits plaintiff to recover without a finding that the car had stopped when plaintiff sought to enter. Flaherty *v.* St. Louis Trans. Co., 106 S. W. 15, 207 Mo. 318.

23. Duty to see or hear passenger.—The crew of a street car, or some of them, being chargeable with the duty of knowing before starting that no one was in the act of boarding or attempting to board the car, defendant street railway company is not entitled to a charge that, if plaintiff attempted to board its car after it had started and without the knowledge of the crew, he could not recover, as their failure to know that he was in the act of getting on might be negligence. Birmingham R., etc., Co. *v.* Lee, 153 Ala. 79, 45 So. 292.

24. In an action for personal injuries caused by the sudden starting of defendant's horse car while plaintiff was attempting to board it, the driver testified that he did not know the plaintiff was attempting to board the car. Held, that it was error to refuse to charge that, if the driver exercised due watchfulness to see or hear persons who wished to board the car, and, so doing, did not see or hear the plaintiff either when attempting to board or when on the step, then defendant was entitled to a verdict. Lamline *v.* Houston, etc., R. Co., 14 Daly 144, 6 N. Y. St. Rep. 248.

25. As to duty to stand until passenger inside car.—In an action for injury to a passenger while entering a car, an instruction that it was not necessary to

on a promise of the conductor as to time to check baggage.[26]

Negligence in Giving Notice of Starting Train.—The question of conductor's negligence in starting a train and giving plaintiff notice having been submitted to the jury in a charge sufficiently clear and explicit, it was not error to refuse to instruct the jury that, if the conductor shouted "All aboard," it was proper for them to consider whether or not plaintiff might not reasonably suppose the train would not start until he had an opportunity to board it.[27]

Burden of Proof of Starting Train While Passenger Boarding Same.—In a passenger's action for personal injuries sustained while attempting to board a train, where it is shown that such injuries were caused by the operation of the train, the charge of the court should not place the burden of proof of negligence on the plaintiff. Thus, in a passenger's action for a child's death by being jerked off a freight train by the sudden starting of the train, an instruction that, if defendant's servants did what men of ordinary care would have done under the circumstances, they were not negligent, and the company would not be liable, as it could only be liable if the evidence showed it was negligent, was misleading as tending to place the burden upon plaintiff to show negligence.[28]

§ 3344. Sufficiency and Safety of Means of Transportation.[29]—Degree of Care Generally.—An instruction that a railway company is bound to exercise the highest degree of care reasonably practicable for the personal safety of its passengers, and that such care should be used for the purpose of safely operating its cars and trains, in having its tracks and switch appliances kept in a reasonably good and safe condition, and for such purpose it was bound to exercise the highest degree of care reasonably practicable in inspecting and keeping its tracks, switch appliances, etc., in good and reasonably safe working order and position, is not misleading.[30]

Defects in Construction of Car.—Where, in a passenger's action for injuries occasioned by a fall received in alighting from an open summer car, there was no evidence that the car was defective or dangerously constructed, there was no error in refusing an instruction relating to defects in the construction of the car.[31]

Tests to Determine Fitness of Equipment.—In an action by a passenger for injuries caused by a defect in the car or equipment an instruction that the company was required to exercise reasonable care commensurate with the danger to ascertain the fitness of the equipment before using the same, and that it was

keep the car stationary until she reached the inside of the car was properly refused, as tending to mislead, where there was testimony that the car was started improperly. Birmingham R., etc., Co. *v.* Hawkins, 44 So. 983, 153 Ala. 86, 16 L. R. A., N. S., 1077.

26. **Time promised by conductor.**—In an action for injuries to plaintiff caused by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised ten minutes by the conductor in which to check her baggage, and the train started before that time expired, then they should find for the plaintiff, is not erroneous as laying too much stress on the time promised her by the conductor. Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636.

27. **Negligence in giving notice of starting train.**—Doyle *v.* Boston, etc., R. Co., 82 Fed. 869, 27 C. C. A. 264.

28. **Burden of proof of starting train while passenger boarding same.**—Miles *v.* St. Louis, etc., R. Co., 90 Ark. 485, 119 S. W. 837.

29. **Burden of proof.**—See post, "Presumptions and Burden of Proof," § 3359.

Defective brakes and grip irons.—See ante, "Requests for Instructions," § 3327.

Passenger on log train.—See ante, "Requests for Instructions," § 3327.

Breaking trolley wire.—See ante, "Conformity of Pleadings and Issues," § 3329; "Applicability to Evidence," §§ 3330-3332.

Elevators.—See post, "Elevators," §§ 3350-3351.

30. **Degree of care generally.**—Logan *v.* Metropolitan St. R. Co., 82 S. W. 126, 183 Mo. 582. See ante, "Misleading Instructions," § 3326; "Degree of Care Required," § 3339.

31. **Defects in construction of car.**—Thompson *v.* Metropolitan St. R. Co., 135 Mo. 217, 36 S. W. 625.

for the jury to determine what tests were reasonably required and would have revealed the defect, etc., sufficiently state the law that it was the duty of the company, before using the equipment, to apply every reasonable test to discover if the same was in suitable condition for service, though a paragraph of the instructions, standing alone, might lead the jury to believe that, if the company bought its equipment from a reputable manufacturer, it performed its duty.[32]

Defective Car Window.—In an action by a passenger for injuries to her arm resulting from the falling of a car window, instructions to the effect that it was the duty of defendant railroad company to keep its passenger coaches in a reasonably safe condition and to use ordinary care to prevent injury to its passengers, but that the jury should find for defendant unless it believed that the window was defective and known to be so by defendant, or might have been know to it by the use of ordinary care, and that the jury should find for defendant if they believed that before the window fell the plaintiff knew of its defective condition, were sufficient.[33]

Sufficiency of Axle—Injury to Cattle Drover.—Where a drover, riding on a freight train, was killed by the breaking of an axle, an instruction, in an action for his death, that if he was riding on the train as authorized by the contract of shipment, and by reason of the insufficiency of an axle of a car in the train he was so injured that he died, and defendant did not use due care in reference to the axle, but intestate did use due care, etc., plaintiffs were entitled to recover, was proper, as modified by an instruction that if the injuries complained of were caused by intestate's acts in jumping from the car through fear or apprehension of danger aroused by the conduct of other persons, and there was no imminent danger to justify an ordinarily prudent person in jumping from the car, and that the danger arose from the breaking of an axle of a foreign car, which had been examined in a careful and thorough manner by defendant's inspectors, and no defect found, and defendant used due care in running and managing the train and in all subsidiary arrangements for the safety of the passenger, plaintiffs could not recover.[34]

Gate to Front Platform.—In an action against a street railway company for damages for killing plaintiff's minor child, an instruction given the jury describing the kind of gates that defendant was bound by statute to provide for the front platforms of its cars, and that if, by the neglect of the driver, "a gate" was not provided to the front platform on which deceased was riding, whereby he came to his death, without negligence on his part, defendant is liable, is not objectionable because of the words "a gate," instead of "such gate," as the kind of gate defendant was required to keep was explained in the instruction.[35]

Snow or Ice on Car Platform.—In an action by a passenger for injuries where her testimony showed that in leaving the train she slipped and was injured because of snow and ice on the car platform, it was not error to refuse to instruct that if defendant's agent used reasonable care in cleaning off the car platform before leaving the place where plaintiff boarded the train, and by the use of such care was unable to discover any snow or ice thereon, then they must find for defendant, notwithstanding plaintiff's slipping was caused by snow and ice on the platform, since it was misleading as to the degree of care required of defendant toward its passengers, and ignored defendant's opportunity to discover and remove the ice and snow after plaintiff had boarded the train, and before she was to leave it.[36]

32. Tests to determine fitness of equipment.—Marshall *v.* Boston, etc., St. R. Co., 195 Mass. 284, 81 N. E. 195.

33. Defective car window.—Cincinnati, etc., R. Co. *v.* Lorton, 33 Ky. L. Rep. 689, 110 S. W. 857.

34. Sufficiency of axle—Injury to cattle drover.—Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969.

35. Gate to front platform.—Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315.

36. Snow or ice on car platform.—Baltimore, etc., R. Co. *v.* Trader, 106 Md. 635, 68 Atl. 12.

Comfort and Sanitation of Car.—In an action for personal injuries to a passenger, an instruction that a railway, as a common carrier of passengers, owes a duty to its passenger to carry him safely and properly, and to use due care to see that the car in which he is being carried is kept in a decent and habitable condition, and so as to afford that degree of comfort to him and other passengers which is usual and practicable in cars of the kind in which he is being carried, was not erroneous because of the words "and other passengers." [37]

Defective Track.—In an action against a street railway company for injuries to a passenger owing to a defective track, defendant could not complain of the fact that the court only charged on its duty to keep its track and appliances in a reasonably safe order and condition.[38]

Knowledge of Condition of Track.—Where a portion of a railway bed was undermined by sudden and extraordinarily heavy rainfalls and gave way whereby a passenger was injured, although the railway bed was in safe condition before the rain and a train had safely passed over it two hours before the accident, and it had been inspected before the time of the passage of the train and was apparently in safe condition an instruction that the liability of the railroad depended on the manner and speed of running the train, considering the condition of the track and the state of the weather, if that in any way superinduced the accident, was erroneous as failing to submit the question of the knowledge of the condition of the track on the part of those in charge of the train.[39]

Defective Bridge—Collapse.—In an action by a passenger against a common carrier for personal injuries resulting from the collapse of a bridge, it is not error to instruct the jury that the slightest neglect against which human prudence and foresight might have guarded, and by reason of which the injury may have been occasioned, will render the carrier liable. And in an action for injury to a street car passenger caused by a bridge collapsing under the car, it was not error to instruct that if the proximate cause of the collapse "might have been" the slipping of stringers, and that the defendant was negligent in the method adopted in placing the stringers in the bridge, plaintiff could recover.[40]

Burden of Proof That Equipment Defective.—An instruction that the happening of an injury to a passenger because of defective appliances creates a prima facie case of negligence, "or, in other words, the company has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by exercising the highest degree of practical care and diligence," is not objectionable as placing the burden of disproving the negligence charged by plaintiff upon the carrier.[41] And in an action against a carrier for injuries to a passenger by the falling of a window of the car, where the evidence, which was not directly disputed or denied, showed that the window catch must have been weak, broken, or defective, as claimed, the court properly instructed the jury that, if the accident and resultant injury were occasioned by the defect in the appliance, a prima facie case of negligence was established, and it was incumbent on defendant to excuse apparent failure of duty.[42]

§ 3345. Management of Conveyances.—Making Coupling.—In an action by a passenger for injuries, it is proper to instruct that if in making the coupling,

37. Comfort and situation of car.—Mathis *v.* Southern Pac. Co., 31 Utah 507, 88 Pac. 668; Fitzgerald *v.* Southern Pac. Co., 31 Utah 510, 88 Pac. 669.

38. Defective track.—Nashville Railroad *v.* Howard, 112 Tenn. 107, 78 S. W. 1098, 64 L. R. A. 437.

39. Knowledge of condition of track.—International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744.

40. Defective bridge—Collapse.—Roanoke R., etc., Co. *v.* Sterrett, 111 Va. 293, 68 S. E. 998.

41. Burden of proof that equipment defective.—Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A., N. S., 527, 16 Am. & Eng. Ann. Cas. 1, rehearing denied in 84 N. E. 13.

42. Cleveland, etc., R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A., N. S., 527, 16 Am. & Eng. Ann. Cas. 1.

the attempt to accomplish which occasioned the collision and consequent injury, the company used a degree of care or caution less, in however small a degree, than the utmost care of very cautious railroad men under the same or similar circumstances, then the defendant was not cautious.[43] But an instruction authorizing a finding for defendant if the coupling was made in a way that was customary and incidental to railroading, without defining the degree of care with which it should have been done, is unduly favorable to defendant.[44]

Rate of Speed at Curve.—In a passenger's action against a street railway company for personal injury, where the petition alleges that the car on which plaintiff was riding was permitted to run upon a curve at an excessive and dangerous rate of speed and to strike the curve with violence, the instructions for the plaintiff need not in totidem verbis require a finding that the car was being run at a rapid, excessive and dangerous rate of speed.[45]

Running Over Switch at "Excessive" Speed.—In an action for injury to a passenger by a railroad company's negligence in running its cars over a switch at a dangerous rate of speed, an instruction that, if the train ran on the switch at an "excessive or improper" rate of speed, causing the injury, defendant would be liable, is not error because of the use of the words "excessive or improper," though the word "negligent" would have been better.[46]

Cars of Different Companies Passing on Curve.—Where, in an action by a street car passenger for injuries for alleged negligence of two street car companies in bringing their cars in close proximity while meeting on a curve, there was some evidence that the car of one company stopped after entering the curve at a point where the danger was greatest, an instruction that such company was not liable, if at the moment of the accident its car was not passing through the curve, was properly refused, because authorizing a verdict for it if its car had stopped after entering the curve.[47]

Acts of Motorman in Emergency.—In an action for injuries to a passenger, an instruction requested by defendant that, if the motorman did not exercise the best judgment which he could have exercised, he being called on to act in an emergency, his error would not be such negligence as would make defendant liable, should be refused, since the language is applicable to an error which might have been very gross, and inconsistent with proper care.[48]

Permitting Passenger to Ride on Footboard.—Refusal to charge that it was not negligence for a street railway company to permit a passenger to ride on the footboard of a crowded car was error, though the court charged that if the passenger voluntarily took his place there, and, by reasonable care, could

43. Making coupling.—Wabash R. Co. *v.* Mathew, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329.

44. Illinois Cent. R. Co. *v.* Colly, 27 Ky. L. Rep. 730, 86 S. W. 536.

45. Rate of speed at curve.—In an action against a street railroad for injuries to a passenger, the petition alleged that the car in which plaintiff was riding was permitted to run upon a curve at an excessive and dangerous rate of speed and to strike the curve with sudden and unusual force, and there was evidence that the car did strike the curve with violence. The court instructed for plaintiff that, if the car struck the curve with violent and unusual force, etc., plaintiff was entitled to recover, and instructed for defendant that plaintiff was required to prove by the greater weight of evidence that her injuries were caused by the car entering the curve at a rapid and excessive speed, and by striking the curve with violent and unusual force. Held, that the instruction given for plaintiff was not erroneous on the ground that it did not expressly require the jury to find that the car was being run at a "rapid, excessive, and dangerous rate of speed." Chadwick *v.* St. Louis Trans. Co., 93 S. W. 798, 195 Mo. 517.

46. Running over switch at "excessive" speed.—Central, etc., R. Co. *v.* Johnston, 106 Ga. 130, 32 S. E. 78.

47. Cars of different companies passing on curve.—Parks *v.* St. Louis, etc., R. Co., 77 S. W. 70, 178 Mo. 108, 101 Am. St. Rep. 425.

48. Acts of motorman in emergency.—Tozier *v.* Haverhill, etc., St. R. Co., 72 N. E. 953, 187 Mass. 179.

have ridden safely, but did not use such care, the company was not liable, especially where the court also charged that, if the accident to the passenger was the direct result of the overcrowded condition of the car, the company would be liable, provided the passenger was not guilty of contributory negligence.[49]

§ 3346. Causing Passengers to Fall from Train or Car.—Passenger Riding on Rear Platform.—In an action for injury to a passenger on a street car from falling from the rear platform, an instruction defining the degree of care and diligence required of railway companies in the carriage of passengers should be given.[50] But an instruction as to the last clear chance doctrine should be left off altogether, except it be contended that the platform on which plaintiff stood was a place of peril.[51]

Brakeman's Pushing Passengers onto Platform.—In an action for damages by reason of plaintiff's being pushed off a train by an employee of the railroad company, the judge need not define the terms "gross negligence," "fraud," "malice," and "cruel or wanton and oppressive conduct," used in his charge.[52] And in such action for injuries sustained by the passenger on an alleged ejection by a brakeman from a train, the defendant carrier is entitled to have the jury instructed as to what was the duty of the brakeman, and as to the rule by which they were to determine when he ceased to act in the performance of his duty; and where recovery is sought on the ground that plaintiff was wrongfully pushed out upon the platform, from which he fell, the jury must be required to find not only that the plaintiff was pushed out upon the platform, but as a natural and proximate result thereof he fell from the train and sustained the injuries complained of. The manner of his leaving the platform is therefore a matter of primary importance and a recovery could be had only upon its being shown that the result was brought about by the positive act of the brakeman. This phase of the case should be made clear, where there is evidence tending to show that plaintiff voluntarily jumped from train after he was pushed upon the platform.[53]

49. Permitting passenger to ride on footboard.—Anderson *v.* City, etc., R. Co., 42 Ore. 505, 71 Pac. 659.

50. Passenger riding on rear platform.—South Covington, etc., St. R. Co. *v.* Riegler, 26 Ky. L. Rep. 666, 82 S. W. 382.

In an action for injury to a passenger from falling from the rear platform of a street car, the court, after charging that, though the jury found defendant was negligent, yet, if they found plaintiff was also negligent, and but for his negligence he would not have been injured, they should find for defendant, continued: "Unless they also find that, notwithstanding plaintiff's negligence, defendant could have, by the exercise of ordinary care, or any degree of care, prevented the accident, then they will find for plaintiff." Held, that the latter part of the instruction should have been omitted, unless it was contended that the rear platform was a place of peril, in which case it should have been: "Unless they also find that, notwithstanding the negligence of plaintiff, defendant, its agents or servants, discovered his perilous position in time to have and could have prevented the injury to him, and failed to do so, then they will find for plaintiff." South Covington, etc., St. R. Co. *v.* Riegler, 82 S. W. 382, 26 Ky. L. Rep. 666.

51. South Covington, etc., St. R. Co. *v.* Riegler, 26 Ky. L. Rep. 666, 82 S. W. 382.

52. Brakeman's pushing passengers onto platform.—Louisville, etc., R. Co. *v.* Ray, 101 Tenn. (17 Pickle) 1, 46 S. W. 554.

53. In an action against a carrier for injuries sustained by plaintiff on his alleged ejection from a train, it appeared that plaintiff and others engaged in a violent altercation in a car; and witnesses for the plaintiff testified that after the fight had been in progress for some time a brakeman seized plaintiff, and pushed him out on the platform, and closed the door, and some testified that the brakeman then stated that he had thrown plaintiff off, and others testified that the statement was that plaintiff was off. The brakeman testified that he did not go out of the car, but that he allowed plaintiff to make his exit, and then closed the door, refusing to allow any one to go out. The court instructed that if the brakeman pushed plaintiff through the door and on the platform for the purpose of protecting plaintiff from violence, and with no purpose to eject him from the train, plaintiff could not recover; and in another instruction the jury was told that plaintiff was not required to show that the brakeman actually threw him from

Passenger Pushed from Car by People Attempting to Escape Collision.—Where, in an action by a passenger for injuries sustained in a railway collision, the evidence showed that, because of the crowded condition of the car, the passenger was standing on the front platform, and that when the danger of a collision was imminent a panic ensued, and he was pushed off by people attempting to escape, and fell to the ground an instant before the collision, an instruction imposing on the carrier the duty of carrying the passenger safely as far as it was capable by human care to do, making it liable for the slightest neglect, and stating that, where a collision results from two cars being run in opposite directions on a single track, the carrier is prima facie negligent, was not erroneous, because based on the theory that the passenger was injured by the collision of the cars.[54]

Going on to Platform Preparatory to Alighting after Station Called.—Instructions that a passenger could not recover for injuries on allegations of gross negligence of defendant in calling a station in the manner and at the time it did, and in failing to warn plaintiff of the danger, were properly refused as leading the jury to disregard the negligence of defendant's servant in prematurely calling the station and in failing to warn plaintiff before suddenly moving the train after having induced him to go on the platform; the court having charged that, if the jury believed that plaintiff was not thrown from the train by a sudden starting thereof or a sudden jerk after it came to a stop, they should find for defendant.[55]

Alighting Passenger Thrown from Car by Premature Start.—Where, in an action for death of a street car passenger by being thrown from the car by an alleged premature start, the court for defendant charged that there was no duty on the conductor to remain on the rear platform after the car was started or to take steps to avert an accident should a passenger on the rear platform be placed in a position of danger by his own negligence or otherwise after a signal to start the car was given, unless the conductor actually knew of such peril and at plaintiff's instance, instructed that if defendants' agents knew or by reasonable care could have known that plaintiff's intestate was attempting to alight, and by the highest degree of care could have prevented the accident, but did not do so, they should find for plaintiff, such instructions were reconcilable, and properly presented the opposing theories of the parties.[56]

§ 3347. Sudden Jerks, Lurches or Jolts.—In a passenger's action for injuries caused by sudden jerks, lurches or jolts of the car or train, an instruction must not state the law too strongly against the carrier,[57] must not ignore

the train, but that if the evidence showed that the brakeman wrongfully put him out of the car, and that for that reason he fell from the platform, it would amount to an ejection, and that it would be sufficient that the act was wrongful, if it appeared the brakeman was endeavoring to remove plaintiff under the circumstances claimed, and that to put one off a train under such circumstances was a wrongful act. Held, that the instruction was erroneous, as defendant was entitled to have the jury instructed as to what was the duty of the brakeman, and as to the rule by which they were to determine when he ceased to act in the performance of his duty, and also because the jury might have inferred that, if plaintiff was pushed on the platform, defendant would be liable, irrespective of the cause from which his fall from the train proceeded. Battis *v.* Chicago, etc., R. Co., 100 N. W. 543, 124 Iowa 623.

54. **Passenger pushed from car by people attempting to escape collision.**—Magrane *v.* St. Louis, etc., R. Co., 183 Mo. 119, 81 S. W. 1158.

55. **Going on to platform preparatory to alighting after station called.**—Midland Valley R. Co. *v.* Hamilton, 84 Ark. 81, 104 S. W. 540.

56. **Alighting passenger thrown from car by premature start.**—Wickham *v.* Leftwich, 112 Va. 225, 70 S. E. 503. See post, "Sudden Jerks, Lurches or Jolts," § 3347.

57. **Sudden jerks, lurches, or jolts.—Must state law correctly.**—The following charge, in an action by a passenger for personal injuries, stated the law too strongly against the defendant company: "A carrier is liable for injuries on its cars,

character of curve on rounding which the jerk, etc., occurred,[58] and must not be misleading.[59]

Sufficiency of Jerk to Sustain Charge.—Whether a jerk of a car, whereby a passenger was injured, will sustain a charge of negligence depends on the violence of the jerk, the situation of the passenger at the time, and the carrier's duty to know that situation.[60]

Definition of "Negligently."—In an action for injuries to a passenger alleged to have been occasioned by a lurch of the train an instruction to find for plaintiff if, inter alia, defendant "negligently or carelessly gave the train a sudden or violent jerk," defines "negligently" in language not susceptible of criticism by defendant, not requesting a definition of such term.[61]

Necessity for Phrase "Thus Causing the Injury."—Where, in an instruction in an action by a passenger for injuries, the court states that the negligence relied on is that at a certain point there was a sudden jerk or lurch imparted to the train, sufficient to throw the passenger therefrom, it is not necessary to add, "thus causing the injury." [62]

Meaning of Phrase "Had Cause to Believe."—In an action for injuries caused by the unexpected starting of a railway car, a charge that if defendant's employees knew or "had cause to believe" that plaintiff was on the car, and failed to exercise ordinary care, and the accident was the result, the verdict should be for plaintiff, is proper, as the phrase "had cause to believe" could not be understood as meaning other than reasonable grounds to believe.[63]

Experience as to Safety of Method of Starting Car.—A charge that if the employees of the carrier by experience were satisfied that the methods used were reasonably safe, the defendant would not be liable, is erroneous.[64]

Jerks, etc., Caused by Irregular Motions.—In an action against a street railway company for injuries sustained by a passenger who was standing in a car, and was thrown down when it rounded a curve, it was proper to refuse to instruct that, if the jury found that the car was not going at an improper speed, they should find for defendant, since the irregular motion might have caused the injury.[65]

caused by a sudden jolting of the cars in starting or coming to a stop; and a railroad company is not relieved from liability by reason of its failure to equip its train intended for passengers with all the appliances which extraordinary diligence would require on trains adapted for transporting passengers." Macon, etc., R. Co. *v.* Moore, 25 S. E. 460, 99 Ga. 229.

58. Character of curve.—In an action for injury to a street car passenger, who was thrown to the street while the car was rounding a curve, a request for a ruling that passengers are not required to expect that on turning a curve the car will be driven at a rapid rate, etc., was properly refused for ignoring the character of the curve in question. Zamore *v.* Boston Elev. R. Co., 84 N. E. 858, 198 Mass. 594.

59. See ante, "Misleading Instructions," § 3326.

60. Sufficiency of jerk to sustain charge.—Birmingham R., etc., Co. *v.* Mayo (Ala.), 61 So. 289.

61. Definition of "negligently."—Louisville, etc., R. Co. *v.* Deason, 29 Ky. L. Rep. 1259, 96 S. W. 1115.

62. Necessity for phrase "thus causing the injury."—Pennsylvania Co. *v.* Paul, 126 Fed. 157, 62 C. C. A. 135.

63. Meaning of phrase "had cause to believe."—Louisville, etc., R. Co. *v.* Popp, 96 Ky. 99, 16 Ky. L. Rep. 369, 27 S. W. 992.

64. Experience as to safety of method of starting car.—In an action for damages for personal injuries alleged to have been caused by defendant starting one of its cars, on which the person injured was a passenger, in a reckless, careless, and negligent manner, the question for the jury is whether, in this particular instance, the car was started in a negligent, dangerous, or improper manner; and a charge, in effect, that if the officers of defendant, by experience, were satisfied in their own minds that the method used in starting the car was reasonably safe, defendant would not be liable, is erroneous. Dickert *v.* Salt Lake City R. Co., 59 Pac. 95, 20 Utah 394.

65. Jerk, etc., caused by irregular motions.—Brierly *v.* Union R. Co., 58 Atl. 451, 26 R. I. 119.

Jolt Caused by Piece of Iron in Slot Rail.—Where, in an action for injuries to a passenger on a street car, the cause of the injury was alleged to be the sudden, violent stopping of the car, and there was some evidence that after the accident a bolt or piece of iron of some kind was taken from the slot rail, it was proper not to restrict the jury to finding negligence as to the presence of a bolt or piece of iron in the rail.[66]

Burden of Proof of Sudden and Violent Stopping Car.—In a suit for injuries to a passenger by the sudden and violent stopping of a street car, a charge that if the car was permitted to come to an unusually abrupt, violent, and unexpected stop, and plaintiff was injured thereby, it would be presumed, in the absence of evidence to the contrary, that the stop was caused or permitted through defendant's negligence, and that it then devolved on defendant to show by a fair preponderance of evidence that the stop was not caused or permitted through its negligence, was proper.[67]

§ 3348. Collisions.—Degree of Care Generally.—An instruction in an action against a carrier to recover for injuries caused by a collision, that it is the duty of a railroad company to use the highest degree of care and caution, consistent with the practical operation of the road, to provide for the safety and security of passengers while being transported is proper.[68]

Trains Moving in Opposite Directions.—Where a passenger shows that he was injured in a collision of trains moving in opposite directions, his prima facie right to recover is established, and, such a collision being shown, with nothing in the pleadings or proof to exonerate the carrier, it is not error to instruct that "defendant admits its liability if plaintiff received any personal injury by reason of, and at the time of, the collision."[69]

Collision Caused by Parting of One of the Trains.—In an action against a railway company for injury to a passenger, an instruction that if defendant was not negligent in operating the trains, and the collision was caused by the parting of one of the trains through no defect in the appliances thereof, and those in charge of such train promptly and properly used all means known to skillful trainmen to prevent the accident, the jury must find for defendant, was properly refused, as tending to mislead the jury, where they could have found that the collision was caused by the negligence of the company's fireman or flagman, who was sent forward to flag the train upon which plaintiff was a passenger, in not giving the signal at a sufficient distance between the trains.[70]

Collision at Crossing of Two Railroads.—Where a passenger is injured by the collision of trains at a crossing of two railroads, each company is liable in full if its servants are negligent; and hence in an action against both it is proper to refuse an instruction, requested by one, correctly defining the duty of the other with respect to the care to be exercised in approaching the crossing, and casting upon it the liability in case the jury found a breach of the duty. Both companies are bound to the same degree of care, and the instruction should be made applicable to both.[71]

Collision Caused by Backing Cars against Caboose.—Where, in an action for injuries to a passenger in a collision caused by backing of cars against a standing caboose in which plaintiff was sitting, there was evidence that plain-

66. **Jolt caused by piece of iron in slot rail.**—Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558.

67. **Burden of proof.**—Briscoe *v.* Metropolitan St. R. Co., 222 Mo. 104, 120 S. W. 1162. See post, "Presumptions and Burden of Proof," § 3359.

68. **Degree of care generally.**—Chicago City R. Co. *v.* Pural, 127 Ill. App. 652, judgment affirmed in 224 Ill. 324, 79 N. E. 686.

69. **Train moving in opposite direction.**—Baltimore, etc., R. Co. *v.* Hausman, 21 Ky. L. Rep. 1264, 54 S. W. 841.

70. **Collision caused by parting of one of the trains.**—Southern R. Co. *v.* Cunningham, 152 Ala. 147, 44 So. 658.

71. **Collision at crossing of two railroads.**—Kansas, etc., R. Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231.

tiff had gone into the car with knowledge of the carrier's servant, an instruction that if the train of cars including the caboose was not coupled to the engine, the plaintiff was on the car at the time of the injury in his own wrong, and could not recover, was erroneous as making defendant's liability exclusively depend on whether the caboose, when plaintiff got into it, was coupled to the engine.[72]

Collision between Train and Street Car.—In a passenger's action for injuries caused by a collision of a street car and railway train on an intersecting track, the charge should define proximate cause,[73] but a request which does not present a case of the intervention of the act of a responsible agent to whose misconduct the injury could be referred as a proximate cause,[74] should be refused. The charge should correctly state the degree of care required of the defendant,[75] but not impose too high a degree of duty on the motorman by requiring him to stop, look, and listen for trains before attempting to cross the railroad track,[76] must not contravene or ignore a statutory duty to stop at the intersection of a railroad,[77] and must not be misleading, as to the right of the street car to stop

72. Collision caused by backing cars against caboose.—Miller *v.* Atlanta, etc., R. Co., 55 S. E. 439, 143 N. C. 115.

73. Proximate cause.—In an action against a street railway company for injuries to a passenger in a collision between a street car and another company's freight train, an instruction defining "proximate cause" should have been given. Shane *v.* Butte Elect. R. Co., 97 Pac. 958, 37 Mont. 599.

74. In an action against a street car company for injuries to a passenger in a collision at the crossing of a steam railroad, defendant requested an instruction that "even if defendant's employees were negligent, if notwithstanding such negligence the accident would not have occurred but for the negligence of the employees of the steam railroad company, and if such employees could, with the exercise of due care, have discovered the presence of defendant's car on the crossing in time to have avoided the accident, and that the injuries complained of resulted from such neglect, such neglect must be considered the proximate cause of the accident, and that of defendant the remote cause." Held, that the instruction was properly refused, as it does not present a case of the intervention of the act of a responsible agent, to whose misconduct the injury could be referred as the proximate cause, so as to render the original negligence of defendant company a remote cause or mere condition of the accident. Washington, etc., R. Co. *v.* Trimyer, 67 S. E. 531, 110 Va. 856.

75. Degree of care.—In an action against a railroad company and a street railroad company for injuries to a passenger on a street car caused by a collision with a railroad train, instructions relating to the degree of care required by a carrier of passengers were not erroneous because inapplicable to the railroad company, since a jury could not have understood the instructions as having any relation to the case against the railroad company. Judgment 124 Ill. App. 627, affirmed in Chicago City R. Co. *v.* Smith, 80 N. E. 716, 226 Ill. 178.

76. Requiring motorman to stop, look and listen.—In an action by a street car passenger, injured in a collision of the car with a railroad train, where it appeared that the motorman had endeavored to look out for trains, an instruction that it was the duty of the motorman to stop and look at a point where he might reasonably expect to see the approaching train was erroneous, in imposing too high a degree of care, since one about to cross a railroad track is not, as matter of law, negligent for failure to stop, look, and listen, though he is bound to use his senses, so that whether the motorman used due care in looking for trains was for the jury. Parker *v.* Des Moines City R. Co., 133 N. W. 373, 153 Iowa 254, Ann. Cas. 1913E, 174.

77. Ignoring duty of street car to stop.—In an action for injuries to a street car passenger by collision with a railroad train at a crossing, an instruction that there was no duty on the part of the operatives of the car to come to a full stop before crossing the railroad, unless they knew or had reasonable cause to know that a train was approaching, was properly refused, as contravening Code 1896, § 3441, expressly imposing such duty. Montgomery St. R. Co. *v.* Lewis, 41 So. 736, 148 Ala. 134.

An instruction that it was the duty of the operator in charge of the train to have brought the same to a full stop before attempting to cross the street car tracks, and that the operatives of the street car were entitled to assume that the train would be so stopped unless the facts and circumstances were such as to indicate that the train would not be stopped, was properly refused as misleading, and as ignoring the duty imposed on the operators of the street car to stop by Code 1896, § 3441. Montgomery St. R. Co. *v.* Lewis, 41 So. 736, 148 Ala. 134.

at any place on the street.[78]

Collision between Street Cars Generally.—Where the complaint, in an action against an electric railway company for injury to a passenger by collision of two cars, simply charges in general terms that defendant, and its agents and servants, so carelessly and negligently operated the cars that they come together in a head-on collision, and that by the exercise of proper care the collision could have been avoided, and the fact of collision was admitted, and defendant introduced evidence bearing on the acts and limitations of the two motormen under the circumstances, it was not error to place on defendant the imputation of negligence, based on its admission of a collision, by an instruction that if the jury found the motorman of either car failed to exercise the judgment, care, caution, and skill necessary under the circumstances, and failed to exercise the care, judgment, caution, and skill usually and customarily attendant in like conditions and circumstances, then defendant had failed to overcome the imputation of negligence in operating the cars, arising in case of such collision.[79]

Collision between Street Car and Special Car of President of Road.—Where a passenger was injured in a collision between an electric car on which he was riding and a car on which the president of defendant company was riding, the court properly refused to instruct that, if shortly before the president's car reached a certain point, its motorman asked the motorman on a passing car if the latter car was the last car out, and was answered that there was one more car, and defendant's president understood the answer to be that the car was the last one out, and, relying on said advice, gave orders for his car to proceed, and if the collision was due solely to the president's misunderstanding of such answer, and such misunderstanding was purely accidental, and did not constitute negligence, the verdict must be for defendant; where the president himself testified that he knew there were nine cars on the road, and that only eight had passed, the instruction was properly refused; it appearing that the president's car was not a regular car on that part of the road, and there being nothing in the record to show that the manager or any motorman knew it was coming out. The instruction was also properly refused where the collision occurred on a day when the cars were crowded, and all the cars were needed to handle the crowds; and again where the president testified that it was the duty of the manager of the road to regulate the running of the cars, and to notify motormen of the cars that were on the road.[80]

Collisions between Cars at Crossing of Two Street Railroad Companies.—In an action against two street railroad companies, jointly, to recover for injuries sustained by reason of a collision at a crossing, an instruction that defendants were liable in case the jury should find that "the collision can be attributed to the want of reasonable care on the part of defendants" is erroneous,

78. In an action by a passenger on defendant's street car for injuries caused by the stopping of the car in a position where it was struck by a locomotive on an intersecting railroad track, a requested ruling that defendant street railway company "had a right to stop its cars at any point upon the street, and that the jury could not, upon the evidence competent for it to consider, find said defendant, or its agents and servants, negligent in stopping the car at the time and place it did, was properly refused as misleading. Lindenbaum *v.* New York, etc., R. Co., 84 N. E. 129, 197 Mass. 314.

In an action by a passenger on defendant's street car for injuries caused by the stopping of the car in a position where it was struck by a locomotive on an intersecting railroad track, a requested ruling that the jury would not be warranted in finding defendant negligent because it stopped its car at the time and place it did was properly refused as misleading. Lindenbaum *v.* New York, etc., R. Co., 84 N. E. 129, 197 Mass. 314. See ante, "Misleading Instructions," § 3326.

79. **Collision between street cars generally.**—Connell *v.* Seattle, etc., R. Co., 47 Wash. 510, 92 Pac. 377.

80. **Collision between street car and special car of president of road.**—Hennessy *v.* St. Louis, etc., R. Co., 73 S. W. 162, 173 Mo. 86.

as their liability depends on whether or not, as a fact, it was attributable to their negligence.[81]

Collision with Animal or Obstruction on Track.—In a passenger's action for injuries as a result of a collision between a street car and an obstruction,[82] or animal,[83] on its track, an instruction that the duty of the company in running the cars required a very considerable degree of care is not an overstatement of its duty.[84] A charge that the company is required to exercise the utmost care for the safety of the passengers, and if the motorman, by the exercise of the utmost care, could not prevent a collision and injury, a verdict should be rendered for the defendant, properly submitted the issues,[85] and an instruction that the carrier is liable if its servants in charge of the car saw the obstruction in time to stop the car and avoid the danger, or could, by the exercise of the care required of them, have seen it in time to stop the car, followed by an instruction as to the degree of care required of a carrier, is not erroneous as requiring the carrier's servant to stop the car when he saw the obstruction, though too late to avoid the injury.[86] While portions of the charge as to the degree of care required might be construed as requiring the motorman to have his car under absolute control, where as a whole it states the rule correctly, it is not erroneous as requiring too high a degree of care.[87]

Burden of Proof of Negligence of Carrier.—In an action for injury to a passenger by collision, it is error to refuse to instruct that the burden is on plaintiff to show by a preponderance of evidence that defendant was guilty of negligence.[88] An instruction, in an action for injury to a passenger from collision,

81. Collisions between cars at crossing of two street railroad companies.—Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988, reversing judgment, 44 N. Y. S. 742, 16 App. Div. 152.

82. Collision with animal or obstruction on track.—Sweeney *v.* Kansas City Cable R. Co., 150 Mo. 385, 51 S. W. 682.

83. Wynn *v.* Paducah City Railway, 31 Ky. L. Rep. 478, 102 S. W. 824.

84. Shay *v.* Camden, etc., R. Co., 49 Atl. 547, 66 N. J. L. 334.

85. Where, in an action against a street railway company for injuries to a passenger in consequence of an unhitched horse in the street becoming frightened and running into the car, the evidence of plaintiff showed that the horse was frightened before the car reached it, and that the motorman did not check the speed of the car, and the evidence of the company showed that the car was barely moving at the time it got opposite the horse, and that the motorman, as soon as the horse showed signs of fright, shut off the current, put on the brakes, and that just as the car got opposite the horse it suddenly wheeled in the direction of the car, an instruction that the company was required to exercise the utmost care for the safety of the passengers, and if the motorman, by the exercise of the utmost care, could not prevent a collision and injury, a verdict should be rendered for the company, properly submitted the issues. Wynn *v.* Paducah City Railway, 102 S. W. 824, 31 Ky. L. Rep. 478.

86. Sweeney *v.* Kansas City Cable R. Co., 51 S. W. 682, 150 Mo. 385.

87. Construed as a whole.—In an action by a passenger against a street car company for injuries sustained by a collision with a dray at a cross street, the court instructed that the drayman and motorman had equal rights, and each owed the duty to approach the crossing at a speed enabling him to stop if necessary to avoid collision; that, if either failed to do so, he was guilty of negligence, and if it caused the injury paintiff must look to such negligent party; that if the car, running at a high speed, ran into the dray as it was attempting to cross and was almost across the track, and whirled it around, so that the shafts were thrust into the car, injuring plaintiff, defendant was liable though the drayman was negligent; but if the dray dashed into the rear of the car, and the shafts protruded and injured plaintiff, then the drayman was liable, and verdict should be for the defendant. Held that, while portions of the charge might be construed as requiring the motorman to have his car under absolute control, as a whole it was not erroneous as requiring too high a degree of care of defendant. Memphis St. R. Co. *v.* Norris, 69 S. W. 325, 108 Tenn. 632.

88. Burden of proof of negligence of carrier.—In an action for injuries to a passenger on a street car by collision with a wagon, where the evidence is conflicting as to whether the car ran into the wagon or the wagon backed into the car, it is error to refuse an instruction that the burden of proof is on plaintiff to show by a preponderance of evidence that defendant was guilty of negligence. Chicago Union Tract. Co. *v.* Mee, 75 N. E. 800, 218 Ill. 9, 2 L. R. A., N. S., 725, reversing judgment 119 Ill. App. 332.

that the presumption of negligence attaches in the case, and defendant has the burden of proving that there was no negligence, and that it was purely accidental, is erroneous, as at least open to construction by the jury of requiring defendant not merely to furnish sufficient testimony to meet the presumption arising from the facts shown by plaintiff, but to overcome them by a preponderance of evidence.[89]

Rebutting Presumption of Negligence.—Where, in an action for injuries to a street car passenger in a collision, the defense was that the injuries complained of were caused from attending parties and dances, a charge that if the passenger was injured without her fault by a collision, the presumption was that the collision and injury resulted from negligence of the carrier, and it must prove, to avoid liability, that it exercised the highest practical care, was not objectionable, but properly coupled together the occurrence of the collision and consequent injury to raise the presumption of negligence.[90]

Rebutting Presumption Where Collision at Crossing of Two Roads.—Where there was but little evidence as to how the accident occurred, but it appeared that the car in which plaintiff was a passenger had nearly crossed over the other company's track when it was struck by its car, it was error to charge, as a matter of law, that the company on whose line plaintiff was a passenger had offered no explanation of the cause of the accident, to rebut the presumption of negligence arising from the fact of the accident, since the relative position of the cars at the time of the accident should have been considered in determining whether or not the company was negligent.[91]

Evidence Establishing Liability as to One of Several Allegations of Negligence.—Where, in an action for injuries to a street car passenger in a collision, the complaint alleged negligent overcrowding of the car and the negligent running of cars in dangerous proximity to each other, without any provision for signals, and the evidence showed that the failure to provide signals was the proximate cause of the accident, and that the overcrowding merely increased the severity of the injury, and the court charged that the burden of overcoming the presumption of negligence arising from the collision and the injury was on defendant, and that plaintiff must prove the material allegations of the complaint, a charge that, if the evidence established a liability as to either charge of negligence, a recovery could be had on the charge supported by the evidence was not misleading, as leading the jury to understand that the overcrowding of the car was actionable negligence.[92]

Res Ipsa Loquitur as Basis for Instruction.—The doctrine of res ipsa loquitur, as applied to a case of injury to a street car passenger from a collision, may properly be made the basis of an instruction; the operation of the rule not being confined to determinations of the sufficiency of evidence by the court.[93]

§ 3349. Derailment.—In an action for injuries to a passenger caused by a derailment,[94] the charge must not subject the carrier to a greater degree of liability than the law imposes. Thus, an instruction, in an action for injuries to a passenger by the derailment of the car, that the carrier was bound to use the highest degree of care for the safety of its passengers consistent with the practical operation of the road, and that if the jury found that the accident would

89. Sewell v. Detroit United Railway, 158 Mich. 407, 123 N. W. 2.

90. **Rebutting presumption of negligence.**—Indiana Union Tract. Co. v. Maher, 95 N. E. 1012, 176 Ind. 289, Ann. Cas. 1914A, 994.

91. **Rebutting presumption where collision at crossing of two roads.**—Judgment 44 N. Y. S. 742, 16 App. Div. 152, reversed in Loudoun v. Eighth Ave. R. Co., 56 N. E. 988, 162 N. Y. 380.

92. **Evidence establishing liability as to one of several allegations of negligence.**—Indiana Union Tract. Co. v. Maher, 176 Ind. 289, 95 N. E. 1012, Ann. Cas. 1914A, 994.

93. **Res ipsa loquitur as basis for instruction.**—Osgood v. Los Angeles Tract. Co., 70 Pac. 169, 137 Cal. 280, 92 Am. St. Rep. 171.

94. **Derailment.**—See ante, "Subsequent Explanation of Charge," § 3336.

not have resulted, had greater care been taken to examine the switch at the place of the derailment of the car, the passenger was entitled to recover, was erroneous, because it subjected the carrier to a greater liability than the law imposes.[95]

Continuous Use of Broken Rail.—In an action for injuries to a passenger by the derailment of the train, a requested instruction that if defendant's trains were continuously operated over a broken rail for a long time with uniformly good results, and without any visible means of detecting the flaws described in the rail, such facts would be evidence of its freedom from danger as strong as defendant could have, tending to rebut the presumption of negligence from continuing its use, was properly refused, since, if such were the law, the duty of inspection to see that the rails were in proper condition might be dispensed with so long as the rails and cross-ties could be used without accident.[96]

Unsound Condition of Ties and Defective Rail.—Where, in an action for injuries to a passenger by the derailment of the train, there was evidence that the train was going from 35 to 40 miles an hour at the time of the accident, and that the cross-ties were rotten at the place of the accident which testimony was contradicted by the defendant, an instruction to return a verdict for plaintiff if the jury found that the train was derailed because of the unsound condition of the ties, or the defective condition of the rails at the point where the injury occurred, or the unusual and dangerous rate of speed at which the train was then running, was proper.[97]

Injury Caused by Suit Case Falling from Parcel Rack.—Where, in an action for injuries to a passenger by the derailment of a train, plaintiff relied on negligent running of the train, unsafe roadbed, and negligent management of the train in allowing a suit case to remain on the racks in the car, and showed that in consequence of the derailment the suit case fell on her, the refusal to apply a less degree of care to the suit case than to the train was not erroneous, since the injury inflicted by the suit case was due to the derailment, and, if negligence was established as to the derailment, the carrier was liable, regardless of its care concerning the suit case; no diverting force having intervened.[98]

Presumption and Burden of Proof.—In a passenger's action for injuries received in a derailment, an instruction as to presumptions and burden of proof must not require the defendant to prove by a preponderance of evidence that it was not negligence,[99] or impose on the carrier the burden of disproving negligence before the defense that the derailment was accidental, is available,[1] and

95. Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793.

96. Continuous use of broken rail.—Colorado Mid. R. Co. *v.* McGarry, 41 Colo. 398, 92 Pac. 915.

97. Unsound condition of ties and defective rail.—Colorado Mid. R. Co. *v.* McGarry, 41 Colo. 398, 92 Pac. 915.

98. Injury caused by suit case falling from parcel rack.—Parker *v.* Boston, etc., Railroad, 84 Vt. 329, 79 Atl. 865.

99. In a personal injury action by a passenger, an instruction that, in order to recover for such injuries as plaintiff received, it was only necessary to show that he was a passenger of the defendant, and that the car that he was riding in was overturned without his fault, and that, when this was done, the legal presumption arose that the overturning occurred through the negilgence of defendant, and the burden of proving that there had been no negligence was cast upon the defendant, did not require the defendant to prove by a preponderance of evidence that it was not negligent, but simply declared that under the circumstances the presumption of negligence would prevail, and entitled plaintiff to recover, unless it was met or overcome by evidence of equal or greater weight, and the instruction was not erroneous. Bonneau *v.* North Shore R. Co. (Cal.), 93 Pac. 106.

In a street car passenger's action for injuries received in a derailment, the court instructed that the burden was upon plaintiff to prove his case by a preponderance, but, upon proving the derailment and resulting injuries, he made a prima facie case, and the burden then shifted to defendant to show that the derailment was not caused by its negligence. Held, that the charge was erroneous. Niedzinski *v.* Bay City Tract., etc., Co., 125 N. W. 409, 160 Mich. 517.

1. Defense that derailment accidental.—Where in an action for injuries to a passenger by the derailment of the train,

must not mislead the jury.[2] In such action an instruction that proof of the derailment raised a presumption of negligence on defendant's part, with a further instruction that if there was negligence, and such negligence was the proximate cause of the injury, plaintiff was entitled to recover.[3] An instruction that plaintiff was entitled to recover, unless defendant showed by a greater weight of evidence that it could not have prevented such derailment by the exercise of the highest degree of care employed by a very careful railroad under the same or familiar circumstances in maintaining its tracks in the same condition, and in the management and control of cars, etc., is proper.[4] And a charge that, if the jury found from the evidence that such derailment was the result of a mere accident or the motion of the power ordinarily incident to cars while running at an allowed rate of speed, then defendant would not be guilty of negligence, put on defendant the burden of showing that the derailment was accidental, and is not open to exception.[5]

Presumption Where Cause of Accident Shown.—In an action for injuries to a passenger by a derailment of the car, caused by a defective switch, the fact that the cause of the accident was shown does not preclude the court from instructing the jury that proof of the derailment and of plaintiff's injury was sufficient to create a presumption of negligence on the part of the carrier.[6]

the court charged that plaintiff must prove negligence in the operation of the train by a preponderance of the evidence, a charge that unless it appeared that the derailment was accidental, the jury must determine whether there was negligence, and that if plaintiff failed to establish, by preponderance of the evidence, the negligence, the verdict must be for the carrier, was not erroneous as imposing on it the burden of disproving negligence before the defense that the derailment was accidental was available. Shelton *v.* Southern Railway, 67 S. E. 899, 86 S. C. 98.

2. In a personal injury action by a passenger, where it appeared that the coach in which plaintiff was riding left the rails, turned over, and was thrown into a creek, it was not error to instruct that the fact that the train overturned is all that plaintiff need establish to recover for injuries sustained, unless his want of care contributed to the overturning or to his injury, and that to rebut this presumption of negligence defendant must show that the overturning was the result of inevitable casualty, or some cause which could not have been prevented by human care and foresight, and in doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains; for, notwithstanding the latter part of the instruction it merely required the defendant to show that the car overturned without any negligence on its part. Bonneau *v.* North Shore R. Co. (Cal.), 93 Pac. 106.

The instruction could not have misled the jury as to the burden of proof, where the jury was told in eight separate instructions that plaintiff, to recover, must prove negligence of the defendant by a preponderance of the evidence, and in three other places that, if they found the evidence on the question of negligence equally balanced, they should return a verdict for defendant, and, at the request of defendant, the court instructed that the presumption of negligence from the happening of the accident was not conclusive, but might be rebutted by the defendant, and that in rebutting the presumption it was not necessary to overcome it by a preponderance of the evidence, but it was sufficient if enough evidence was introduced to balance the presumption, for in that event it was overcome in the eyes of the law. Bonneau *v.* North Shore R. Co. (Cal.), 93 Pac. 106.

3. Overcash *v.* Charlotte Elect. R., etc., Co., 57 S. E. 377, 144 N. C. 572, 12 Am. & Eng. Ann. Cas. 1040.

4. O'Gara *v.* St. Louis Trans. Co., 204 Mo. 724, 103 S. W. 54, 12 L. R. A., N. S., 840, 11 Am. & Eng. Ann. Cas. 850.

5. Overcash *v.* Charlotte Elect. R., etc., Co., 144 N. C. 572, 57 S. E. 377, 12 Am. & Eng. Ann. Cas. 1040.

6. Presumption where cause of accident shown.—Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126.

In an action by a passenger for injuries received from the overturning of a car, though there was no showing that the car was not in good condition, it was proper to refuse requested instructions that the jury could not find against defendant unless satisfied from the evidence that the derailment was due to some negligence on the part of defendant or some of its agents, and that the jury were not entitled to find such negligence from the mere happening of the accident, and that they were not entitled to guess or speculate as to the nature of such evidence, but that they must be able to reach some conclusion as to what the negligence was; for a car does not ordinarily leave

Presumption Where Derailment of Special Freight Due to Explosion.—Where a passenger suing for injuries caused by the derailment of a car loaded with dynamite exploded thereby submitted evidence of the specific and general negligence alleged, and the carrier attempted to explain the cause of the derailment and to show that it was not due to any want of care, a charge that the passenger, to recover, need only prove that he was a passenger, and that while he was riding on the car provided for him he was injured by the derailment without his fault, and that the burden of proving absence of negligence was then on the carrier, was proper.[7] And an instruction that the passenger could rely on the presumption of negligence proof of the "derailment" of the car and the injuries, and an instruction that no presumption of negligence arose from the "explosion" of the dynamite and resulting injuries, were not contradictory, the former relating to the "derailment," and not to the "explosion" of the dynamite.[8]

§§ 3350-3351. Elevators[9]**—§ 3350. Safety and Sufficiency.**—An instruction that one operating a passenger elevator in a department house was charged with the duty of keeping the elevator and the premises about it "safe" is erroneous, as making him an insurer.[10]

Absence of Doors.—Where plaintiff's injury in an elevator was caused by a combination of a metal projection and the open side of the elevator cage, it was proper to refuse an instruction that the jury should not consider the fact that the elevator cage had no doors.[11]

Right to Presume Statute as to Appliances Complied with.—Evidence tending to show that an elevator moved after the door was opened for the passenger to alight, thereby causing his injury, is sufficient to justify an instruction that plaintiff had a right to presume that a statute requiring passenger elevators to have appliances to prevent them from starting while the doors were open had been complied with and that noncompliance with such statute was negligence.[12]

§ 3351. Management.—In a passenger's action for injury by the negligent operation of a passenger elevator, an instruction that defendant was a common

its track and overturn unless something is wrong, and that is true whether the car is in good condition or not. Minihan *v.* Boston Elev. R. Co., 197 Mass. 367, 83 N. E. 871.

7. **Presumption where derailment of special freight due to explosion.**—Roberts *v.* Sierra R. Co., 111 Pac. 519, 14 Cal. App. 180, rehearing denied in 111 Pac. 527.

8. Roberts *v.* Sierra R. Co., 111 Pac. 519, 527, 14 Cal. App. 180.

9. **Elevators—Conformity to issue.**—See ante, "Conformity to Pleadings and Issues," § 3329.

Applicability to evidence.—See ante, "Applicability to Evidence," §§ 3330-3332.

10. **Safety and sufficiency.**—Tippecanoe, etc., Trust Co. *v.* Jester (Ind.), 101 N. E. 915.

11. **Absence of doors.**—Goldsmith *v.* Holland Bldg. Co., 81 S. W. 1112, 82 Mo. 597.

12. **Right to presume statute as to appliances complied with.**—The fifth floor of defendant's building, where the elevator passed, was cut away too much, and to prevent passengers from stepping into the space between the elevator and the floor an iron plate was attached to the floor, thus closing the space when the elevator was flush with the floor, but not when it was a few inches lower. Plaintiff was injured while leaving the elevator on the fifth floor, the heel of her shoe being wrenched off and the shoe otherwise torn, and her foot being badly bruised on top, and when found, immediately after the accident, she was lying on the floor immediately in front of the elevator door. Plaintiff's testimony, which was her only evidence as to how the accident occurred, tended to show that the elevator stopped, and the boy opened the door, but that when she started out the elevator moved upward, catching her foot, and that then by her direction the elevator was moved down again, releasing her foot, and she fell, she thought, inside the elevator. Held, that such evidence was sufficient to justify an instruction that plaintiff had a right to presume that Gen. laws, c. 108, § 16, requiring passenger elevators to have appliances to prevent them from starting while their doors are open, had been complied with, and that noncompliance with the statute would be evidence of the negligence. Bullock *v.* Butler Exch. Co., 52 Atl. 122, 24 R. I. 50.

carrier, subject to the same rules and laws concerning negligence as are applicable to other common carriers, standing alone, constitutes reversible error, in that it leaves the jury to speculate as to what duties the law casts upon common carriers.[13] The instruction should set forth the duties of the defendant carrier with respect to which there is an alleged breach and the degree of care required of him, defining "due care" as used therein,[14] and "negligence."[15] The instruction should also state the effect of failure to exercise the required degree of care.[16] But error in such instructions may be cured by subsequent ones.[17] And it is not error to refuse a requested charge not necessary to make clear the issues and which was already covered by other instructions.[18]

Injured Person Barred from Being Passenger.—In an action for injuries sustained by one riding in defendant's passenger elevator through the falling thereof, an instruction failing to submit to the jury the question whether plaintiff's previous misconduct had been such as to warrant defendant prohibiting him from using the elevator thereby barring him from being a passenger at the time was erroneous.[19]

Movement of Elevator at Request of Injured Person.—In an action for injury to an elevator passenger, caused by the elevator being moved while plain-

13. Management.—Judgment 110 Ill. App. 504, affirmed in Masonic Fraternity Temple Ass'n *v.* Collins, 71 N. E. 396, 210 Ill. 482.

14. Defining "due care."—In an action against the owner of a building for injuries to one riding, according to custom, on a freight elevator while engaged in moving the effects of a tenant, plaintiff requested an instruction that due care, as used in the instructions meant care commensurate with the means being used and the danger to be apprehended, and that defendant was bound to use that degree of care which prudent and competent men would exercise under like circumstances. Held, that the refusal of the instruction was error, notwithstanding that plaintiff's petition had alleged specific acts of negligence, placing the burden upon him to prove such acts, since, irrespective of where the burden of proof lay, the measure of care was the same. Orcutt *v.* Century Bldg. Co., 99 S. W. 1062, 201 Mo. 424, 8 L. R. A., N. S., 929.

15. Should define negligence.—A charge that plaintiff is entitled to recover, if defendant or its agents were guilty of negligence in operating its elevator, whereby the injury to plaintiff occurred, is defective, if no definition of negligence is given. Kentucky Hotel Co. *v.* Camp, 97 Ky. 424, 17 Ky. L. Rep. 297, 30 S. W. 1010.

16. Failure to exercise required degree of care.—An instruction that, if the owner of an elevator failed to exercise the high degree of care required by carrying a passenger and negligently permitted him to be injured by such want of due care, the verdict should be for plaintiff, was proper. Quimby *v.* Bee Bldg. Co., 87 Neb. 193, 127 N. W. 118.

17. In an action for the death of plaintiff's intestate, caused by the alleged negligent operation of a passenger elevator, the court charged that defendant was subject to the same rules and laws concerning negligence as are applicable to common carriers, without stating what those rules were. Other instructions, however, stated that plaintiff must establish by the weight of the evidence that defendant's negligence was the proximate cause of the injury, and that no negligence on decedent's part contributed thereto, and that if they found the defendant guilty of negligence in some manner, and not guilty of the negligence charged in the declaration, they should find for defendant. Other instructions gave a correct definition of the ordinary care which the plaintiff was required to show had been exercised by deceased, and stated that the law as given in the instructions was the law of the case, and must be followed, whether the jury believed it to be right or not. Held, that the error in giving the first-mentioned instruction was cured by the subsequent ones. Judgment 110 Ill. App. 504, affirmed in Masonic Fraternity Temple Ass'n *v.* Collins, 71 N. E. 396, 210 Ill. 482. See ante, "Obviating Error by Other Instructions," § 3335.

18. Repeating instructions.—It is not error to refuse to instruct that plaintiff can not recover because of the faulty condition of the shaft, or because defendant was without skill in the management of the elevator; the court having instructed clearly that plaintiff could not recover unless he received his injuries in acting on the invitation of defendant to enter the elevator. Burgess *v.* Stowe, 96 N. W. 29, 134 Mich. 204.

19. Injured person barred from being passenger.—Ferguson *v.* Truax, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L. R. A., N. S., 350, 13 Am. & Eng. Ann. Cas. 1092.

tiff was attempting to leave it, an instruction that if the elevator was moved, at plaintiff's request, after it stopped, such moving was not negligence, was too favorable to defendant, and should have been that if the elevator was so moved, at plaintiff's request, as to conduce to the accident, then such moving was not negligence on the part of defendant.[20]

Elevator Opened by Passenger with Knowledge of Operator.—In an action for injuries received by the operation of an elevator in defendant's building, where the operator testified that people were accustomed to open the door when they went down in the elevator, and that they generally did so, it authorized an instruction that if the elevator doors were opened by some one other than the operator, but with his knowledge, it would be his act.[21]

Fall of Elevator Is Evidence Warranting Instruction.—The fact of the falling of an elevator is evidence tending to show want of care in its management by the operator or his servants or want of repair or faulty construction, and warrants an instruction directing the jury to find for plaintiff if the elevator, because of its negligent or faulty construction, or of negligence on part of the servants in operation, fell and caused plaintiff's injuries.[22]

§ 3352. Setting Down Passengers in General.—An instruction in a passenger's action for injuries received while alighting from a train or car must not be misleading.[23] All of the instructions must be taken together and if correct as a whole they will not be held erroneous because of some facts which, standing alone, might be error.[24] It should not be a mere repetition of a previous instruction but may apply a legal rule first laid down to the case made by the proof,[25] and must hypothesize negligence of the carrier's act. Thus an instruction that a carrier is responsible to a passenger in damages if he went on the

20. Movement of elevator at request of injured person.—Bullock *v.* Butler Exch. Co., 52 Atl. 122, 24 R. I. 50.

21. Elevator opened by passenger with knowledge of operator.—Clark *v.* Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114.

22. Fall of elevator is evidence warranting instruction.—In an action for personal injuries sustained while on a passenger elevator, the declaration alleged that defendant did not use proper care, and did not have the most improved appliances, and did not keep the appliances in good order. The evidence showed that the elevator fell from the eighth to the ground floor, the injury sustained by plaintiff, and tended to show that the elevator was overcrowded. No evidence was introduced by plaintiff as to the appliances, but defendant introduced such evidence. The accident was caused by the bursting of a water pipe which controlled the elevator's speed. Held, that an instruction directing the jury to find for plaintiff if the elevator, owing to its negligent and faulty construction, or to the negligence or carelessness on the part of the servants in operating the same, fell and caused the plaintiff's injuries, was proper. Judgment 70 Ill. App. 166, affirmed in Hartford Deposit Co. *v.* Sollitt, 50 N. E. 178, 172 Ill. 222, 64 Am. St. Rep. 35.

23. Setting down passengers in general.—In an action against a street railway company by a passenger for injuries received in getting off a car, an instruction is properly refused, as calculated to mislead the jury, which directs that the jury can not find negligence on the part of the conductor, and unless they find that the motorman was negligent they should find for the defendant, and in considering that question they can not infer the existence of any fact not shown to their satisfaction by the evidence. City, etc., R. Co. *v.* Svedberg, 20 App. D. C. 543, affirmed in 24 S. Ct. 656, 194 U. S. 201, 48 L. Ed. 935. See ante, "Misleading Instructions."

24. Must be taken as a whole.—St. Louis, etc., R. Co. *v.* Cleere, 76 Ark. 377, 88 S. W. 995.

25. In an action against a railroad company for personal injuries sustained by a passenger while attempting to alight from a train, it is proper to charge that a railroad company, carrying passengers by means of steam, is held to a high degree of care to prevent accidents to passengers; and a further instruction that it is the company's duty, at each station where passengers get off its trains at night, to have the passway out of the cars so lighted as to enable passengers getting off, and using reasonable care and diligence, to do so with safety, is not objectionable as being a mere repetition of the former instruction, since it is but the application of the legal rule first laid down to the case made by the proof. Galveston, etc., R. Co. *v.* Thornsberry (Tex.), 17 S. W. 521.

platform or step of the coach after the signal for the station at which he was to alight, and was thrown to the ground by the violent jerking or bumping of the train by the operation of its movements, which arose from the neglect on the part of said operatives, was erroneous, as authorizing recovery for the injury without stating the condition that the carrier was guilty of negligence.[26]

Use of Words "Stopped Still" for "Stopped."—Where a street car company was entitled to an instruction that it was not guilty of negligence unless a car had "stopped" when a passenger attempted to alight, the use of the term "stopped still" was no abuse of the right.[27]

Speed of Car before Stopping.—In an action against a street railroad company for personal injuries received while plaintiff was alighting from a car, it was error to refuse to charge that the speed of the car coming down the street, before the accident, had no bearing on the question of defendant's or plaintiff's negligence, and that it should not be considered on the question of defendant's negligence.[28]

Safe Appliances.—In a passenger's action for injuries received in alighting from a train or car, a charge that if the appliance used by the carrier to enable passengers to alight was a reasonably safe appliance for the purpose, and was properly placed for use by a passenger exercising due care, the carrier was not liable, should be modified by adding the condition that the carrier was not guilty of negligence in using it nor otherwise guilty of negligence; so held as to the use of a footstool.[29]

Stopping before Reaching Station.—In an action for the wrongful death of a passenger who got off of the train several hundred yards before the train reached his station, and was killed by a freight train backing over him on the side track, it is error to charge the jury that defendant is bound to provide a safe crossing from its track at the station, and that it must use extraordinary diligence in protecting the passenger until he has a safe and secure exit from the station; for, as the passenger was killed at a place other than the station, the charge is misleading.[30]

Burden of Proof of Reasonable Opportunity to Alight.—In an action for injuries to a passenger by the premature starting of a street car as he was in the act of alighting, a charge that plaintiff could recover if the jury found that defendant's servant in starting the car neglected to observe the degree of care defined in a prior instruction as the care devolving on a carrier of passengers, but that the burden was on plaintiff to show that while he was in the act of alighting, but before he had reasonable opportunity to do so, it was suddenly started, etc.; sufficiently charged on the issue whether plaintiff had been given a reasonable opportunity to alight.[31] And a charge that it was the company's duty to exercise the highest degree of care and foresight consistent with the proper and ordinary conduct of its business to carry its passengers safely, including the duty of allow-

26. Louisville, etc., R. Co. *v.* Stillwell, 134 S. W. 202, 142 Ky. 330.

27. Use of words "stopped still" for "stopped."—Peck *v.* St. Louis Trans. Co., 77 S. W. 736, 178 Mo. 617.

28. Speed of car before stopping.—Hardy *v.* Milwaukee St. R. Co., 89 Wis. 183, 61 N. W. 771.

29. Using footstool.—In an action against a railroad company for injuries received by a passenger in alighting from a train wherein it appeared that she was obliged to step down onto a box, eleven inches square at the top, and somewhat larger at the bottom, and that the box was standing on rough stones, and tipped as she stepped on it, a charge, requested by defendant, that if the stepping stool was a reasonably safe appliance, and was properly placed on ground sufficiently smooth to prevent it from turning by the use of due care by passengers, the jury should find for the defendant, was properly qualified by adding the condition that defendant should not be guilty of negligence in using it, nor otherwise guilty of negligence. Missouri Pac. R. Co. *v.* Wortham, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368.

30. Stopping before reaching station.—Central R. Co. *v.* Thompson, 76 Ga. 770.

31. Burden of proof of reasonable opportunity to alight.—Westervelt *v.* St. Louis Trans. Co., 121 S. W. 114, 222 Mo. 325.

ing a sufficient time for passengers to alight when the car was stopped for that purpose, and when the gates were thrown open for the purpose of exit, and that failure to perform such a duty would constitute negligence, which, if it resulted proximately in injury to a passenger, would render the company liable, assuming that the passenger was not guilty of contributory negligence, was not objectionable as imposing upon plaintiff the burden of proving defendant's negligence in essentially the same manner as if plaintiff had been a mere third person, and not a passenger.[32]

Passing Usual Stopping Place.—An instruction in a passenger's action for injuries sustained in alighting from a train or car which had run by the usual stopping place must not be misleading,[33] must not be on a point not involved in the case[34] or irrelevant,[35] must not include only the defense of contributory negligence.[36]

Passenger Carried by Destination.—In an action for injury to a passenger by failure to stop for her to alight, an instruction that if plaintiff refused to go to the station beyond when the conductor offered to take her to that station, and the conductor did offer so to do, and, after refusing, plaintiff told the conductor to let her off where she was, and the train was then stopped and she voluntarily got off, she could not recover, was properly refused, as implying an obligation on plaintiff to go to the next station.[37]

Assisting Passengers to Alight.—In a passenger's action for injuries received in alighting from a train or car, it is proper for the court to call the at-

32. Hoblit *v.* Minneapolis St. R. Co., 111 Minn. 77, 126 N. W. 407.

33. Passing usual stopping place.—In an action for injuries to a passenger while alighting from a street car, the court charged that, while it was the duty of the defendant to stop its car at the point where plaintiff requested to be let off, if he did so, notwithstanding the fact that defendant carried him past that point, this would not give plaintiff the right to jump off a rapidly moving car, and that, if the jury found that plaintiff jumped from a car moving at a rate of speed that would restrain men of ordinary care and prudence from alighting from the car under such circumstances, plaintiff could not recover. The court also added that it was the duty of defendant's employees in charge of the car to bring it to a full stop, and allow plaintiff sufficient time to alight, but, if it failed to bring the car to a stop, and allow plaintiff sufficient time to alight and get away from it, while he was trying to do so in a careful and prudent manner, but, instead, started the car suddenly, while he was in the act of alighting and thus injured plaintiff, defendant was liable. Held, that such instructions were erroneous, as calculated to mislead the jury. McDonald *v.* City Elect. R. Co., 100 N. W. 592, 137 Mich. 392.

Such error was not cured by a subsequent conflicting instruction that, if plaintiff alighted from the car when in motion, he would be guilty of contributory negligence, which would prevent his recovery. McDonald *v.* City Elect. R. Co., 100 N. W. 592, 137 Mich. 392. See ante, "Misleading Instructions," § 3326.

34. Where a passenger sues a carrier to recover for an injury sustained in alighting from the train on a dark night after it had passed the usual stopping place, and at a place where there were no platforms and landings, an instruction as to the care required of a carrier in maintaining platforms and landings was properly refused, as such instruction was not involved in the case. Henry *v.* Grant St. Elect. R. Co., 64 Pac. 137, 24 Wash. 246. See ante, "Conformity to Pleadings and Issues," § 3329.

35. In such a case, where the issue necessarily involved the relation and attitude of the parties, and there was evidence tending to show that plaintiff had insisted on getting off the train where she did, an instruction that, while it is the duty of railroad companies to use a high degree of care, they are not insurers of the safety of passengers, but that passengers must themselves use reasonable care, could not be said to be irrelevant. Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017.

36. In an action against a railroad company for personal injuries sustained in alighting from a train which had been run past the depot platform, an instruction that if the conductor had offered to back up to the platform for plaintiff, but was requested by her not to do so, and had thereupon assisted her with ordinary care, there could be no recovery, was not objectionable, in including only the defense of contributory negligence. Conwill *v.* Gulf, etc., R. Co., 85 Tex. 96, 19 S. W. 1017.

37. Passenger carried by destination.—Louisville, etc., R. Co. *v.* Seale, 172 Ala. 480, 55 So. 237.

tention of the jury to facts shown in evidence in determining whether the employees of the company should have assisted the passenger to alight, and leave it for the jury to say whether there was negligence in not giving the passenger assistance, as the duty to assist passengers to alight might arise under special circumstances.[38] And an instruction that it is not the train crew's duty to assist plaintiff in alighting, unless she requested assistance, is as favorable to the company as is necessary.[39]

Signal to Stop Disregarded by Driver of Street Car.—In an action to recover for injuries received in getting off defendant's street car, an instruction, in effect, that if the driver only slackened his speed when signalled to stop, and plaintiff, in endeavoring to get off, was thrown down and injured, defendant was liable, if the jury believed that the driver was negligent in not stopping, is erroneous, unless qualified by adding that they must also believe that plaintiff used ordinary care and reasonable diligence to avoid the consequences of defendant's act.[40]

Duty to Warn Passenger Not to Alight from Moving Car.—Where plaintiff alleged in her petition that she left the car and descended the steps with the knowledge of the brakeman, who failed to warn her of the danger, and there was evidence tending to prove those facts, an instruction that if the train stopped before reaching the station, "or was moving so slowly" as to lead the plaintiff, as a prudent person, to believe it had reached the depot, and was stationary, and that the brakeman saw her attempting to alight before the train had reached the station, and failed to warn her that it was dangerous to alight, the defendant was guilty of negligence, was proper.[41] An instruction that if the conductor, in addition to warning plaintiff not to step from the car before she alighted therefrom, "exercised reasonable care to prevent her from alighting therefrom," she could not recover, is not error.[42]

Warning Infant Passenger Not to Alight from Moving Train.—Where in an action by an infant passenger for personal injuries received by jumping off a train while in motion, it appeared that at a previous trial failure to stop the train at the depot was not considered negligence, it was proper for the court in its charge to allude to the failure to stop the train as tending to show that it was the duty of defendant to instruct plaintiff how to act, and put him on his guard against attempting to leave the train while in motion.[43]

Invitation to Alight from Moving Train.—In a passenger's action for injuries sustained in alighting from a train, the court should not instruct on the theory of the injuries having resulted from an express or implied invitation to get off the train while in motion, unless such issue is in the case.[44] The instruction must be considered as a whole[45] and must be applicable to the facts

38. Assisting passengers to alight.—McGovern *v.* Interurban R. Co., 136 Iowa 13, 111 N. W. 412, 13 L. R. A., N. S., 476.

39. Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961.

40. Signal to stop disregarded by driver of street car.—West End, etc., St. R. Co. *v.* Mozely, 79 Ga. 463, 4 S. E. 324.

41. Duty to warn passenger not to alight from moving car.—Smitson *v.* Southern Pac. Co., 37 Ore. 74, 60 Pac. 907.

42. McHugh *v.* St. Louis Trans. Co., 88 S. W. 853, 190 Mo. 85.

43. Warning infant passenger not to alight from moving train.—Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

44. Invitation to alight from moving train.—The theory of the declaration and proof of plaintiff being that she was thrown from the steps of defendant's car by "a sudden and violent jerk" of the train after it had stopped, and while she was attempting to alight, and defendant's theory being that she was injured by jumping from the train while in motion, and without invitation, plaintiff is not entitled to an instruction on the theory of the injuries having resulted from an "express or implied invitation" to get off the train while in motion. Payne *v.* Nashville, etc., R. Co., 61 S. W. 86, 106 Tenn. (22 Pickle) 167. See ante, "Conformity to Pleadings and Issues," § 3329.

45. In an action by a passenger for personal injuries sustained in jumping off a moving train under the direction of defendant's porter, an instruction that "car-

of the case.[46]

What Amounts to Invitation to Alight.—In an action for injuries received by a passenger while attempting to alight from a train, it was not error to refuse to instruct that the brakeman's calling the station and the actual stopping of the train do not warrant a finding that defendant negligently led plaintiff to suppose the train had reached the place for her to alight, where there were other circumstances bearing on the question whether plaintiff supposed the train had reached the station.[47]

Alighting from Moving Train or Car Generally.—In a passenger's action for injuries sustained in alighting from a moving train or car, the instruction should not declare in effect that the carrier's negligence was established by the movement of the train, without reference to whether or not the act of moving was the act of the defendant, as, for instance, where the failure to stop was due to a passenger pulling the bell rope,[48] and should not hypothesize defendant's negligence on plaintiff's belief under the circumstances and not on the belief of a reasonably prudent person.[49]

Injury after Alighting Generally.—An instruction that, "after plaintiff alighted" in the street from defendant's car, defendant ceased to owe him any duty, and if the jury believe "that plaintiff was injured by a backward movement" toward the car on his own part, caused by an approaching vehicle, defendant was not liable, should be modified to read "if plaintiff alighted," and

riers of passengers by steam are held to the highest degree of care, and are responsible for the smallest negligence to such passengers," is not reversible error, where the other instructions made clear the predicate for the cause of action, and under the instructions, as a whole, the jury could not have taken the instruction as referring to the conduct of the porter. St. Louis, etc., R. Co. *v.* Leamons, 82 Ark. 504, 102 S. W. 363.

46. In an action against a common carrier for injuries received by a passenger who, being carried past his station alights from a moving train, following the advise of the conductor, the following instruction was given: "The court instructs the jury that the law in tenderness of human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute." Held, this instruction is correct as a general proposition of law, but to make it applicable to the facts in the present case, it should have been qualified with some such language as follows: "Provided, however, such negligence is the proximate cause of the injury complained of." Farley *v.* Norfolk, etc., R. Co., 67 W. Va. 350, 67 S. E. 1116. See ante, "Applicability to Evidence," §§ 3330-3322.

47. What amounts to invitation to alight.—Barry *v.* Boston, etc., R. Co., 172 Mass. 109, 51 N. E. 518.

48 Alighting from moving train or car generally.—In an action against a railroad company for injuries to a passenger while getting off a train at her destination, it appeared that no stop was made, but that the train was kept in motion by a passenger who pulled the bell rope. Plaintiff saw the rope pulled, knew it was pulled by a passenger, remonstrated with him, but left the train while in motion. The jury was instructed that, if the place was a regular stopping place for passengers, it was defendant's duty to stop; that failure to do so was a violation of public duty; and any one injured thereby could recover, though it appeared that one not an employee of defendant had, by pulling the bell rope, caused the train to move. Held, that this was error, as it declared, in effect, that defendant's negligence was established by the movement of the train, without reference to whether or not the act of moving was the act of defendant. Mississippi, etc., R. Co. *v.* Harrison, 66 Miss. 419, 6 So. 319, 14 Am. St. Rep. 573.

49. In an action for injuries to a passenger, a charge that plaintiff was entitled to recover if defendant negligently moved the train more rapidly after slowing down at the station at which plaintiff wished to alight, provided plaintiff acted on the slower motion of the train and attempted to get off, and such slower motion was such as to make plaintiff believe that it was safe to act upon it, and the injury was occasioned by the increased speed, was bad, in that it hypothesized defendant's negligence on plaintiff's belief under the circumstances, and not on the belief of a reasonably prudent person. Sweet *v.* Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667.

"that plaintiff was thereafter injured;" plaintiff's evidence being that, as he was in the act of alighting from the front car, and while one foot was still on the car, the cars gave a sudden lurch, and he was struck by the trailer.[50]

Passenger Crossing Track after Alighting.—See post, "Providing Safe Place or Means for Alighting," § 3354.

§ 3353. Starting or Moving Train While Passenger Alighting.—In an action for injuries to an alighting passenger from the starting of the car, the charge must hypothesize that the starting of the car was the proximate cause of the injury,[51] must properly state the issues,[52] must be supported by the evidence,[53] must be clear and definite,[54] must not be misleading,[55] or contradictory

50. Injury after alighting generally.—Rehearing, 78 S. W. 217, 25 Ky. L. Rep. 1587, denied in Louisville R. Co. *v.* Meglemery, 79 S. W. 287, 25 Ky. L. Rep. 2062.

51. Starting or moving train while passenger alighting.—In an action for injuries to an alighting passenger from the starting of the car, an instruction that plaintiff would be entitled to recover if the car was negligently started was erroneous, for failing to hypothesize that the starting of the car was the proximate cause of the injury. Birmingham R., etc., Co. *v.* Moore, 163 Ala. 43, 50 So. 115.

In an action by a passenger for injuries, an instruction that, if the jury found that the street car came to a full stop to allow passengers to alight, and thereupon plaintiff, using due care, attempted to get off the car, but while attempting so to do the car was started by a servant of the street car company, by reason of which the plaintiff was thrown to the ground and injured, the finding should be for the plaintiff, was properly given. United R., etc., Co. *v.* Rosik, 68 Atl. 511, 107 Md. 138.

52. Must properly state issues.—In an action for injuries to a street car passenger while alighting, the issue being whether the car started while plaintiff was getting off, or whether she merely caught her foot on something, a charge which stated that it was unnecessary to define negligence in general, and that if the car started up after coming to a stop, while plaintiff was in a position of danger, from which the starting of the car would have a tendency to throw her, it was negligence, and plaintiff should recover, but if plaintiff simply slipped in alighting from the car, while it was standing still, there was no negligence, and plaintiff could not recover, properly submitted the issues. Cummings *v.* Detroit United Railway, 163 Mich. 304, 128 N. W. 206.

The day following an injury to a passenger while she was suffering therefrom, an agent of the carrier procured from her a statement signed by a friend at her direction to the effect that the car suddenly started after it had come to a stop, and after leaving the hospital, she filed her original petition containing a similar allegation. Some weeks thereafter a deposition of the motorman having been taken, plaintiff filed an amended petition, alleging that the injury occurred by reason of a sudden jerk while the car was being brought to a stop. Held, that in view of the answer, which was a general denial, and the theory on which the case was tried by defendant, that plaintiff was not injured while alighing from the car, but, if at all, by falling some distance from the place of alighting, a reference in the charge to the duty of defendant in respect to a sudden start after a full stop and its duty in respect to bringing the car to a stop and keeping its gates open in the meantime was not reversible error. Van Vranken *v.* Kansas City Elev. R. Co., 111 Pac. 202, 84 Kan. 287.

53. Conformity to Evidence.—In an action for death of a passenger, claimed to have been caused by a sudden jerk of a street car while he was alighting, a passenger testified for the company that, to the best of his recollection, the car stopped at the crossing. All of the company's testimony was not introduced to show that the car so stopped. Held, that a charge that some of the testimony offered by the company tended to show that the car stopped at the crossing was not erroneous. Birmingham R., etc., Co. *v.* James, 25 So. 847, 121 Ala. 120. See ante, "Applicability to Evidence," §§ 3330-3332.

54. Clearness.—Grace *v.* St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121. See ante, "Clearness and Definiteness," § 3324.

55. Misleading instructions.—Louisville, etc., R. Co. *v.* Eakin, 103 Ky. 465, 20 Ky. L. Rep. 736, 933, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872. See ante, "Misleading Instructions," § 3326.

In an action for injury to a passenger on a street car as he was alighting, the court instructed that he could not recover on the theory that the power was applied, and the car started up and he was thrown, before the car had stopped. Held, that this was not liable to be understood by the jury as not precluding recovery if the car merely started up after it had slowed down, but before it had stopped. Hastings *v.* Boland, 98 N. W. 1017, 136 Mich. 240.

Obvious reference to starting engine by engineer.—In an action by a passenger

in stating the negligence charged,[56] must not give undue prominence to facts not a part of the act of negligence,[57] must not be on matters which have no tendency to effect plaintiff's claim,[58] and must not invade the province of the jury.[59]

Modification of Requests.—In such action the court may, of course, modify a requested instruction so that it shall state the law correctly,[60] and may strike out words which do not change it with reference to the acts of negligence complained of.[61]

Curing Error.—Error in an instruction in such case may be cured by a subsequent instruction which correctly states the law and makes clear the uncertainty in the former[62] or by the court's subsequently withdrawing or modifying a

for personal injuries received by the sudden jerking of a train as the passenger was alighting, it is not error to charge that even though the conductor is not bound to assist female passengers in alighting from the car, the servants or agents of the company must not be at fault as such charge obviously has reference to the sudden starting of the engine by the engineer. Central R. Co. *v.* Whitehead, 74 Ga. 441.

56. Contradiction in stating negligence.—A petition alleged that the brakeman called plaintiff's station; that the car stopped; that plaintiff, while attempting to alight, was thrown off, by the sudden starting of the car; and that "defendant was negligent in stopping the car where it did, and in inviting and permitting passengers to leave the train." The first paragraph of an instruction stated the negligence charged in the language of the petition. Another paragraph told the jury that they might find defendant negligent if, when plaintiff attempted to alight, the brakeman failed to warn him that the train had not yet reached the station, and plaintiff could not see that the train was not at the station, and, while exercising ordinary care, he was thrown off and injured by the starting of the car. Held, that the instructions were not contradictory in stating the negligence charged. Devine *v.* Chicago, etc., R. Co., 69 N. W. 1042, 100 Iowa 692.

57. Undue prominence to facts not part of negligence.—An instruction that the negligence charged is that the conductor of defendant's car stopped it to permit plaintiff to alight, and while she was alighting suddenly started it, throwing her down and injuring her, is not objectionable as placing stress on the stopping of the car as part of the act of negligence. Peck *v.* St. Louis Trans. Co., 77 S. W. 736, 178 Mo. 617.

58. Matters not affecting plaintiff's claim.—An instruction in an action by a passenger against a street railroad for injuries received by starting the car while she was alighting, that it was the duty of the company to carry the passenger to her place of destination, is not erroneous, as being on a matter having no tendency to prove plaintiff's claim. Judgment 99 Ill. App. 591, affirmed in West Chicago St. R. Co. *v.* Lieserowitz, 64 N. E. 718, 197 Ill. 607.

59. Invading province of jury.—In an action for injuries to a passenger, instructions stating in effect that defendant was guilty of negligence if it slowed up its train to receive a passenger, and after so slowing up moved off more rapidly without seeing that plaintiff, who was wishing to get off, was not in a position of peril, were bad, in that they took from the jury the question of defendant's negligence. Sweet *v.* Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667.

60. Modification of requests.—In an action against a street railroad for personal injuries to a passenger, and offered instruction that if plaintiff stepped to the footboard of the car while it was still in motion, and on that account was thrown to the street and injured, he could not recover, was properly modified by making it further necessary to his nonrecovery that he failed to use ordinary care since, as matter of law, it is not always negligence to attempt to get off a car when it is in motion. United R., etc., Co. *v.* Rosik, 68 Atl. 511, 107 Md. 138. See ante, "Requests for Instructions," § 3327.

61. In an action for injuries to a passenger in alighting from a car, an instruction that the only charge which plaintiff brings against defendant is that the car had come to a full stop for the purpose of letting plaintiff get off, and those in charge, being defendant's employees, negligently started the car with a sudden motion while plaintiff was in the act of getting off, and in determining defendant's liability the jury must not consider any other question of negligence, was not erroneously modified by striking out "for the purpose of letting plaintiff get off." McCaffery *v.* St. Louis, etc., R. Co., 90 S. W. 816, 192 Mo. 144.

62. Curing error.—Grace *v.* St. Louis R. Co., 56 S. W. 1121, 156 Mo. 295. See ante, "Curing Error," §§ 3335-3336.

In an action against a street railway company for injuries to plaintiff caused by suddenly starting a car on which he was a passenger after slowing it down to allow him to alight, indefiniteness in instructing that it was the duty of defendant's servants to exercise a high degree of care to so control its cars as to enable plaintiff to alight safely at his point of

statement in its charge.[63]

Theories of Case.—In a passenger's action to recover for injuries sustained in alighting, the court should give a requested instruction embodying a theory of the case not covered in the general charge;[64] but the instruction must not be confused or contradictory in that it includes two theories of plaintiff's case.[65]

Degree of Care Generally.—In a passenger's action for injuries sustained by a sudden starting or moving of the train or car while the passenger was in the act of alighting, the charge must not state the degree of care required of the carrier too broadly;[66] it must not impose on the conductor an absolute duty to

destination is cured by also instructing that, if plaintiff signified his desire to stop at a certain street, and the usual place of stopping at such street for a car going north was at the north crossing, then the gripman, in the exercise of a high degree of care, was not required to slow up or attempt to stop south of such north crossing, though plaintiff left his seat, and got down on the running board. Grace *v.* St. Louis R. Co., 56 S. W. 1121, 156 Mo. 295.

63. In an action for death of a passenger, claimed to have been caused by a sudden jerk of the car while he was alighting therefrom, a witness testified that the car slowed up almost to a standstill, it being hard to tell whether it was going or standing still. The court charged that some witnesses testified that the car so nearly stopped that its motion was almost imperceptible, but subsequently withdrew the statement, saying merely that some of the testimony tended to show that the car slowed up. Held not error. Birmingham R., etc., Co. *v.* James, 25 So. 847, 121 Ala. 120.

64. Theories of case.—In an action by a passenger against a street railroad company to recover a personal injury, it appeared that, after stoping at the place where plaintiff intended to alight, pursuant to a signal from her companion, the car started up before she got off; that in response to a signal it again stopped, after moving about its length, with something of jerk; that at that time plaintiff was standing on the platform or near the door, and was thrown down by the jerk and seriously injured. There was evidence ending to show that plantiff was still in her seat when the car started after the stop, and that she moved to the door afterward, while the car was in motion. Held, that it was error to refuse an instruction asked by defendant that if the jury found such to be the fact, and that the car stopped at the crossing a reasonable length of time to allow passengers to alight, and the motorman exercised proper care under the circumstances in making the second stop, plaintjff could not recover, even though there was a jerk which caused plaintiff to fall. St. Louis Trans. Co. *v.* Thompson, 137 Fed. 713, 70 C. C. A. 405.

Under such evidence, the jury should have been instructed that if the circumstances were such that the conductor, in the exercise of the utmost care, was authorized to call for the emergency stop, and if that stop was made with the utmost care there could be no recovery, and the failure to so instruct was error. St. Louis Trans. Co. *v.* Thompson, 137 Fed. 713, 70 C. C. A. 405.

65. In an action for injury to a street car passenger the court instructed that the gist of the action was an injury by the company's negligently starting the car while the passenger was alighting; that, to warrant a recovery, it must be shown that the passenger was injured as the proximate result of the negligent starting of the car; that it was for the jury to determine whether the defendant was negligent in the alleged starting of the car, and whether the injuries were caused thereby; and that they might consider whether the car was fully stopped, and whether there was a sufficient length of time for the passenger to safely alight, and whether the car was so crowded as to make it difficult for her to depart; that it was the company's duty to stop its cars long enough, and to provide facilities, for a safe alighting; and that, if the car did not start while the passenger was getting off, but that she fell from some other cause, plaintiff could not recover. Held, that the instruction was not objectionable, as confused and contradictory, in that it included two theories of plaintiff's cause of action. Indianapolis St. R. Co. *v.* Hockett, 66 N. E. 39, 159 Ind. 677.

An instruction that it was the duty of defendant carrier to stop its train so that plaintiff could alight upon the platform, and if it failed to do so, and plaintiff was without fault, to find for plaintiff, was not susceptible of the construction that it required the carrier to stop the train until plaintiff had alighted therefrom. St. Louis, etc., R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644.

66. Degree of care required of carrier.—In an action by a passenger against a street car company for injuries sustained by a sudden starting of the car while plaintiff was in the act of alighting, an instruction that "defendant owed to plaintiff the duty of exercising the utmost care and vigilance to permit her to alight in safety" was properly refused, as it states the degree of care required of defendant too broadly. Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

see that no passenger was alighting;[67] but it is proper to charge that, in providing for the safety of passengers, it is the duty of the company "to use such means and foresight as persons of the greatest care and prudence would usually use in similar cases,"[68] and that it was defendant's business to know before starting the car whether the passengers getting off the car were in a position to be injured; and that it would be negligence to start the car suddenly under such circumstances without exercising every precaution for the safety of those who might be alighting from the car.[69]

Reasonable Time to Alight.—In a passenger's action for injuries sustained by reason of the starting or moving of the car while he is alighting, where there is evidence authorizing it,[70] it is proper to charge that, if plaintiff was rightfully in the car, it was the carrier's duty to cause the car to remain standing long enough to enable him to leave it in safety, by the exercise of ordinary care,[71]

67. Duty to see that no passenger alighting.—An instruction, in an action for injuries to a street car passenger, caused by the sudden starting of the car on signal of the conductor while the passenger was alighting, that the conductor must see that no passenger was alighting was erroneous, as imposing on the conductor an absolute duty instead of the duty of exercising the highest degree of care. Louisville, etc., Tract. Co. *v.* Korbe, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768, reversing judgment 90 N. E. 483.

In an action for injuries to a street car passenger while alighting, an instruction that it was the duty of the conductor to see that no passenger was in the act of alighting therefrom, or in a dangerous position, before putting the car in motion, was erroneous as leading the jury to believe that it was the absolute duty of the conductor to know that plaintiff was alighting when it was put in motion, regardless of whether such conductor had an opportunity to know such fact, and without regard to whether, if he had exercised the care which the law required, he could have known that she was leaving the car. Louisville, etc., Tract. Co. *v.* Korbe, 175 Ind. 450, 94 N. E. 768, denying rehearing and petition to remand 93 N. E. 5.

68. Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

69. In an action against a cable car company for injuries received in alighting from a car alleged to have been prematurely started, after instructing the jury that common carriers of passengers must use such vigilance and foresight as they can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents, it was not improper to instruct that "it was the defendant's business to know, before starting up the car, whether passengers getting off or on the car were in a position to be injured, and it would be negligence to start the car suddenly, under such circumstances, without exercising every precaution for the safety of those who might be getting off or on." Tobin *v.* Omnibus Cable Co., 34 Pac. 124, 99 Cal. xix.

70. Evidence authorizing.—In an action against a street car company for injuries by failing to give a passenger sufficient time to alight, an instruction that, if the employees knew plaintiff was attempting to alight, it was their duty to give her a reasonable time to do so, was properly given, where there was some evidence authorizing it. Central Kentucky Tract. Co. *v.* Chapman (Ky.), 124 S. W. 830.

In an action against a street railroad for injuries to a passenger, a girl thirteen years of age, it appeared that she had with her a bundle which was a large one for a child of her size, and that, while she was alighting with it and had one foot on the step and one on the ground, the car suddenly started by the conductor, who was looking at her; and the court instructed that it was the duty of defendant's servants not to start the car until plaintiff had an opportunity to alight therefrom with reasonable safety, and that if, when she was in the act of alighting and exercising ordinary care, defendant's servants suddenly started the car before she had an opportunity to alight with reasonable safety, and by reason thereof she was injured, she was entitled to recover. Held, that the instruction was not erroneous on the ground that the court should have told the jury that it was the duty of the conductor not to start the car until plaintiff had a reasonable opportunity to alight therefrom with safety; the evidence not showing any unreasonable delay on the part of plaintiff, and the jury being required to find, as precedent to a recovery by plaintiff, that the car did not start until she had an opportunity to alight by the exercise of ordinary diligence. Louisville R. Co. *v.* Owens, 97 S. W. 356, 29 Ky. L. Rep. 1294.

71. Duty to keep car standing reasonable time.—Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

In an action against a street railway for injuries owing to the starting of a car

that the plaintiff is entitled to a reasonable time to leave the car,[72] that what constitutes such a reasonable time depends upon the age and physical condition of the passenger[73] and whether he is encumbered with bundles, etc.,[74] and is a

while plaintiff was alighting therefrom, the court instructed that, if plaintiff was injured because of the starting of the car before she could leave it in safety by the exercise of ordinary care, the law was for the plaintiff, and the jury should so find. Held, that the instruction was not erroneous on the ground that the court should have defined the degree of care which the law imposed on the carrier. Henning *v.* Louisville R. Co., 74 S. W. 209, 24 Ky. L. Rep. 2419.

In an action against a street railway company for injuries to a passenger, claimed to have been caused by starting the car after it had stopped and when she was about to get off, the court charged the jury, without objection, that the only question for them to determine was whether, in getting off the car, plaintiff, before she had an opportunity to alight, was thrown to the street by a jerk caused by defendant's employees. Thereafter, at the close of the whole charge, in response to a request by plaintiff to further charge, the court stated that he would modify his charge, and thereupon charged that if the jury found the car had stopped, and that plaintiff was preparing to alight, and the car gave a start or jerk before she had a reasonable opportunity to do so, unless the start or jerk was satisfactorily explained by defendant, it was guilty of negligence, and it was not incumbent on plaintiff to prove what caused the same. Held, that this could not be treated as a charge that, if the jury found that plaintiff's version of the case was true, defendant was liable as a matter of law. Judgment, 86 N. Y. S. 85, 90 App. Div. 213, affirmed in Bente *v.* Metropolitan St. R. Co., 72 N. E. 1139, 180 N. Y. 519.

Plaintiff pulled off of car by brakeman.—In an action for injuries sustained in getting off a train, an instruction that, if the train did not stop long enough to allow plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was injured, then plaintiff can recover, is not defective, where, in another paragraph, the court told the jury that, under such a state of facts, the plaintiff could not recover if guilty of contributory negligence. Owens *v.* Kansas, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39.

72. Plaintiff entitled to reasonable time.—Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

In an action against a carrier for injuries to a passenger by the starting of the train while he was alighting, an instruction that it was the duty of the carrier to stop the train a sufficient time to permit passengers to leave the car with safety was properly modified by changing the word "sufficient" to "reasonable." Barringer *v.* St. Louis, etc., R. Co., 85 S. W. 94, 87 S. W. 814, 73 Ark. 548.

A railroad company must hold its passenger train long enough at a station to permit all its passengers to alight with safety, but without unnecessary delay; and an instruction in an action for the death of a passenger, in alighting from defendant's train, that defendant must hold its train long enough for passengers to leave the train and reach the station platform "with ease," is misleading. Louisville, etc., R. Co. *v.* Eakin, 103 Ky. 465, 45 S. W. 529, 20 Ky. L. Rep. 736, 933. Dissenting opinion, 46 S. W. 496, 47 S. W. 872.

73. In an action by a passenger for injuries, an instruction that the passenger is entitled to a reasonable time to leave the car, and what will constitute such time depends on the age and physicial condition of the passenger, is not erroneous as inferring that the age and decrepitude of a passenger must determine the time. Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

74. Passenger encumbered with bundles.—Plaintiff's wife was injured by a fall while alighting from a train, and she testified that she had several bundles, and started to get off as soon as she could after the train stopped. The court charged the jury to find for plaintiff if his wife used reasonable diligence to get off, conditioned as she was, and the train started with a jerk, and caused her to fall, while she was using ordinary care, but that, though the train did not stop long enough, the jury should find for defendant if she tried to get off while the train was moving, and in so doing was herself guilty of a want of ordinary care; and that plaintiff could not recover if the train stopped long enough, and his wife negligently remained on the train until it started, and then tried to get off. Held, that there was no error prejudicial to defendant. Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

In an action by a passenger against the railroad company for negligently starting the train before the passenger could alight, a charge that if, when the train stopped at her destination, plaintiff, in reasonable haste commensurate with her age and incumbrance of baggage, directly proceeded to alight, and before she could clear herself from the steps of the train it started with such violent motion so as to throw her to the ground and injure her, the jury should find for plaintiff, is not erroneous because of the reference to plaintiff's baggage. Florida R. Co. *v.* Dorsey, 59 Fla. 260, 52 So. 963.

question for the jury.[75] Also it is proper to charge that if defendant started the train before a reasonable time had elapsed, and plaintiff, while the motion was so slow that a prudent person would apprehend no danger in stepping from it, attempted to leave the car, and that while he was in the act of stepping off the motion was suddenly accelerated by defendant's negligence, causing the injury complained of, the jury must find for plaintiff unless they find that he was guilty of contributory negligence.[76] The instructions given for the plaintiff and defendant on this question must be considered in connection with each other,[77] and must not mislead the jury.[78]

Conductor's Knowing of Passenger's Danger.—There is no error in the charge that after reasonable alighting time for passengers has elapsed the conductor of a train should avoid all injury to a passenger that he "possibly can when he knows or sees that she is about to suffer some damage.[79]

Requiring Finding of Complete Stop.—An instruction to the jury that plaintiff was entitled to a verdict if they should find inter alia that defendant's servants "did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety" does not require a finding that there was a complete stop.[80]

Duty to Give Notice of Movement.—Where, in an action for injuries to a passenger, she testified that she started at once to leave the train when it stopped, and fell by its sudden start before she had time to alight, an instruction that, where a train has stopped at a station, it is the carrier's duty to give passengers notice of all movements of the train, before they have time to alight, was applicable.[81]

Stopping before Reaching Station.—An instruction that, if the train stopped before reaching the station, and plaintiff was led to believe from the words or acts of defendant's employee that it was a proper time for her to

75. Question for jury.—In an action for injuries to a passenger, the evidence as to the length of time the train remained stationary being without conflict, a charge that the time required for a passenger to leave a train depends on the circumstances of each case, and that whether the stop on the day of the accident was reasonably sufficient is a question for the jury to determine, is not erroneous. Florida R. Co. *v.* Dorsey, 59 Fla. 260, 52 So. 963.

76. Louisville, etc., R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443.

77. Charge must be taken as a whole.—In an action for injuries to a passenger while alighting from a train, owing to the carrier starting the train, the court instructed, for defendant, that the law does not require a railroad conductor, before starting his train, to find out that all passengers desirous of getting off have done so, but only to stop a reasonable length of time. At the request of plaintiff, the court instructed that a railroad company should stop a train long enough for passengers to alight with diligence, and that if plaintiff attempted to leave the train with reasonable dispatch, and defendant's servants knew that he had not alighted, but started the train while he was alighting, it was negligence, and that, if plaintiff was under the influence of liquor, it would not relieve defendant from reasonable care, and that, if his condition was known to defendant, it was defendant's duty to have been more careful to avoid injuring him. Held, that there was no error in the instructions given for defendant, when considered in connection with the instructions given at the instance of plaintiff. Barringer *v.* St. Louis, etc., R. Co., 85 S. W. 94, 87 S. W. 814, 73 Ark. 548.

78. Must not be misleading.—In an action for injuries resulting from plaintiff being thrown while stepping off a train, the jury were misled by the court's modification of defendant's requested charge, that the railway company is only required to stop its trains long enough for its passengers to alight, and that it is not bound to see that such passengers have actually alighted, by giving the charge, "I can only charge you that in connection with the statute, * * * that a railroad shall entirely stop its trains upon each arrival at a station * * * for a sufficient time to receive and let off passengers." Brown *v.* Atlantic, etc., R. Co., 87 S. C. 314, 69 S. E. 510.

79. Conductor's knowing of passenger's danger.—Florida R. Co. *v.* Dorsey, 59 Fla. 260, 52 So. 963.

80. Requiring finding of complete stop.—Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 14 S. W. 760, affirming 13 S. W. 889.

81. Duty to give notice of movement.—St. Louis, etc., R. Co. *v.* Briggs, 87 Ark. 581, 113 S. W. 644.

alight, and in attempting to do so she was thrown to the ground by the sudden jerk of the car or in any other manner and injured, defendant was guilty of negligence, was not erroneous, as not supported by the evidence, where the brakeman had testified that when the whistle sounded he went into the car where plaintiff was seated, and announced, "The next station is Springfield," which was plaintiff's destination.[82]

Signal to Start.—In a passenger's action for injuries sustained by reason of the premature starting of a car from which he was alighting, the charge of the court as to the giving of the signal to start and starting the car must be taken as a whole and not construed to mean that the mere giving of the signal was an act of negligence, but that it would be negligence for the conductor to give the signal and start the car while the passenger was attempting to alight.[83]

Signal to Start Given by Passenger.—In a passenger's action for injuries in alighting because of the sudden starting of the train, where the signal to start was given by a passenger, it is sufficient to charge that the carrier is not liable if the train was started because of a passenger's giving the signal to start.[84] The propriety of such charge depends upon the sufficiency of the evidence to exclude the inference that the signal was given by one of the train crew[85] and its appearing that the conductor was engaged in the performance of duty, as, for instance, collecting fares.[86]

Notice of Infirmity of Passengers.—It was not necessary to instruct, in an action against a street car company for injuries to a crippled passenger in

82. Stopping before reaching station.—Smitson *v.* Southern Pac. Co., 37 Ore. 74, 60 Pac. 907.

83. Signal to start.—Plaintiff, after the conductor of a street car had rung the signal bell to stop the car, was proceeding to alight, holding a parcel under one arm, when he fell and broke his leg. There was a conflict of evidence as to where plaintiff fell, which involved the questions whether the car had stopped and moved on again as plaintiff was in the act of alighting, or whether he attempted to alight before it was at a standstill. The court instructed the jury that if while plaintiff was attempting to alight, the conductor rang the signal bell, and the car started, this would amount to actionable negligence of the conductor, and, if the accident happened by reason thereof, plaintiff could recover. Held, that the charge did not mean that the mere ringing of the bell was an act of negligence, but that it would be negligence for the conductor to ring the bell and start the car while plaintiff was attempting to alight. Kirchner *v.* Detroit City R. Co., 91 Mich. 400, 51 N. W. 1059.

84. Signal to start given by passenger.—At the trial of an action against an elevated railroad company for injuries sustained by a passenger while stepping from the car to the station platform, owing to the sudden starting of the train, a witness testified that, to steady himself when the train stopped, he caught hold of the bell cord, and thereby gave the signal which caused the train to start. The court charged that if the jury found that the train was so started then defendant was not negligent, and plaintiff could not recover. Held, that defendant could not have been prejudiced by the refusal of the court to charge that there was no proof that there was any vice in the system of communicating signals, or that the method of fixing the bell rope was not the best method, and that the jury were not to consider these questions. Ferry *v.* Manhattan R. Co., 118 N. Y. 497, 23 N. E. 822, affirming 54 N. Y. Super. Ct. 325.

85. In an action for injuries while alighting, where the engineer testified that he moved the train on a signal, and the conductor, porter, and baggage master testified that they did not give such signal, and the fireman was out of the state, it was not error to refuse to charge that if the engineer received proper signal, which was not given by any of the train crew, then his act in starting the train would not be negligence for which defendant was liable. Southern R. Co. *v.* Horton, 134 Ga. 18, 67 S. E. 400.

86. The collection of fares being part of the duty of the conductor of a street car, though it is equally his duty to look after the safety of his passengers, it is not error to instruct that he was in the performance of his duty while collecting fares; it appearing that he was collecting fares when the car stopped, that before giving his starting signal he would have gone to the platform to see whether all passengers so desiring had alighted, and that before he had done so a starting signal was given by a passenger, resulting in injury to another passenger, who was alighting. Cary *v.* Los Angeles R. Co., 108 Pac. 682, 157 Cal. 599, 27 L. R. A., N. S., 764, 21 Am. & Eng. Ann. Cas. 1329.

alighting by the sudden starting of the car, that to authorize recovery plaintiff's infirmity must have been apparent to the motorman, or defendant must have had notice thereof, where the undisputed evidence showed that the motorman knew of plaintiff's crippled condition.[87]

Passenger Going to Running Board before Car Stops.—Where, in an action against a street railway company for injuries caused plaintiff by suddenly starting a car on which he was a passenger after slowing it down to permit him to alight, the court instructs that it was the defendant's duty to so control its cars as to enable plaintiff to alight in safety at his point of destination, and the evidence shows the accident to have occurred before the destination was reached, it is proper to refuse a modifying instruction, asked by defendant, that it was not defendant's duty to begin stopping the car as soon as plaintiff signified his desire to get off, nor as soon as he got down on the running board.[88]

Burden of Proof.—In an action for injuries to a passenger alighting from a street car, a charge that the burden of proof was on plaintiff to show that the car had stopped or slowed down, and that, while plaintiff was alighting, and before she had a reasonable time to alight, defendant's servants caused the car to move forward with increased motion, and thereby plaintiff was thrown on the street and injured, whereas, if defendant's servants had exercised a high degree of care, they would have prevented such injury, was not open to the objection of throwing on plaintiff the burden of proving that the sudden starting of the car could have been prevented by the exercise of the high degree of care incumbent on defendant.[89]

§ 3354. Providing Safe Place or Means for Alighting.—In a passenger's action for injuries sustained by reason of the failure of the carrier to provide a reasonably safe place or means for alighting, the charge should be adjusted to the evidence.[90] The court should instruct as to the duty of the carrier in regard to selecting a reasonably safe place for landing passengers[91] but must not make the carrier an insurer of the safety of the place at which it landed passengers,[92] and must not take the question of the carrier's negligence from the jury.[93]

87. **Notice of infirmity of passenger.**—Mitchell *v.* Des Moines City R. Co. (Iowa), 141 N. W. 43.

88. **Passenger going to running board before car stops.**—Grace *v.* St. Louis R. Co., 156 Mo. 295, 56 S. W. 1121.

89. **Burden of proof.**—Reagan *v.* St. Louis Trans. Co., 180 Mo. 117, 79 S. W. 435.

90. **Providing safe place or means for alighting.**—Turner *v.* City Elect. R. Co., 134 Ga. 869, 68 S. E. 735. See ante, "Applicability to Evidence," §§ 3330-3332.

91. Though an instruction that it is the duty of a street railway to provide a reasonably safe place for passengers to alight from a car was not accurately adjusted to the evidence, it might not require a new trial, had not the judge failed to instruct as to the duty of defendant in regard to selecting a reasonable safe place for the landing of passengers. Turner *v.* City Elect. R. Co., 68 S. E. 735, 134 Ga. 869.

In a passenger's action for injuries sustained by falling into a hole on alighting from the train, the court instructed that the company must exercise that high degree of care that a very cautious person would exercise, including the providing safe means of egress at destination, and its failure to do so would be negligence; and, if defendant stopped its train at plaintiff's destination, in the exercise of ordinary care, was injured by stepping into a hole on alighting, and if defendant was negligent in permitting such hole, and stopping its train and inviting plaintiff to alight there, and her injuries were sustained as the direct result of such conduct, plaintiff could recover. Held, that the gist of the instruction was as to the company's negligence in stopping its train at an unsafe place and inviting plaintiff to alight there, and it was not limited to the condition of the station grounds, and the degree of care required, with respect thereto, when the relation of passenger did not exist. Rearden *v.* St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961.

92. An instruction that it was the duty of a carrier to furnish a safe place for passengers to alight, such a place as it is able to furnish, made the carrier an insurer of the safety of the place at which it landed passengers. Southern R. Co. *v.* Skinner, 65 S. E. 134, 133 Ga. 33.

93. **Question for jury.**—In an action by a passenger for injuries received while alighting from a train at a station, an instruction that it is the duty of the defendant as well as all railroads to provide a

Theories of Case.—In a passenger's action for injuries received in alighting from a train, a requested instruction which limits plaintiff's right to recover to the only ground upon which he sought a recovery is properly given [94] but an instruction which embodies a theory of the case that seeks to exclude from the consideration of the jury an occurrence from which there is reason to infer that the wrong of the carrier brought the injured person into danger, should be refused.[95]

Invitation to Alight.—The instruction on the issue of invitation to alight must not be misleading as by requiring "proof that defendant" did issue such invitation,[96] and should not withdraw from the jury the question whether stopping the car at the place where plaintiff attempted to alight was an invitation; but an instruction that, when a car is stopped at or near the place where the passenger gives the signal for it to stop, this may be taken as an invitation to alight, is not objectionable as withdrawing from the jury the question whether or not stopping the car at the place where plaintiff was injured constituted an invitation to alight there.[97]

Car Run by Approaches.—Where the evidence showed that the company did not maintain platforms at a highway crossing, but that approaches to the rails on either side had been planked by it, and the highway had been graded up to the planks, and that it was usual to stop cars for passengers to alight by stepping onto the approach, and that the company did not stop the car until after it had passed the approach, an instruction that if the company stopped the car to allow passengers to alight, and notified a passenger to alight at an unsuitable place, and failed to furnish a reasonably safe place, the jury might find that the company was negligent, was proper.[98]

reasonably safe place for its passengers to light, that there is no question about that, but that it must provide a reasonably safe place, was erroneous in that it did not submit the question of defendant's negligence. Mason *v.* Erie R. Co., 68 Atl. 105, 75 N. J. L. 521.

A passenger, in alighting from a street car at a temporary terminus selected by the defendant, stepped on a stone in the highway, and sustained injuries for which she brough suit. The jury was instructed that the plaintiff could recover damages if the place selected by the defendant for her to leave its car was not a safe one for that purpose. Held, that such instruction was erroneous, because it did not submit to the jury the question of the defendant's negligence, which was the gravemen of the action. Foley *v.* Brunswick Tract. Co., 50 Atl. 340, 66 N. J. L. 637.

A charge that a street car company must select a reasonably safe place for landing passengers when it stops a car for the purpose is not open to objection that it instructs the jury that a failure so to do would be negligence per se. Macon R., etc., Co. *v.* Vining, 51 S. E. 719, 123 Ga. 770.

94. Theories of case.—Plaintiff's claim, as made by her testimony, being that her injury on alighting from defendant's train was caused by her stepping into a hole beneath the rail of an adjoining track, there was no error in granting defendant's requested charges that, if plaintiff did not stick her foot in such hole, but stubbed her toe on the rail, and because of that fell, verdict must be for defendant. Howland *v.* New York, etc., R. Co., 58 Atl. 683, 26 R. I. 138.

95. In an action for injuries to plaintiff's intestate, who was a passenger on defendant's train, it appeared that, while the train was stopping at L., the intestate, thinking that to be his destination, attempted to alight; that, by the starting of the train, he was thrown to the track; and that, while in a dazed and semiunconscious condition, he was run over by defendant's train about seventy yards from L. Held, that the refusal of instructions embodying the theory that the occurrence at L. should be excluded from consideration was proper. Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

96. Intention to alight.—In an action against a street railroad company for injuries to a passenger, alleged to have been caused by negligence in stopping the car at a place where it was dangerous to alight, a requested instruction that plaintiff, having alleged that defendant negligently invited her to alight at the place of injury, could not recover without proving that defendant "did issue such invitation," was misleading because of the quoted words. Mobile, etc., R. Co. *v.* Walsh, 40 So. 560, 146 Ala. 295.

97. Mobile, etc., R. Co. *v.* Walsh, 40 So. 560, 146 Ala. 295.

98. Car run by approaches.—McGovern *v.* Interurban R. Co., 136 Iowa 13, 111 N. W. 412, 13 L. R. A., N. S., 476.

Lights.—In an action by a passenger for injuries received while alighting at a station, it is proper to instruct that with other circumstances the jury might consider whether there was any light at the place.[99]

Crossing Tracks after Alighting.—The instructions in a passenger's action for injuries sustained in attempting to cross the track after alighting from a train or car must not require a greater degree of care on part of the defendant thus the law improves and if when taken as a whole they do not they are not erroneous.[1] Such instruction must not limit plaintiff's right to recover by making it depend upon whether he alighted from the car before it stopped.[2] Such instruction must not be involved or misleading as to the right to complain of a violation of a custom to give warning signals when passing a standing car[3] or as to the duty of the motorman to give signals when passing another car.[4] The charge in such case should take notice of the distance from the stopping place at which the accident occurred[5] and where the accident occurred as a result of a

99. **Lights.**—Macon, etc., R. Co. *v.* Anderson, 121 Ga. 666, 49 S. E. 791.

1. **Crossing tracks after alighting.**—Plaintiff's intestate on leaving a passenger coach placed on a side track adjacent to the main track and across from the station, was killed by an engine backing on the main track, and in an action for the death the court instructed that if defendant backed an engine between the coaches and platform without a guard or lookout, without signal or warning which would reasonably attract the attention of a man of ordinary care, defendant was guilty of negligence; and another instruction stated that defendant's only duty in running the engine was to use ordinary care with reference to the speed, to keep a lookout while passing through the station and to give signals, and that, if such things were done, there was no negligence. Held, that such instructions, when taken together, were correct, and not erroneous on the ground that the word "guard" required greater care than that required by the statute, which only requires a lookout to be kept, and on the ground that it assumed the existence of the fact that plaintiff's intestate was rightfully on the track; there being some testimony to show that a guard was maintained near by, who warned persons, and the question as to deceased's right on the track having been covered by specific instructions. St. Louis, etc., R. Co. *v.* Cleere, 88 S. W. 995, 76 Ark. 377.

2. **Alighting from car before it stopped.**—In an action for injury to one alighting from a street car and struck by a passing car while attempting to cross tracks behind the car from which he alighted, an instruction that, if he alighted before the car reached his station and while it was in motion, he could not recover, was properly refused, since under it he could not recover, though he alighted just before the car stopped and while it was moving very slowly. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

3. In an action for injury to one alighting from one street car and struck by another while attempting to cross tracks behind the car from which he alighted, an instruction that if plaintiff alighted before his car reached the regular stopping place, and if a custom to give warning signals when passing a standing car and to reduce speed or stop opposite the standing car existed when plaintiff was hurt and was for the benefit altogether of passengers alighting from the standing car, and if plaintiff alighted at such point to escape paying fare, then he was not entitled to complain of any violation of such custom, was properly refused, as being involved and misleading. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

4. In an action against a street railway company for injury to an alighting passenger, struck by a passing car while attempting to cross a track, an instruction that the motorman on such car was not bound to give signals, except when passing or about to pass another car, was properly refused, as tending to mislead the jury, where the evidence showed that plaintiff was injured at a station where the car from which he alighted stopped, or so near the station as not to have relieved the motorman of the duty of giving signals of the approach of the car that injured plaintiff. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

5. **Distance between stopping place and place of accident.**—In an action against a street railway company for injury to an alighting passenger, struck by a passing car while crossing tracks behind and east of the car from which he alighted, an instruction that, if he was injured while crossing the track at a point east of the regular stopping place, the company owed him no duty to cause the car which struck him to be stopped opposite the car from which he alighted while it was standing at the stopping place, was properly refused, as not showing how far east of the stopping place the plaintiff was when injured. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

freight car passing a passenger car at or near a station, the charge as to the duty to reduce the speed of the freight car should distinguish between a rapid or slow movement of the passenger car.[6]

§ 3355. Care as to Persons Accompanying Passengers.—An instruction that it is the duty of a railroad company to keep between its road between its depot and ferry landing in a reasonably safe condition for all persons, instead of limiting the duty to passengers to persons having business with it, is not misleading, when the sole issue is the company's liability for injuries to one who used the road in going to the landing to meet his family.[7]

§ 3356. Liability to Persons Accompanying Stock.—An instruction relative to the liability of a railroad company for injuries to one accompanying live stock on a train must not be so vague and self-contradictory in its terms as to be obscure,[8] and it is proper to refuse a peremptory instruction based upon the theory that the caretaker was bound to remain constantly in the caboose,[9] but error to refuse to instruct that the caretaker becomes a trespasser if, after reaching his car, he left it and wandered upon the tracks and placed himself on the ground near enough to the main line to be injured by a passing train.[10]

Degree of Care.—The carrier can not complain of a charge that the carrier must exercise the highest degree of care towards passengers, where the court adds that the general rule should not be applied to one who becomes a passenger on a freight train to look after his stock.[11]

6. Slow or rapid movement.—In an action against a street railway company for injury to a passenger, struck by a passing freight car while passing behind the car from which he alighted, an instruction that, if the passenger car was moving when the freight car passed it, it was not the company's duty to have reduced the speed of the freight car or to have stopped it opposite the passenger car, was properly refused, for not distinguishing between a rapid or slow movement of the passenger car, since a passenger may alight from a slowly moving car, and since a passenger car within a very short distance of a station is likely to be discharging passengers, and it would be culpable negligence for another car, operated by the same company upon the same highway, to pass it at a full or very rapid speed. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198.

7. Care as to persons accompanying passengers.—Chesapeake, etc., R. Co. *v.* Meyer (Ky.), 119 S. W. 183.

8. Liability to persons accompanying stock.—Bolton *v.* Missouri Pac. R. Co., 172 Mo. 92, 72 S. W. 530.

9. In an action for injuries to one in charge of live stock during transportation, the contract for which provided that such person should remain in the caboose car while the train was in motion, it is proper to refuse a peremptory instruction based on the theory that he was bound to remain in the caboose whether or not the train was in motion. Texas, etc., R. Co. *v.* Reeder, 76 Fed. 550, 22 C. C. A. 314, judgment affirmed in 18 S. Ct. 705, 170 U. S. 530, 42 L. Ed. 1134.

10. Plaintiff's intestate was traveling on a freight train, accompanying stock and household goods as a caretaker. The car was placed on a side track, to be taken to its destination by a local train. During the night deceased sought his car, and there was some evidence that he found it, and afterward left it, and was found in a fatally injured condition by the side of the main line track, a considerable distance from his car. Later in the night a fast passenger train came in. The fireman saw an object about 140 feet ahead of the train, outside of the track, but was unable to detect what it was. As the engine passed it, he saw that it was a man lying outside of and free from the track. On his report, defendant's employees went to the spot, and found deceased. Held error to refuse to instruct that if it was found that deceased reached his car, and afterwards left it, and wandered upon the tracks, and placed himself on the ground near enough to the main line track to be injured by a passing train, he would be a trespasser, and the enginemen were not bound to expect his presence there nor look out with a view to discover him, and the defendant would not be liable for not stopping the train before passing him. Shanahan *v.* Chicago, etc., R. Co., 90 Neb. 637, 134 N. W. 276.

11. Degree of care.—Plaintiff, who was in charge of stock on a freight train, went forward while the train had stopped to examine his stock. The train started suddenly, and, finding that from its speed he could not board the caboose from the ground, he got upon the top of the train to walk back to the caboose, as it was customary for cattle men to do under the

§ 3357. Proximate Cause.—In a passenger's action for personal injuries, the charge in respect to the proximate cause must not be vague, uncertain, or calculated to confuse the jury,[12] and must not ignore an issue fairly made by the evidence as to the cause of the injury.[13].

Must Hypothesize Negligence Alleged as Proximate Cause.—The hypotheses to a recovery in instructions in an action for injury to a passenger must include the condition that the negligence or wrong charged in the complaint afforded the proximate cause of the injury.[14]

Must Limit Liability to Such Neglect as Was Proximate Cause.—The charge in a passenger's actions for personal injuries must limit the defendant's liability to such negligence as was the proximate cause of the injury[15] and not permit the jury to find defendant liable if the injury resulted from a different cause, and an instruction that if defendant was negligent, and its negligence was the sole proximate cause of plaintiff's injury, the verdict should be for plaintiff, is not erroneous.[16]

Making Carrier Insurer.—The charge as to the proximate cause in a passenger's action for personal injuries must not make the carrier an insurer, and an instruction that if a passenger is injured on a train, and the railroad does not exercise the highest degree of care, it is liable for the injury, etc., was not erroneous as eliminating the question of proximate cause, and making defendant an insurer.[17]

Exclusion of Contributory Negligence.—The charge as to proximate cause in a passenger's action for personal injuries must not exclude consideration of the plaintiff's contributory negligence.[18]

circumstances. He did not look towards the front of the train, and was struck by a bridge. Held, that defendant can not complain of an instruction that the plaintiff was a passenger, and that carriers must exercise the highest degree of care towards passengers, where the court adds that the general rule should not be applied to one who becomes a passenger on a freight train for the purpose of looking after his stock. Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. 451, 5 C. C. A. 551.

12. Vague, uncertain or misleading instruction.—See ante, "Misleading Instructions," § 3326.

A charge that, in order to determine that defendant's negligence was the proximate cause of plaintiff's injury, the jury must "find from the testimony that the circumstances and conditions were such that the defendant ought to have known that its conduct might produce the injury which the plaintiff sustained, or to anybody else standing in the same relation he did," was vague, uncertain, and calculated to confuse the jury. Zimmer *v.* Fox River Valley Elect. R. Co., 95 N. W. 957, 118 Wis. 614. See ante, "Clearness and Definiteness," § 3324.

Where, in an action for injuries to a passenger on a street car by an alleged premature start, the only negligence submitted to the jury related to the management of the car at the very moment of the accident, it was not error to refuse to charge that the carrier's failure to stop the car at the street where plaintiff intended to alight was not the proximate cause of her injury and did not entitle her to recover and there could have been no misunderstanding on the part of the jury in this regard. Cody *v.* Market St. R. Co., 148 Cal. 90, 82 Pac. 666.

13. Ignoring issues.—Where there is evidence, in an action for injuries received by a passenger in getting off a street car, that plaintiff had stepped from the car before its speed was increased, it is error to instruct that the injury was caused by such increase of speed. Root *v.* Des Moines City R. Co., 83 N. W. 904, 113 Iowa 675.

14. Must hypothesize negligence alleged as proximate cause.—Birmingham R., etc., Co. *v.* Fisher, 173 Ala. 623, 55 So. 995.

15. Must limit liability to such neglect as was proximate cause.—In an action for injury to a street car passenger, the court instructed that the defendant would be responsible for "the slightest neglect resulting in an injury," etc. Held that, in view of the following instructions that there could be no recovery unless the injury was shown to be the direct and proximate result of defendant's negligence, the first instruction was not erroneous for failing to limit defendant's liability to such neglect as was the proximate cause of the injury. Indianapolis St. R. Co. *v.* Hockett, 66 N. E. 39, 159 Ind. 677.

16. Chesapeake, etc., R. Co. *v.* Mathews, 114 Va. 173, 76 S. E. 288.

17. Making carrier insurer.—Sutton *v.* Southern Railway, 82 S. C. 345, 64 S. E. 401.

18. Exclusion of contributory negligence.—An instruction was to find for defendant railway company if the injury

Charge as to What Constitutes Proximate Cause.—In an action for injuries to a passenger where a vital question in dispute was whether the proximate cause of plaintiff's injury was defendant's negligence, the court should have instructed that it was not enough to prove that the injury to the plaintiff was the natural consequence of the negligence of the defendant, but that it must also have been the probable consequence, and that the injury might have been reasonably foreseen with ordinary intelligence.[19]

Unavoidable Accident.—Where, in a passenger's action for personal injuries, the court explains to the jury what constitutes an unavoidable accident, and instructs them that if the injury to the plaintiff was the result of such an accident the defendant is not liable, such instruction is not open to the objection that "it did not permit the jury to consider the defense that said injury was caused by an unavoidable accident."[20] And where plaintiff, suing a street-car company for injuries received as a passenger, limits himself to a right to recover for the negligence of defendant, which defendant denies, contending that the injury was caused by unavoidable casualty, a charge that, though plaintiff was hurt without his fault, yet defendant was not liable, unless the jury find that the car went down the incline by reason of defendant's negligence, and if, by reason of any unavoidable casualty, it got beyond the control of defendant's gripman, then there was no negligence, properly stated the law applicable.[21]

Burden of Proof.—In a passenger's action for personal injuries where the complaint alleged other injuries than one claimed to have caused appendicitis, it was not error to refuse to charge that the burden of proof is on the plaintiff to show that the injuries alleged were the proximate cause of the appendicitis.[22]

Proximate and Remote Cause of Collision between Train and Street Car.—See ante, "Collisions," § 3348.

§ 3358. Companies or Persons Liable.—Unsafe Approach to Depot Operated by Depot Company.—Where a carrier uses a depot operated by a union depot company having charge of the sale of tickets over the carrier's road, an instruction, in an action for injuries sustained in falling by reason of an unsafe approach to such depot after procuring a ticket, that a railway ticket may be lawfully sold by any one with whom the company places it, and it will not be necessarily required to keep the premises where such person may sell the tickets in repair, is erroneous, as placing the burden on the purchaser to ascertain whether he was dealing with a broker or an agent of the carrier before assuming that the carrier was obligated to furnish a safe approach to its depot.[23]

was caused by plaintiff's taking too short a step to reach a railway platform, provided that the same was the cause of the injury, and defendant was not negligent, proximately causing such accident. Held, that where the issue of fact was simply whether a defect in such platform, existing by reason of the company's negligence, had caused the injury, such instruction was error, as permitting the jury to find defendant liable, though the injury resulted from a different cause, and as excluding consideration of plaintiff's alleged contributory negligence. St. Louis, etc., R. Co. *v.* Barnett, 45 S. W. 550, 65 Ark. 255.

19. Charge as to what constitutes proximate cause.—Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935.

Plaintiff's wife was jolted off the platform of a car into the street by a sudden whipping up of the car horses. She alighted on her feet. While standing there she was struck and injured by a runaway horse and buggy. In a suit for damages against the car company, there being no dispute as to the facts, defendant's counsel asked the court to charge that, if there was any negligence on the part of the driver of the car, it was not the proximate cause of the injury. The court refused, saying that it was a question for the jury under the evidence. Held error. South Side Pass. R. Co. *v.* Trich, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672.

20. Unavoidable accident.—Macon Consol. St. R. Co. *v.* Barnes, 38 S. E. 756, 113 Ga. 212.

21. Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

22. Burden of proof.—Birmingham R., etc., Co. *v.* Moore, 148 Ala. 115, 42 So. 1024.

23. Unsafe approach to depot operated by depot company.—Herrman *v.* Great Northern R. Co., 68 Pac. 82, 27 Wash. 472, 57 L. R. A. 390.

Company Furnishing and Operating Train on Another Road.—Where, in an action against a railway company constructing a railroad on its right of way, and another company furnishing a train and crew for the carriage of employees to and from work, and the engineer, for negligence causing the death of an employee while being carried from work, the pleadings and proof showed but one train in use on the road and that the company furnishing the train and crew was operating it under the employment of the company constructing the road, an instruction that, if decedent was a passenger "on one of defendant's or either defendant's work train," it was the duty of defendants and their employees to exercise the highest degree of care, etc., was proper; it being immaterial which company actually owned the work train.[24]

Viaduct Owned and Maintained by City.—In a passenger's action for personal injuries, where the question of the relation between the city whose streets are occupied by the tracks of the carrier, and the carrier is not involved, it is proper for the court in response to a question from the jury also to instruct them.[25]

Collision at Crossing of Two Railroads.—See ante, "Collisions," § 3348.

§ 3359. Presumptions and Burden of Proof.[26]—In an action against a carrier for injuries to a passenger, the charge should not relieve the plaintiff from the burden of establishing his allegation of negligence in the first instance by a preponderance of the evidence;[27] on the other hand, where the plaintiff

24. Company furnishing and operating train on another road.—Chicago, etc., R. Co. *v.* Hollis, 91 S. W. 258, 28 Ky. L. Rep. 1102.

25. Viaduct owned and maintained by city.—The declaration alleged that plaintiff, while riding, as a passenger, on the footboard of defendant's cars, and while using due care for his safety, was struck by a viaduct, which stood near the track, and along which defendant negligently ran its cars. The jury, after retiring, sent the following communication to the court: "The city built the bridge, and takes care of repairing it, and the city railway company pays license for its cars to go across, and that in my estimation, the city is in fault, and not the railway company." The court instructed the jury that they must decide the case on the law and the evidence, and whether the city was liable or not was not a question before them. Held, that the instruction was proper. Judgment 82 Ill. App. 185, affirmed in West Chicago St. R. Co. *v.* Marks, 55 N. E. 67, 182 Ill. 15.

26. Presumptions and burden of proof.—Defective equipment and appliances.—See ante, "Sufficiency and Safety of Means of Transportation," § 3344.

Starting train while passenger boarding.—See ante, "Starting or Moving Car While Passenger Boarding Same," § 3343.

Sudden and violent jolts or jerks.—See ante, "Sudden Jerks, Lurches, or Jolts," § 3347.

Collisions.—See ante, "Collisions," § 3348.

Derailments.—See ante, "Derailment," § 3349.

Sudden starting of car while passenger alighting.—See ante, "Starting or Moving Train While Passenger Alighting," § 3353.

Proximate cause.—See ante, "Proximate Cause," § 3357.

27. In an action against a carrier for death of a passenger in a collision, the court charged that the burden was on the carrier to show that the collision occurred without its fault, and from inevitable casualty or unavoidable accident, etc., and that it must establish by a preponderance of the evidence that the collision resulted from such unavoidable accident, etc. Held erroneous, as relieving plaintiffs from the burden of establishing their allegation of negligence in the first instance, the court having nowhere instructed that the burden was on plaintiffs to establish the truth of their allegation of negligence by a preponderance of the evidence. Valente *v.* Sierra R. Co., 91 Pac. 481, 151 Cal. 534.

Res ipsa loquitur.—In an action for injuries to a passenger in a collision in a case wherein the doctrine of res ipsa loquitur was applicable, the court properly refused an instruction placing on plaintiff the burden of proof, throughout the entire trial, as to the negligence of defendant's servants, and requiring plaintiff to prove by a preponderance of the evidence that defendant's servants were guilty as specified in the instruction, and that such negligence was the direct and proximate cause of the injury. Price *v.* Metropolitan St. R. Co., 220 Mo. 435, 119 S. W. 932.

Under statutes.—Under a statute making the fact of injury to a passenger by the running of a street car prima facie evidence of negligence, a requested instruction, in an action by a passenger injured, that the burden of proof was on

produces sufficient proof of defendant's negligence to make a prima facie case, the charge should not free defendant of the burden of establishing by a preponderance of evidence that it has been guilty of no negligence whatsoever which caused the accident and that the damage has been caused by inevitable casualty or by some cause which human care and foresight could not prevent.[28] Even where the passenger's injuries were received under circumstances giving rise to a presumption of negligence, it is nevertheless proper to charge that the burden of proof is upon plaintiff,[29] and it is error to charge that defendant is liable for the slightest negligence, and that it must repel by satisfactory proof every imputation of such negligence, when the facts do not create a presumption of negligence against defendant, and cast on it the burden to disprove negligence, and when the contributory negligence of plaintiff is involved.[30] But a charge that defendant was liable for want of ordinary care, and that the burden of proof to show negligence rested on the plaintiff is sufficiently favorable to the carrier.[31]

Requisites of Charge Generally.—In a passenger's action for personal injuries the charge as to presumption and burden of proof must not be conflicting.[32]

plaintiff to show that the accident was due to defendant's negligence, and, if the jury were not satisfied by a preponderance of evidence that plaintiff's injury was the result of the negligence of defendant, or its employees, to find for defendant, was properly refused. Pensacola Elect. Co. *v.* Alexander, 50 So. 673, 58 Fla. 337.

28. Burden of defendant to rebut prima facie case.—In an action by a passenger against a carrier for injuries resulting from the collapse of a bridge, a requested charge that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, and can not recover if it is just as probable that the accident resulted from one of two causes, for one of which defendant was not responsible, was properly modified to state that plaintiff, to establish defendant's negligence, must show more than a probability of a negligent act, but that, when plaintiff had shown that he was injured by the breaking down of the bridge and overturning of the car, it was sufficient proof of defendant's negligence, and that the burden of proof was then on defendant to establish by a preponderance of evidence that it has been guilty of no negligence whatsoever which caused the accident, and that the damage has been caused by the inevitable casualty or by some cause which human care and foresight could not prevent. Roanoke R., etc., Co. *v.* Sterrett, 62 S. E. 385, 108 Va. 533, 19 L. R. A., N. S., 316.

29. Patterson *v.* San Francisco, etc., R. Co., 81 Pac. 531, 147 Cal. 178.

30. Blake *v.* Camden Interstate R. Co., 50 S. E. 408, 57 W. Va. 300.

31. Defendant, an electric street railroad company, offered the free use of three of its cars to take members of a woman's convention for a ride about the city. The offer was accepted, the plaintiff's ward became one of the passengers, and was injured in a collision. The cars were operated by the regular employees of defendant. Held, that in an action to recover for the injury an instruction that defendant was liable for want of ordinary care, and that the burden of proof to show negligence rested on the plaintiff, was at least sufficiently favorable to defendant. Indianapolis Tract., etc., Co. *v.* Lawson, 143 Fed. 834, 74 C. C. A. 630, 5 L. R. A., N. S., 721.

32. Requisites of charge generally.—An instruction for defendant in a personal injury case that if the jury find from all the evidence in the case, whether offered by plaintiff or defendant, that there was no negligence of the character submitted, then defendant's burden has been sustained, and it is entitled to a verdict, though they should find that plaintiff was a passenger, and was injured without fault on his part, does not conflict with an instruction for plaintiff that the burden was on him to show that the accident was caused by defendant's negligence, and, if he so showed, then the burden shifted to defendant to excuse itself; the first instruction simply telling the jury the means defendant might employ to excuse itself, and directing what evidence they might consider in determining whether defendant was without fault. Feary *v.* Metropolitan St. R. Co., 62 S. W. 452, 162 Mo. 75.

Conflicting instructions.—In an action for injuries to a passenger by being struck by a trolley pole, an instruction that the burden was on the carrier to show that it did all that human care, vigilance, and foresight could reasonably do, consistent with the character and mode of conveyance adopted, in the practical prosecution of its business, to prevent accidents and injuries to passengers riding on and alighting from its cars, was not in conflict with other instructions requiring plaintiff to prove that defendant owned and operated the car in question, and requiring defendant to exercise such care

must not be uncertain,[33] must not be misleading as to the means of proof required,[34] or place the burden of proof on the wrong party.[35] Further the charge must not be objectionable as misleading the jury to believe that the carrier's negligence had been established,[36] must be based upon or be applicable to the evi-

as human beings are capable of, consistent with the practical operation of defendant's trains, and that a party charging negligence must prove it. Judgment 102 Ill. App. 202, affirmed in Chicago City R. Co. *v.* Carroll, 68 N. E. 1087, 206 Ill. 318.

33. Certainty.—See ante, "Clearness and Definiteness," § 3324.

In an action against a carrier for injuries to a passenger, the court charged that if the jury found plaintiff was injured substantially as claimed, and that the accident could not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence was raised, and that the burden was on defendant to rebut it, and, to that end, that defendant must prove that, as to the matters which the circumstances indicated were the cause of the accident, defendant and its employees exercised that high degree of care which the law required of them. Held, that the instruction was not erroneous on the theory that it was left uncertain as to what circumstances the jury might consider, since the word "circumstances" merely had reference to the claim made by plaintiff as to the manner in which the accident happened, and in other instructions the jury was plainly told that, in order to recover, plaintiff must establish the negligence charged. Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

Certainty as to claims referred to.—In an action against a carrier for injuries to a passenger, the court instructed that if plaintiff was injured substantially as claimed by him, and the accident would not have happened, had defendant exercised the utmost care, a presumption of negligence against defendant was raised. Held, that the instruction was not erroneous on the theory that it was uncertain as to what claims were referred to—whether those stated in the petition or in the evidence—plaintiff's claim having been stated in his petition, and his testimony having tended to support such claim. Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

34. Misleading instructions—Measure of proof.—Instructions requested by defendant that the burden was on plaintiff to prove that she was injured by the carelessness of the driver of a street car, and if the testimony left the jury in uncertainty as to whether she was so injured, the jury must find for defendant; and that the burden of proving that the car was not stopped a reasonable time to allow plaintiff to alight therefrom was on plaintiff, were misleading as to the measure of proof, and properly refused. Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748. See ante, "Misleading Instructions," § 3326.

35. Placing burden of proof on wrong party.—In an action against a railroad company by a passenger on a freight train for personal injuries, a charge to find for defendant if the jury believe from a preponderance of evidence that the train was not run at a dangerous rate of speed, that the cars were not negligently loaded, and that the employees did not fail to keep a proper lookout, places the burden of proof on defendant, and is erroneous. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Showing cause of accident and exculpating circumstances.—In an action against a carrier for injuries to a passenger the court instructed that, if plaintiff had shown conditions at the time and place of the accident, either in the rolling stock or track, in some respect as complained of, from which the jury might find negligence in some manner, the burden was on defendant to prove that such conditions were not the cause of the accident, and that it was not negligent in any manner as claimed in the construction, operation, or maintenance of the rolling stock or roadbed. Held, that the instruction was not erroneous on the theory that it placed on defendant the burden of showing the cause of the accident, and also of exculpating itself from every other charge of negligence stated in the petition, since, if the cause were proven, the derailment of the train could not have been occasioned by another cause, and other instructions had stated that, in order to find for plaintiff, the jury must find not only that he was injured, but that defendant was negligent in some one or more of the particulars charged in the petition, and that such negligence was the direct cause of the injury. Cronk *v.* Wabash R. Co., 98 N. W. 884, 123 Iowa 349.

36. Leading jury to believe that negligence of carrier established.—The court, in an action for injuries to a passenger, having instructed that the burden of proof was on plaintiff, and that he must prove defendant's negligence and his own freedom from negligence by a preponderance of the evidence, an instruction that the jury were the best twelve men to determine "this accident, because of this negligence, as the case may be, of any twelve men in the world," because the jury had heard and knew more about

dence,[37] and not invade the province of the jury.[38] The general rules as to the power to modify requested instructions,[39] as to repetition of instruction,[40] and harmless error[41] apply, and all of the instructions are considered as a whole.[42]

it, was not objectionable as misleading the jury to believe that defendant's negligence had been established. Malinowski *v.* Detroit United Railway, 117 N. W. 565, 154 Mich. 104.

37. Must be based on evidence, whether car properly built.—The court having instructed that if the car in which deceased was riding ran off the track, and thereby killed him, without fault on his part, there was prima facie negligence, unless defendant had used due care in the construction and inspection of its cars, and found no defects which contributed to the injury, need not further instruct that if the car is broken the presumption of negligence does not necessarily arise that it was improperly built, especially when it does not appear that such further instruction is applicable to the evidence. Ohio, etc., R. Co. *v.* Voight, 122 Ind. 288, 23 N. E. 774. See ante, "Applicability to Evidence," §§ 3330-3332.

38. Province of jury.—Where, in an action for injuries to a passenger on a street car from the burning out of a fuse, there was evidence which would have warranted the conclusion that the duration and intensity of the flame produced by the explosion was greatly in excess of that which would have been the result if the fuse had been in proper condition, and that the improper condition of the fuse could have been discovered by the use of reasonable care, an instruction that the doctrine of res ipsa loquitur did not apply was properly refused since how far negligence could be inferred from the accident itself under such circumstances was for the jury. Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285. See ante, "Invading Province of Jury," § 3333.

Construction as invading province of jury.—A charge that negligence can not be presumed, but must be proved; that, though plaintiff was injured in getting on or off defendant's car, such fact alone does not entitle plaintiff to recover, but he must prove that he was injured in direct consequence of the negligence of defendant's employees; does not tell the jury that negligence can not be inferred from circumstances. Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

39. Modification of requests.—Where, in an action for personal injuries, claimed to have been caused by the upsetting of defendant's stagecoach, in which plaintiff was a passenger, defendant requested a charge that a mere probability that plaintiff's injuries were caused by the upsetting of the stage would not justify a verdict for him, an additional statement by the court that, if the jury were satisfied from the evidence that plaintiff received the injuries, they could take such injuries into consideration in making up their verdict, is not erroneous. Schafer *v.* Gilmer, 13 Nev. 330.

In an action against a railroad company for injuries to a passenger, where an instruction is given for defendant that the burden of proof is on plaintiff to show negligence from which his injury resulted, it is error to refuse to modify the instruction by adding that the injury itself, if plaintiff was in the exercise of ordinary care, is prima facie evidence of negligence. Gleeson *v.* Virginia Mid. R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, reversing 5 Mackey (16 D. C.) 356.

Instance where error not cured by modification.—A charge that if the car stopped to allow passengers to alight, and, while plaintiff was alighting, started with a sudden and violent jerk, the burden is on defendant to show that its driver was not negligent, is not cured by a modification that the burden is on plaintiff "to show, in the first place, the negligence of the driver." Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

40. Repetition of instructions.—Where the court charged that the law imposed on plaintiff the burden and necessity of showing by a preponderance of evidence that it was the negligence of the defendant railroad company, and not something else, which caused the alleged injuries, the refusal of a requested instruction concerning the preponderance of evidence in such a case was not error. Southern Pac. Co. *v.* Schuyler, 135 Fed. 1015, 68 C. C. A. 409.

41. Harmless error.—See ante, "Harmless Error," § 3334.

In an action against a railroad company to recover for damages caused by the derailment of a car, an instruction that, after plaintiff proved the injury and the derailment of the car, the burden of proof shifted to defendant, although not as accurate as the statement that the facts of the derailment of the car and of plaintiff's injury thereby make out a prima facie case of defendant's negligence, will not be condemned, in view of the fact that Rev. St. 1879, § 3586, provides that the court shall in all proceedings regard substance rather than form, and the requirement in Rev. St. 1879, § 3659, that the court shall not reverse for any error not affecting the substantial rights of the adverse party. Furnish *v.* Missouri Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

42. Charge taken as a whole.—In an action by a passenger for injuries sus-

Express Reference to Burden of Proof.—It is safer to so frame instructions as to indicate the burden of proof without expressly referring to it, and therefore the court should instruct the jury that, if plaintiff's injury was due to any defect in the car or cars on which he was riding, or the machinery or appliances connected therewith, and he did not, by want of ordinary care, contribute to the injury, they should find for him the damages he thereby sustained, unless they believed from the evidence defendant had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the car and appliances and secure their safety.[43]

Must Not Authorize Presumption of Negligence from Mere Fact of Injury.—In a passenger's action for personal injuries, the charge of the court as to presumptions and burden of proof of negligence must not justify the jury in presuming negligence from the mere fact that the passenger was injured,[44] the burden of proof of negligence being on the plaintiff; but that burden is sustained by proof of the injury as a result of the carrier's act in operating the in-

tained, the court charged that the effect of the plea of defendant was to put the burden of proof on plaintiff to show by a preponderance of the evidence that the allegations of the complaint were true, and also that, if plaintiff was a passenger, the law would raise a presumption against the defendant company that it was negligent, and the burden would be on defendant to rebut such presumption, or that the plaintiff could by ordinary care have avoided the effect of defendant's negligence. Held, that the instructions together properly stated the rule as to the burden of proof. Freeman *v.* Collins Park, etc., R. Co., 43 S. E. 410, 117 Ga. 78.

The refusal, in an action for injuries received by the negligent starting of a street car while plaintiff was alighting therefrom, to instruct that the burden is on plaintiff to show by a preponderance of the evidence how she came to fall, is not erroneous, when considered in connection with other instructions that plaintiff can not recover if the jury believes from the evidence that she alighted in safety and fell down from other causes, and that she can not recover unless she shows by a preponderance of evidence that defendant was negligent in the manner charged in the declaration, and that such negligence was the proximate cause of the injury. Judgment, 99 Ill. App. 591, affirmed in West Chicago St. R. Co. *v.* Lieserowitz, 64 N. E. 718, 197 Ill. 607.

Where the judge in his charge as to the presumption arising from proof of injury on a street car to a passenger did not limit the presumption to the specific acts of negligence alleged, but in his general charge specifically confines the jury to such specifications of negligence, it is no ground for new trial. Georgia R., etc., Co. *v.* Reeves, 51 S. E. 610, 123 Ga. 697.

43. Express reference to burden of proof.—Davis *v.* Paducah R., etc., Co., 113 Ky. 267, 24 Ky. L. Rep. 135, 68 S. W. 140.

44. Mere fact of injury.—In an action against a carrier for injuries to a passenger, the court charged that if the jury found that plaintiff was not guilty of contributory negligence, and that he was thrown from the car as claimed, and that such accident would not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence against defendant was raised, casting the burden on it to rebut such presumption. Held, that the instruction was not erroneous on the ground that it justified the jury in presuming negligence from the mere fact that plaintiff was injured while a passenger. Fitch *v.* Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665.

Drover.—In an action for the death of a drover, riding on a freight train, an instruction that the fact that the drover was killed while a passenger was prima facie evidence of negligence on defendant's part, etc., was error, since the mere fact that he was killed, without reference to "how" he was killed, raises no presumption of negligence. Western Maryland R. Co. *v.* State, 53 Atl. 969, 95 Md. 637.

There being evidence that the relation of carrier and passenger existed between plaintiff and defendant, and it being admitted by defendant that plaintiff had received physical injuries by the operation of its train, and the court having charged, on request of defendant, that the mere fact that plaintiff had charged any particular matter as negligence did not warrant the jury in treating it as such, but that they must determine that from the evidence, it was not error to add, "always bearing in mind the presumption of law as to negligence under the pleadings in the case, to which your attention has been called, and the burden that has been placed on defendant by reason of that presumption." Georgia R., etc., Co. *v.* Adams, 56 S. E. 409, 127 Ga. 408.

strumentalities employed in its business[45] or from a defect therein.[46]

Must Limit Injuries to Those Arising from Agency of Carrier.—An instruction that an injury to a passenger on a train is itself prima facie evidence of negligence or liability by the carrier is erroneous, not limiting the injuries to those arising from some agency of the carrier.[47]

Evidenced Equally Balanced.—In a passenger's action for personal injury where each of the two theories of the case is advanced as the opposite of the other, it is proper to instruct the jury to find for the defendant if the evidence was equally balanced as between such theories. Thus, where the only issue on which depended the liability of a carrier for death of a passenger was whether the car stopped and then started backward as the passenger was attempting to alight, or whether she voluntarily stepped from it while it was still going forward, an instruction to find for defendant if the evidence was equally balanced as between such theories was proper.[48]

One Count Bottomed on Simple Negligence Other on Gross.—One count of plaintiff's complaint being bottomed on simple negligence of defendant's conductor, and the other, for the same injury, alleging gross negligence of the conductor, it was error for the court, its attention being called by a requested charge to the degree and nature of proof required to sustain the allegations of the second count, not to instruct as to the liability under such count, giving the distinction between simple negligence and gross negligence, leaving them, instead, to infer that plaintiff, if in the exercise of due care, could recover under either count, if the conductor was shown to be negligent.[49]

Failure to Charge on Contributory Negligence and Apportionment of Damages.—An instruction, in the trial of an action against a railway company for personal injuries, that, if the plaintiff shows a prima facie right to recover, it is incumbent on the defendant "to establish, by a preponderance of the evidence, one of two facts, either that it was without negligence, or that the plaintiff could have avoided the consequence of the negligence by the exercise of ordinary care," is not rendered erroneous because of a failure to charge in the same connection on the law of contributory negligence and apportionment of damages, the more especially when the legal rules bearing on such subject are, in connection with instructions given on the measure of damages, fully and fairly stated.[50]

Fact of Employment of Driver of Stage Coach.—In an action for an injury sustained by the plaintiff in a stage coach, an instruction to the jury that, if the defendant owned the horses, in the absence of all evidence to the contrary it was reasonable to presume that the driver having the control of them was placed in that situation by the defendant's consent, and that they were employed

45. Injury from carrier's act in operating instrumentalities.—An instruction, in an action for injuries to a passenger, that the carrier is required to exercise the highest degree of care in transportation of passengers, and that a showing that the injury was caused by the carrier's act in operating the instrumentalities employed in its business raises a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without its negligence, was not erroneous, as requiring defendant to overcome plaintiff's showing by a preponderance of the evidence; the court having also charged that plaintiff was required to prove her case by a preponderance of the evidence. Cody *v.* Market St. R. Co., 82 Pac. 666, 148 Cal. 90.

46. Broken rail.—Instructions held not erroneous on the ground that it placed on plaintiff the burden of proving defendant's negligence, for, though such burden was on plaintiff, it was sustained by proof of the accident resulting from a broken rail. Whittlesey *v.* Burlington, etc., R. Co., 90 N. W. 516, 121 Iowa 597, reversed in 97 N. W. 66.

47. Must limit injuries to those arising from agency of carrier.—Brice *v.* Southern Railway, 85 S. C. 216, 67 S. E. 243, 27 L. R. A., N. S., 768.

48. Evidence equally balanced.—Wyatt *v.* Pacific Elect. R. Co., 156 Cal. 170, 103 Pac. 892.

49. One count bottomed on simple negligence, other on gross.—Yancey *v.* Boston Elev. R. Co., 205 Mass. 162, 91 N. E. 202, 26 L. R. A., N. S., 1217.

50. Failure to charge on contributory negligence and apportionment of damages.—Macon Consol. St. R. Co. *v.* Barnes, 38 S. E. 756, 113 Ga. 212.

in his business, but that the contrary might be shown, submitting the question to them as one of fact for them to decide, is unexceptionable.[51]

Proof of Willfulness.—In an action for injuries to a passenger on defendant's train, it was proper to instruct the jury that, "to establish the charge of willfulness, * * * an actual intent to do the particular injury alleged need not be shown; but if you find, from all the evidence, that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfulness." [52]

Explanation of How Accident Happened.—In an action againts a railroad company for negligence, an instruction that, when the plaintiff has shown that the car left the track without fault on his part, "it devolves on the defendant to explain how the accident happened," is inaccurate. It may be possible to explain how the accident happened, but the defendant, in order to overcome the presumption of negligence, and exonerate itself from liability in such case, must show that it had employed the utmost skill, prudence, and circumspection practically and usually applied to railroad carrying, and that the cause of the accident was not, and could not reasonably have been discovered and guarded against.[53]

Culpable Cause of Accident Not Alleged as Shown.—Where, in a suit for injury to a passenger caused by the derailment of an electric car, the particular negligence was not alleged, and the evidence was insufficient to show the particular cause of the accident, if the accident is such as to indicate there was negligence, either by reason of a defect in the track or car or in the mode of running it, it would be the duty of the court to instruct that plaintiff was not bound to introduce evidence to warrant a finding against defendant in either of these particulars, taken by itself alone, and that it was enough if the jury found negligence in some one or more of them, though they could only conjecture as to which one was the culpable cause of the accident.[54]

Proof of Justification of Assault.—In a passenger's action against a street car company for an assault by its conductor, it was proper to charge that the burden of proving its plea of justification was on the company.[55]

§ **3360. Weight and Sufficiency of Evidence.**—In a passenger's action for personal injuries, the charge should not comment on the weight of evidence.[56]

Instances.—And a charge that an injury which was occasioned by an unusual occurrence is presumed to have been caused by negligence unless by further proof the contrary is shown, is erroneous as commenting on the weight of evidence.[57]

Facts as to Competency or Incompetency of Trainmen.—It is error to charge the jury that they may consider facts proven as to the competency or in-

51. Fact of employment of driver of stagecoach.—Haight *v.* Turner, 21 Conn. 593.

52. Proof of willfulness.—Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, 22 N. E. 340, 6 L. R. A. 241, 16 Am. St. Rep. 334.

53. Explanation of how accident happened.—Louisville, etc., R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476.

54. Culpable cause of accident not alleged as shown.—James *v.* Boston Elev. R. Co., 90 N. E. 513, 204 Mass. 158.

55. Proof of justification of assault.—Birmingham R., etc., Co. *v.* Coleman (Ala.), 61 So. 890.

56. Weight and sufficiency of evidence.—Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536, 16 S. W. 320.

57. Instances.—Texas Cent. R. Co. *v.* Burnett, 80 Tex. 536, 16 S. W. 320.

Derailment or abnormal operation of machinery.—While an injury to a passenger on a railroad resulting from the derailment of a train or the abnormal operation of machinery raises an inference of negligence on the part of the carrier which may authorize the jury to so find, where the railroad company has introduced evidence to show that it used all proper care to avoid such accident, a charge that the fact of the injuries is prima facie evidence of negligence, which defendant is called on to rebut, is a charge on the weight of the evidence. St. Louis, etc., R. Co. *v.* Parks, 97 Tex. 131, 76 S. W. 740.

competency of the trainmen, which tend to show that the act in question was not done by the motorman in a reasonably careful manner.[58]

Snow and Ice on Platform.—A request to charge that the fact that there was snow and ice on the step of a car from which plaintiff was alighting, and on which he slipped and fell at the time of his injury, was no evidence of negligence, is properly refused.[59]

§ 3361. **Credibility of Witnesses.**—In a passenger's action for personal injuries, it is proper to instruct the jury as to what matters may be considered upon the credibility of the plaintiff who has testified in his own behalf. Thus, it was held correct in an action for injuries received while riding on defendant's car, for the court to instruct as follows: "It is proper for you to consider all the testimony bearing upon the question as to whether this plaintiff paid his fare or not. Of course, it matters not whether he paid his fare with a nickel, or with pennies, or in any other way. If in fact he did pay his fare, then he became a passenger upon the car. But, of course, it is proper for you to carefully remember the proof which he and other witnesses offered in regard to the payment of the fare; for, even while he may be mistaken in regard to the manner in which he paid his fare, still, if in fact he did pay his fare, he thereby became a passenger. But, if he was mistaken—has given incorrect testimony in your presence—in regard to the manner of paying his fare, that is proper for you to consider upon the credibility which is to be given to his testimony of other witnesses in this regard." [60]

§ 3362. **Damages.**—In a passenger's action for personal injuries, a charge in regard to punitive or exemplary damages is not ordinarily applicable to a case of mere negligent tort. To justify such charge there must be evidence of willful misconduct, malice, fraud, wantonness or oppression, or that entire want of care which would raise a presumption of a conscious indifference to consequences.[61]

Failure to Stop Car.—In an action by a passenger on a street car for injuries received in alighting from the car, there was no error in charging that the jury might consider whether or not the car ought to have stopped at a given point, in determining questions with reference to the circumstances under which the conductor and plaintiff may have acted, in regard to whether the circumstances would be such as to authorize a finding for punitive damages, and gen-

58. **Facts as to incompetency of trainmen.**—McBride *v.* St. Paul City R. Co., 75 N. W. 231, 72 Minn. 291, following Fonda *v.* St. Paul, etc., R. Co., 71 Minn. 438, 74 N. W. 166.

59. **Snow and ice on platform.**—Tacoma R., etc., Co. *v.* Turner, 196 Fed. 484, 116 C. C. A. 258.

60. **Credibility of witnesses.**—Reem *v.* St. Paul City R. Co., 84 N. W. 652, 82 Minn. 98.

61. **Damages.**—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778, citing Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000; Southern R. Co. *v.* Davis, 132 Ga. 812, 65 S. E. 131.

Any instruction as to punitive damages is erroneous, where there is no evidence of gross negligence. East Tennessee, etc., R. Co. *v.* Lee, 90 Tenn. (6 Pickle) 570, 18 S. W. 268.

Failure to provide suitable accommodations.—In a suit for injury to a passenger from being thrown from the platform of a car, where the only negligence alleged was failure to provide suitable accommodations inside the car, and there was no evidence of willful misconduct, or of entire want of care, it was error to give a charge authorizing punitive damages. Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

Ties partly decayed.—Where, in an action for injuries to a passenger, it appeared that the accident was caused by the spreading of rails, the mere fact that some of the ties when torn out of the roadbed by the derailed cars appeared to be decayed or rotten in part did not warrant an instruction that defendant was guilty of gross negligence or wanton disregard of the safety of passengers, where there was no evidence to show that such rottenness of the ties was the cause of the spreading of the rails. Illinois Cent. R. Co. *v.* Lence, 100 S. W. 215, 30 Ky. L. Rep. 988.

erally in considering the circumstances immediately leading up to and attending the occurrence.[62]

Passenger Pushed from Moving Train by Conductor.—Where, in an action against a railroad company, it appears that a passenger was injured by being pushed from a moving train by the conductor at a station at which he did not wish to alight, an instruction on the subject of punitive damages, is not inappropriate.[63]

Assault by Employee of Carrier.—In an action for assault by employees of a street railway company, where the court in its charge fully defined the relation of the defendant company to a passenger, and the duty imposed by law as growing out of this relation, and in proper terms left it to the jury to determine whether the employees were acting for the company at the time, and that if they were acting as peace officers, and, in view of the behavior of the plaintiff, they were required in order to preserve peace to take him into custody, and they did so, using no more force than was necessary, plaintiff could not recover, and, further, that it was the duty of the employees of the company to protect other passengers from such acts as it was claimed that plaintiff was guilty of, and eject him from the premises if necessary, it was not error to instruct that if the plaintiff had been assaulted in the manner alleged, and that he sustained damages thereby, it was the duty of the jury to assess his damages at such sum as they thought he was entitled to, considering character of the injury sustained, and the attendant humiliation, pain, and suffering.[64] And in a suit against a railway company for an assault by a brakeman on a passenger, the court having charged that there could be no recovery unless the assault was wanton and malicious, the company cannot complain of a charge that, in the event of a verdict for the plaintiff, the jury should award him such a sum as they might think fair and reasonable; the damages recoverable being made up of several ingredients, such as medical attendance, bodily pain, and anguish of mind induced by the hurt, and all damages, present and prospective, which are the natural result of the act done, and the injury received by the plaintiff.[65]

Use of Profane and Boisterous Language by Carrier's Servant in Presence of Passenger.—In an action by a prospective passenger against a railway company for injuries for its failure to properly heat its waiting room at a depot, for permitting such room to be and remain locked, and for annoyances and insults, an instruction allowing punitive damages in addition to the actual damages was prejudicial, as permitting the jury to award punitive damages for the profane and boisterous language of defendant's agent in the absence of sufficient proof of such languages,[66] and an instruction in such action that plaintiff's damages should be such a sum of money as would compensate her for the pain and anguish of body and mind suffered on account of the injuries sustained, is prejudicial, as warranting damages for mental suffering for profane and boisterous language of the company's agent in the absence of sufficient proof of such language.[67]

Assault by Fellow Passenger.—An instruction, in an action against a carrier for an assault by a fellow passenger, authorizing a recovery for physical pain and suffering, and such mental suffering as was the proximate and necessary consequence of the assault, was not obnoxious as allowing damages for mental

62. Failure to stop car.—Savannah Elect. Co. *v.* McElvey, 55 S. E. 192, 126 Ga. 491.

63. Passenger pushed from moving train by conductor.—Atlanta, etc., R. Co. *v.* Potts, 57 S. E. 686, 128 Ga. 397.

64. Assault by employee of carrier.—Rand *v.* Butte Elect. R. Co., 40 Mont. 398, 107 Pac. 87.

65. St. Louis, etc., R. Co. *v.* Blackburn (Ark.), 15 S. W. 469.

66. Use of profane and boisterous language by carrier's servant in presence of passenger.—St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

67. St. Louis, etc., R. Co. *v.* Wilson, 66 S. W. 661, 70 Ark. 136, 91 Am. St. Rep. 74.

suffering by plaintiff, due to his being compelled to kill his assailant.[68]

§§ 3363-3365. Actions for Breach of Contract of Carriage—§ 3363. Form, Requisites and Sufficiency in General.—Misleading Instructions.—The charge in a passenger's action for breach of the contract of carriage must not be misleading by binding the defendant to a guaranty of the schedule by an agent, even though the passenger knew the agent had no authority to do so,[69] or by implying forcible ejection where the passenger alighted as a result of the trainmen's calling the wrong station.[70]

Use of Conjunctive Instead of Disjunctive.—In an action against a street railroad for failure to stop a car and admit plaintiff as a passenger, an instruction that if the conduct of defendant's servants was not "insulting and intentionally willful," though negligent, only nominal damages could be awarded, was objectionable as using the conjunction after the word "insulting."[71]

Misleading Use of Words "Though Negligent."—In an action against a street railroad for failure to stop a car and admit plaintiff as a passenger, an instruction that if the conduct of defendant's servant was not "insulting and intentionally willful," though negligent, only nominal damages could be awarded.[72] Was objectionable in using the phrase "though negligent," as it would warrant the jury in believing that gross negligence or any degree of negligence was intended.[73]

Use of Too Broad Terms—Allowing Punitive Damages for "Indecorous Conduct."—In an action by appellee to recover for an injury resulting from being taken past a station to which she had purchased a ticket, it was error to instruct the jury that if any of the employees of the company were "indecorous" or insulting, they should award the plaintiff "damages in their discretion" not exceeding the amount claimed in the petition.[74] The term "indecorous conduct" is too broad. It may embrace conduct which would not authorize their infliction.

Certainty as to Occasion Intended.—In an action for refusal to receive and check plaintiff's trunk, an instruction is erroneous, which leaves it doubtful whether the occasion alluded to therein as that when plaintiff had not endeavored to deceive defendant, was the occasion mentioned in the declaration, or some other.[75]

Conformity to Issues and Pleading.—The charge in a passenger's action for breach of the contract of carriage must conform to the pleadings and issues. Where, on threats of expulsion, a passenger pays a fare, but does not leave the car, it is error to submit the question of expulsion to the jury in an action against the railroad company for damages.[76]

Applicability to Evidence and Facts of Case.—An instruction in a passenger's action for breach of the contract of carriage must be applicable to the evidence and facts of the case. It is error to give an instruction not supported by at least some evidence in the case.[77] On the other hand, the charge must not ignore evidence; as, for instance, evidence that plaintiff was directed to the

68. Assault by fellow passenger.—Bedsole *v.* Atlantic, etc., R. Co., 151 N. C. 152, 65 S. E. 925.

69. Misleading instructions.—Mulligan *v.* Southern Railway, 84 S. C. 171, 65 S. E. 1040.

70. Louisiana, etc., R. Co. *v.* Rider (Ark.), 146 S. W. 849.

71. Use of conjunctive instead of disjunctive.—Godfrey *v.* Meridian R., etc., Co., 101 Miss. 565, 58 So. 534.

72. Misleading use of words "though negligent."—Godfrey *v.* Meridian R., etc., Co., 101 Miss. 565, 58 So. 534.

73. Godfrey *v.* Meridian R., etc., Co., 101 Miss. 565, 58 So. 534.

74. Use of too broad terms—Allowing punitive damages for "indecorous conduct."—Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 3 S. W. 530, 9 Ky. L. Rep. 7, 7 Am. St. Rep. 600.

75. Certainty.—Norfolk, etc., R. Co. *v.* Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110.

76. Paying fare under threat of expulsion.—Myers *v.* Southern Railroad, 64 S. C. 514, 42 S. E. 598.

77. Applicability to evidence and facts of case.—Jenkins *v.* Chesapeake, etc., R. Co., 57 S. E. 48, 61 W. Va. 597, 49 L. R. A., N. S., 1166, 11 Am. & Eng. Ann. Cas. 967.

wrong car by the conductor,[78] or evidence of wantonness, insult, or aggravation.[79]

Failure to Prove Allegation of Contract to Carry for Hire.—On the trial of a passenger's action for breach of an alleged contract, instructions for the plaintiff based upon the theory of an implied contract and which ignore the special contract alleged in the declaration are inappropriate and should be refused. Thus, in an action against a carrier which had entered into a contract with the county court to transport sick persons to a pesthouse, by a person who was put in a car of the carrier to be transported, an instruction for defendant which told the jury that plaintiff having alleged in his declaration that defendant agreed to carry him for hire, and having failed to prove such allegation, was not entitled to recover in an assumpsit, was improperly refused.[80]

Charge as to Aggravating Circumstances Where Passenger Carried by Station, Unsupported by Evidence.—In a passenger's action for being carried beyond his station, where there was no pretense that the conductor treated the passenger harshly, or with anything but polite consideration, when he discovered that he had been carried past the station, an instruction as to aggravating circumstances should not have given.[81] Thus, a passenger was carried three miles beyond her destination, and compelled to walk back, when there was evidence that the conductor stated that he regretted the fact, and that he tried to procure a conveyance to carry the passenger back to her destination, but no evidence of any willful acts of defendant's employees, it was error to charge that the jury should award a certain sum if such employees were guilty of oppression, fraud, or other willful misconduct evincing a reckless disregard of consequences.[82]

Stating Conjectural and Hypothetical Cases.—In a passenger's action for breach of the contract of carriage, the instruction should not state a conjectural or hypothetical case. It has been so held as to instructions in a passenger's action for being put off his train at a point other than his destination because the train did not stop at the latter place.[83]

Presentation of Theories of Case.—In a passenger's action for breach of a contract of carriage each party is entitled to a charge presenting his theory of the case. Thus, in a passenger's action for damages for misconduct of a conductor on a street car towards a passenger who refused to pay fare and to whom no transfer had been issued through the alleged negligence of the conductor of

78. **Where plaintiff boarded wrong car by direction of conductor or flagman.**—In an action against a railroad for damages sustained by a passenger by reason of having gotten onto the wrong car, the complaint alleged that defendant's "conductor or flagman" directed plaintiff to the wrong car. Plaintiff's evidence showed that both the conductor and flagman separately and at different times gave plaintiff the direction complained of. Defendant's flagman testified that he gave plaintiff no such direction, and had nothing to do therewith. The conductor was not examined, and hence plaintiff's testimony as to what he told her was uncontroverted. Held, that a charge that plaintiff could not recover unless defendant's "conductor and flagman" told plaintiff to get on the wrong car was erroneous and prejudicial. Robertson *v.* Louisville, etc., R. Co., 37 So. 831, 142 Ala. 216.

79. **Ignoring evidence of wantonness insult or other aggravation.**—Where there was evidence that a person having a ticket was excluded from a train, that the person was quiet and orderly, and that the conductor rudely thrust him back in the presence of a large crowd, stating that he was drunk and a nuisance, and refused him passage, an instruction that there was no evidence of wantonness, insult, or other aggravation was properly refused. Story *v.* Norfolk, etc., R. Co., 45 S. E. 349, 133 N. C. 59.

80. **Failure to prove allegation of contract to carry for hire.**—Jenkins *v.* Chesapeake, etc., R. Co., 61 W. Va. 597, 57 S. E. 48, 49 L. R. A., N. S., 1166, 11 Am. & Eng. Ann. Cas. 967.

81. **Charge as to aggravating circumstances where passenger carried by station, unsupported by evidence.**—Southern R. Co. *v.* Hobbs, 45 S. E. 23, 118 Ga. 227, 63 L. R. A. 68.

82. Kentucky Cent. R. Co. *v.* Biddle, 17 Ky. L. Rep. 1363, 34 S. W. 904; Kentucky Cent. R. Co. *v.* Fern (Ky.), 34 S. W. 904.

83. **Stating conjectional and hypothetical cases.**—Texas, etc., R. Co. *v.* Ludlam, 52 Fed. 94, 2 C. C. A. 633.

the first car, where the court gave the plaintiff's instructions on her theory and evidence in that case, it should also instruct on the defendant's theory and evidence in the case and a failure to do so is error.[84]

Charge Favorable to Party Objecting.—See post, "Damages," § 3368.

§ 3364. Acts Constituting Breach and Excuses Therefor.—Refusal to Accept Ticket.—In an action against a carrier for its refusal to accept a ticket issued to plaintiff, plaintiff was entitled to an instruction upon her rights under the actual contract of transportation as well as under the contract evidenced by the ticket.[85]

Refusal to Validate Return Portion of Ticket.—In an action against a carrier for refusal to validate the return portion of a passenger's excursion ticket, good only in the hands of the original purchaser, for lack of sufficient evidence of identity, an instruction making the carrier's liability turn solely on the question whether the jury believed the ticket agent wrongfully refused to validate the ticket, and failing to submit the question whether proof of the holder's identity as the original purchaser offered to the ticket agent was such as should have satisfied the mind of a reasonably conscientious and prudent man, was erroneous.[86]

Failure to Stop at Flag Station to Take Up Passenger.—An instruction in a passenger's action for failure to stop a train on signal at a flag station must not ignore testimony as to whether the signal was seen by the servant of the company[87] must be applicable to case[88] and not calculated to confuse the jury as to what is meant by plaintiff's signals.[89]

84. Presentation of theories of case.—Plaintiff, on entering a street car, asked the conductor if the car went to a certain locality and was answered in the affirmative. It was necessary to change cars, and plaintiff did not ask for or receive a transfer. She refused to pay fare in the second car, and the conductor backed the car to police headquarters. In an action to recover for damages suffered by reason of such conductor's conduct, on behalf of plaintiff an instruction was given that if there was a rule of defendant requiring a transfer ticket, and plaintiff entered the second car without a transfer through the negligence of the conductor of the first car, relying on his statements, she was entitled to be carried without further payment of fare. Defendant's instruction that if plaintiff knew of the reasonable regulation requiring transfers, and did not ask for one, without the conductor of the first car telling her that none was necessary, she could not ride in the second car without payment of fare, was modified by adding, "unless she was induced to do so by the conduct and statement of the conductor of the first car." Held that, the question as to the custom of issuing a transfer being merely one of fact, defendant's instructions on its theory and evidence of the case should have been given without the modification; the latter changing the issue from mistreatment by the second conductor, as pleaded, to misconduct of the conductor of the first car. Little Rock, etc., R. Co. *v.* Trainer, 56 S. W. 789, 68 Ark. 106.

85. Refusal to accept ticket.—Illinois Cent. R. Co. *v.* Fleming, 146 S. W. 1110, 148 Ky. 473; Illinois Cent. R. Co. *v.* Roberts, 146 S. W. 1113, 148 Ky. 478.

86. Refusal to validate return portion of ticket.—Baltimore, etc., R. Co. *v.* Hudson, 80 S. W. 454, 117 Ky. 995, 25 Ky. L. Rep. 2154.

87. Failure to stop at flag station to take up passenger.—Where, in an action by a passenger for damages from defendant's failure to stop a train at a flag station, the fireman testified that he was also keeping a lookout for signals as the train passed the station, a requested instruction that if the engineer was keeping a proper lookout for signals, and did not see the signal to stop, the jury should find for the defendant, though they believed the signal was given, was properly refused. Yazoo, etc., R. Co. *v.* Mitchell, 35 So. 339, 83 Miss. 179.

88. And where a complaint alleges that the conductor was acting within the scope of his duty when he failed or refused to stop the train at a flag station at which plaintiff was waiting, a request to charge that the conductor of a train is not called upon to look out for signals of intending passengers at flag stations was properly refused as inapplicable. Milhouse *v.* Southern Railway, 52 S. E. 41, 72 S. C. 442, 110 Am. St. Rep. 620.

89. Where, in an action against a railroad company for failure to stop a train at a flag station, the evidence showed that the only signal to stop was made by a third person, an instruction submitting the question whether plaintiff signaled the train, and charging that if the train was signaled by a third person, and if the servants of the company saw, or by

Passenger Carried on Wrong Train.—In an action for injuries to a passenger resulting from her being carried on the wrong train, the court's charge that if, after the mistake was discovered, she asked to be carried to a certain point, from which she could readily reach her intended destination, and this was refused, she might recover, did not charge that it was negligence not to grant her request.[90]

White Passenger Compelled to Ride in Negro Coach.—An instruction that plaintiff, a white passenger, could not recover for having been compelled to ride in a colored coach, if the conductor in good faith believed, and in the exercise of ordinary care could believe, that such passenger was a colored person, and he was not insulting, together with an instruction stating the converse, properly presented the law of the case.[91] In an action against a carrier for requiring a white passenger to ride in a coach set apart for negroes, it is improper to modify instructions which preclude recovery if the conductor honestly believed that the passenger was a negro, by the clause "unless plaintiff made known to the conductor that he was a white person."[92]

Delay of Train, Guaranty of Schedule.—In an action against a railroad company because of the delay of a train upon which plaintiffs expected to travel, an instruction that, notwithstanding the time-table, if an agent of the company made a position statement to the purchaser of a ticket, and informing him about train, such statement would govern the contract as to the conditions mentioned in the time-table, and is such a case the jury might consider both, in getting at the contract between the passenger and the railroad company, etc., was misleading, as it bound the defendant to a guaranty of the schedule by an agent, even though the passenger knew that the agent had no authority to do so.[93]

Carrying Passenger by Destination.—In an action against a carrier for carrying a passenger past her destination, the court properly refused to charge that if plaintiff, after being carried past her station, got off the train voluntarily, and was not put off by defendant's agents or servants, or some of them, the jury must bring in a verdict for defendant.[94]

Train Not Stopping at Station for Which Passenger Held Ticket.—In an action against a railroad company for failing to stop a train, and let a passenger off, at a station for which he had purchased a ticket, where the evidence tended to show that the defendant ran two daily trains that stopped at the station for which the passenger held the ticket, and also ran a through train, which, by the rules of the company, was not allowed to stop at such station, and that, when the ticket was taken up by the conductor on the latter train, he informed the plaintiff that he must get off at a station before reaching the one for which he held a ticket, or go to the next station beyond, and that the plaintiff voluntarily went on to the station beyond, it is error to instruct the jury that, if the plaintiff purchased his ticket for the station at which he wished to stop, he had a right to enter the first train due after he purchased the ticket, unless he was informed, before he entered the train, that it would not stop at the station for which the ticket was purchased.[95]

the exercise of ordinary care might have seen, plaintiff's signals, plaintiff should recover, was erroneous, as calculated to confuse the jury. Southern R. Co. *v.* Lanning, 35 So. 417, 83 Miss. 161.

90. Passenger carried on wrong train.—Writ of error 79 S. W. 598, denied in St. Louis, etc., R. Co. *v.* Pruitt, 80 S. W. 72, 97 Tex. 487.

91. White passenger compelled to ride in negro coach.—Louisville, etc., R. Co. *v.* Ritchel, 148 Ky. 701, 147 S. W. 411, 41 L. R. A., N. S., 958, Ann. Cas. 1913E, 517.

92. Norfolk, etc., R. Co. *v.* Stone, 111 Va. 730, 69 S. E. 927.

93. Delay of train—Guaranty of schedule.—Mulligan *v.* Southern Railway, 84 S. C. 171, 65 S. E. 1040. See post, "Damages," § 3362.

94. Carrying passenger by destination.—Louisville, etc., R. Co. *v.* Seale, 160 Ala. 584, 49 So. 323.

95. Train not stopping at station for which passenger held ticket.—Pittsburgh,

Failure to Carry to Destination Due to Trainman's Calling Wrong Station.—Where, in an action against a carrier for setting down a passenger before reaching his destination, there was no claim that there was a forcible ejection, but that the trainman called the wrong station, a charge, authorizing recovery for injuries caused by being "put off the train" before reaching his destination, was not misleading as implying forcible ejection.[96]

Refusal to Move Train Back to Stopping Place.—Where the claim for damages is for refusing to move a train back to the stopping place, obliging plaintiff to alight in a rain, and not for running beyond, it is proper to refuse to charge that, in determining whether defendant was negligent, the jury may take into consideration the character of the train, and the efforts made to stop it at the proper place in the first instance.[97]

Failure to Deliver Passenger at Destination as Causing Illness.—In an action against a carrier for failure to deliver a passenger at his destination, it was not error for the court to refuse to instruct that an illness suffered by the passenger was not caused by the failure to deliver him at his destination, as such question was for the jury.[98]

§ 3365. Damages.—Failure to Stop at Flag Station to Take Up Passenger.—In a passenger's action for failure of a train to stop on signal at a flag station. Where the court charged that if the failure to stop a passenger train at a flag station in response to a signal was willful, etc., on the part of the engineer, the jury could award punitive damages, it was error to refuse to charge at defendant's request that if the engineer did not act maliciously, etc., only actual damages could be recovered.[99] The charge in such action must be applicable to the facts of the case,[1] must state that the engineer understood the signal,[2] and where the acts of the defendant's servants are characterized as willful, must state what acts were referred to and what were meant.[3]

etc., R. Co. *v.* Nuzum, 50 Ind. 141, 19 Am. Rep. 703.

Charge as to measure of damages favorable to defendant.—See post, "Damages," § 3362.

96. Failure to carry to destination due to trainman's calling wrong station.—Louisiana, etc., R. Co. *v.* Rider (Ark.), 146 S. W. 849.

97. Refusal to move train back to stopping place.—Alabama, etc., R. Co. *v.* Sellers, 9 So. 375, 93 Ala. 9, 30 Am. St. Rep. 17.

98. Failure to deliver passenger at destination as causing illness.—Sloan *v.* North American Transp., etc., Co., 24 Wash. 221, 64 Pac. 150.

Failure to stop street car.—See post, "Damages," § 3362.

99. Failure to stop at a flag station to take up passenger.—Yazoo, etc., R. Co. *v.* White, 82 Miss. 120, 33 So. 970. See ante, "Acts Constituting Breach and Excuses Therefor," § 3364.

1. Where, in an action by a passenger for failure of a train to stop on signal at a flag station, there was evidence justifying the submission of the question as to whether the failure to stop was willful, as alleged, an instruction that, if the jury found for plaintiff under the evidence, they could not award any damages in excess of the actual pecuniary money damages sustained by plaintiff, was properly refused. Yazoo, etc., R. Co. *v.* Mitchell, 35 So. 339, 83 Miss. 179.

Where the testimony left it uncertain as to whether the engineer of a train saw a signal to stop at a flag station, and there was no proof that other employees saw the signal, an instruction that, if the engineer or other employees saw the signal to stop, and their failure to stop the train was either willful or capricious, punitive damages might be imposed, was erroneous. Southern R. Co. *v.* Lanning, 35 So. 417, 83 Miss. 161.

2. An instruction that, if the engineer of a train saw a signal to stop at a flag station, and the failure to stop was either willful or capricious on his part, punitive damages might be imposed, was erroneous for failing to state that the engineer understood the signal. Southern R. Co. *v.* Lanning, 35 So. 417, 83 Miss. 161.

3. An instruction, in an action against a railway company for failing to stop a train at a flag station, that if the acts of defendant's servants were characterized by willfullness or capriciousness punitive damages might be awarded, was erroneous for failing to state what acts were referred to and what servants were meant. Southern R. Co. *v.* Lanning, 35 So. 417, 83 Miss. 161.

Failure to Stop Street Car and Take up Plaintiff.—In an action against a street railroad company for failure to stop a car and take up plaintiff as a passenger, an instruction that if the conductor and motorman did not see plaintiff, and did not intentionally and capriciously decline to stop the car, exemplary damages could not be awarded, is objectionable as omitting defendant's liability in case it was grossly negligent.[4]

White Woman Compelled to Ride in Colored Car.—In an action against a railroad company by a white woman to recover compensatory damages for being forced to ride in a colored car, an instruction on the measure of damages, which tells the jury that in assessing her damages they are not limited to compensation for the actual damages sustained by her, but may, in addition, take into consideration the discomforts, mortification and humiliation suffered by her, if proved with reasonable certainty, is obscure, and calculated to confuse and mislead the jury. The jury should be plainly told that the measure of recovery is compensatory damages, and that discomfort, mortification and humiliation, if proved with reasonable certainty, constitute elements of such damage.[5]

Failure to Transport to Destination in Reasonable Time.—Where plaintiff alleged that defendant railroad negligently failed to transport him to his destination in a reasonable time, that it failed to keep the caboose in which he was riding comfortably heated, and failed to put him down at the regular place for the landing of passengers, by reason of which plaintiff was made very uncomfortable, got his feet wet, and was sick a long time, the court should have instructed that if, as a proximate cause of the alleged negligence, plaintiff was made sick, the jury should find a fair compensation for the time lost and any physical or mental suffering endured and for any permanent reduction of his power to earn money, if such there was.[6] The court should also have instructed that plaintiff could not recover for any suffering or sickness which he might have prevented by ordinary care, or for anything which defendant by the exercise of ordinary care could not have reasonably guarded against; that if, when there was no negligence delaying the train, plaintiff voluntarily left it, before it arrived, and walked to the station, he could not recover for any sickness brought on him by the walk; and that if the delay in reaching the station was due to a wreck on the road, and could not have been avoided by ordinary care, and ordinary care was used to keep the caboose reasonably heated, they should find for defendant.[7]

Refusal to Stop at Passenger's Station.—In an action for willful tort in refusing to stop a train at a station, an instruction that, if the act of defendant was done wrongfully and recklessly, plaintiff would be entitled to recover exemplary damages by way of punishment by adding to the compensatory damages a sufficient sum to prevent defendant from doing a like wrong to anybody else, is not erroneous as awarding compensatory damages on failure of plaintiff to prove the willful tort alleged.[8]

Carrying Passenger Beyond Destination.—Instructions in an action against a carrier for its willful failure to stop its train at a passenger's destination to enable him to alight should leave to the jury to determine what damages, whether actual or punitive, should be awarded.[9] Where defendant's evidence tended to show that the train stopped at plaintiff's station and that many passen-

4. **Failure to stop street car and take up plaintiff.**—Godfrey *v.* Meridian R., etc., Co., 101 Miss. 565, 58 So. 534. See ante, "Form, Requisites and Sufficiency in General," § 3363.

5. **White woman compelled to ride in colored car.**—Norfolk, etc., R. Co. *v.* Stone, 111 Va. 730, 69 S. E. 927.

6. **Failure to transport to destination in reasonable time.**—Southern R. Co. *v.* Miller, 33 Ky. L. Rep. 505, 110 S. W. 351.

7. Southern R. Co. *v.* Miller, 33 Ky. L. Rep. 505, 110 S. W. 351.

8. **Failure to stop at passenger's station.**—Reeves *v.* Southern R. Co., 46 S. E. 543, 68 S. C. 89.

9. **Carrying passenger beyond destination.**—Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236, the charge of the court in this case was held not to preclude a recovery of actual damages alleged and proved, but to conform to the above rule.

gers got off there, it was not error to refuse a charge authorizing punitive damages.[10] But the defendant can not object to a charge as to the measure of damages which is favorable to it.[11]

Failure of Steamboat to Stop at Wharf.—In an action against a steamboat company by a passenger holding a round-trip ticket for damages through failure of defendant to stop at a wharf for plaintiff, whereby plaintiff was compelled to walk to his home through a rain and became ill, the refusal of instructions that the proper damages are the cost of the ticket plus any reasonable charge for lodging, or, if plaintiff was compelled to return to his home that night, the reasonable cost of obtaining a conveyance, and that he could not recover for any sickness brought about through exposure from a walk voluntarily and unnecessarily taken by him, and that he could not recover on exposure to the elements, nor for any sickness in consequence thereof, nor for any time lost, after returning to his home in consequence of such exposure, and the substitution of a charge that the measure of damages was the amount necessarily expended by plaintiff as the result of defendant's negligence, together with the proportionate cost of the round-trip ticket purchased by plaintiff and not used by him, and that plaintiff was not entitled to any damages for expenses unnecessarily incurred by him, or for sickness or injury resulting from exposure or sickness unnecessarily undergone, was error.[12]

§§ 3366-3368. Actions for Ejectment—§ 3366. Form, Requisites and Sufficiency in General.—In a passenger's action for damages for ejection from the train to his destination, an instruction must not be too general.[13]

Terminology and Phraseology.—In an action against a railroad company for wrongful ejection from its train, an instruction that whenever the element of malice or oppression, or a reckless disregard of the rights of others, enters into a transaction, and when the act is done in the strict line of duty of the conductor, but done under a state of facts not justifying the act done, and in a wrongful or perhaps careless manner, the law authorizes exemplary damages, is not objectionable because of the use of the phrase, "and when the act is done in the strict line of duty of the conductor."[14] The charge was not erroneous because of the use of the expression "careless manner," the word "careless" being used in the sense of "reckless."[15]

Construction of Words and Phrases.—In an instruction in a passenger's

10. Where a passenger was carried past his station, and was compelled to walk back from the next station during the nighttime, by which he was made sick, sore, and lame, and defendant's evidence tended to show that the train stopped at his station, and that many passengers got off there, it was not error for the court to refuse to charge the jury, authorizing it to allow plaintiff punitive damages. Yazoo, etc., R. Co. *v.* Smith, 35 So. 168, 82 Miss. 656.

11. Charge favorable to party objecting.—In an action by a passenger for being put off a train at K., nine miles from her destination, because, under the rules of the company, the train did not stop at the latter place, the court, without objection, gave an instruction which declared the company's liability, and further stated that the measure of damages was the price of the ticket she purchased next morning from K. to her destination, and the increased damage suffered by reason of being left at K., instead of at some earlier place, provided that the conductor, by promptly informing her that the train did not stop at her destination, would have enabled her to stop at some other station where she would have suffered less than she suffered at K. Held, that the rule as to the measure of damages was favorable to the company, as authorizing a lessening of the actual damages suffered; and the instruction was not objectionable as stating a conjectural or hypothetical case. Texas, etc., R. Co. *v.* Ludlam, 52 Fed. 94, 2 C. C. A. 633.

12. Failure of steamboat to stop at wharf.—Rock Creek Steamboat Co. *v.* Boyd, 111 Md. 189, 73 Atl. 662.

13. Form, requisites and sufficiency in general.—Miller *v.* King, 166 N. Y. 394, 59 N. E. 1114, affirming 58 N. Y. S. 1145, 40 App. Div. 618.

14. Terminology—"When the act is done in the strict line of duty of the conductor."—Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

15. Careless in sense of reckless.—Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

action for ejection from a train, the word "ejected" does not imply the use of force;[16] the words "ejected or removed" are not construed as meaning "removal by arrest;"[17] the word "insult" conveys the idea of affronts by profane or obscene language or words; the words "set upon" imply an unwarranted attack; and the words "violently handled" indicate a physical assault.[18]

Certainty and Definiteness.—In a passenger's action for personal injuries received by his being ejected from a train or car, the instructions must be certain and definite and not leave the jury to speculate and generalize as to the measure of the carrier's duties, the standards of which are fixed and defined by law. Thus, in such action an instruction that if plaintiff was a passenger on defendant's street car he was entitled to courteous treatment at the hands of the conductor, and if, without fault on his part, he was not treated with care and courtesy, he was entitled to recover, is erroneous in leaving it to the jury to say what would be courteous treatment.[19] That is too uncertain. Jurors might differ greatly in their ideas of what would be "courteous treatment."

Misleading Instructions.—An instruction in a passenger's action for wrongful ejectment must not be misleading[20] whether the action is one for ejection from a train or street car.[21] It is essential that the instructions to the jury be not

16. Ejected as implying use of force.—In an action against a railway company for the death of a passenger after he was put off the train, an instruction telling the jury to find for plaintiff, if they believed that his intestate was on defendant's train in such a state of intoxication as to render him incapable of caring for himself, and defendant's servants, knowing such condition, negligently ejected him at a place and under such circumstances as to necessarily or probably endanger his life by passing trains, does not require the jury to believe, in order to find for plaintiff, that his intestate was put off by force, as the word "ejected" does not imply the use of force. Bohannon *v.* Southern R. Co., 65 S. W. 169, 112 Ky. 106, 23 Ky. L. Rep. 1390.

17. "Ejected or removed" not construed as meaning "removed by arrest."—In an action against a railroad corporation for an assault and false imprisonment, it appeared that the plaintiff, who was the holder of a mileage coupon ticket, tendered, while a passenger on a train on the defendant's railroad, some of the coupons in payment of his fare, in violation of the conditions of the contract under which he held them, and that the conductor of the train refused to receive them, and arrested him. The plaintiff at the trial asked the judge to rule that the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion, with an intention to defraud the railroad company. The judge refused so to rule, but did rule that the coupons offered by the plaintiff to the conductor were not a legal tender of his fare, and that, upon the plaintiff's refusal to make any other payment, the conductor, who was a railroad police officer, might arrest him without a warrant. The plaintiff excepted to the refusal to rule as requested, but not to the ruling given. Held, that the words "ejected or removed," in the ruling requested, were not to be construed as meaning "removed by arrest." Marshall *v.* Boston, etc., R. Co., 145 Mass. 164, 13 N. E. 384.

18. Words "insult," "set upon," "violently handled."—An instruction, in an action against a carrier for an assault by its conductor on a passenger, which authorizes a verdict for the passenger on finding that he, while pursuing his journey, "was set upon by the conductor and insulted and violently handled, or was wrongfully ejected from the train on which he had a right to be," is not open to the objection that it does not charge that the action of the conductor must have been wrongful or unprovoked; the words "set upon" necessarily implying an unwarranted attack, and the word "insult" conveying the idea of affronts by profane or obscene words, and the words "violently handled" indicating the result of the physical assault. Yazoo, etc., R. Co. *v.* Williams, 39 So. 489, 87 Miss. 344.

19. Certainty and definiteness.—Little Rock R., etc., Co. *v.* Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A., N. S., 97.

20. Misleading instructions.—Rosenkovitz *v.* United R., etc., Co., 108 Md. 306, 70 Atl. 108; Virginia, etc., R. Co. *v.* Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A., N. S., 899.

21. Ejection from street car.—And where, in an action for injuries to a passenger ejected from a street car, the court charged that if plaintiff boarded the car for the purpose of riding as a passenger, and tendered his fare, which the conductor, without excuse, refused to receive, and wantonly ejected plaintiff from the car, the verdict should be for him, and that if he was on the car for the purpose of selling newspapers, the verdict should be for defendant, unless the injury was caused wantonly, etc., and oral instruction that the court had refused instruc-

such as to mislead them into a failure to distinguish between the force used in ejecting the passenger, made necessary by his resistance and own misconduct, and force or violence used by the officers or agents of the railroad company not made necessary by the passenger's resistance or misconduct.[22]

Instructions Hypothetical in Form Not Misleading.—An instruction in an action against a railroad company for assault in expelling plaintiff from a car, after the court had ruled that plaintiff was wrongfully in the car, "that if plaintiff was wrongfully there defendants had a right to use reasonable force to remove him," does not, because of its hypothetical form, neutralize the court's ruling so as to mislead the jury to understand that it was for them to determine whether plaintiff was wrongfully on the car.[23]

Invading Province of Jury.—The instructions in a passenger's action for wrongful ejection must not invade the province of the jury by taking from them the determination of disputed questions of fact.[24] Thus, a charge where the evidence was conflicting as to whether plaintiff's ticket was limited or unlimited, which told the jury that there was nothing whatever to limit the ticket,[25] and a charge which pretermits all inquiry as to the degree of force employed to overcome the passenger's resistance to ejection,[26] is error. And in an action against

tions prepared by plaintiff, and had given, in lieu of, them its own instructions, which were read, and stating that at the instance of the parties it had granted prayers, which were read; that the object of the instructions was to present the theories of the case; that if the story told by plaintiff was believed, a verdict was authorized in his favor, while if defendant's story was believed, the verdict should be for it, was erroneous as misleading the jury to the prejudice of plaintiff. Rosenkovitz *v.* United R., etc., Co., 70 Atl. 108, 108 Md. 306.

22. A ticket agent, by mistake, gave plaintiff a ticket to an intermediate point, and on his refusal to pay fare beyond the intermediate point he was ejected by the conductor, assisted by a passenger, and in an action for the ejection it appeared the plaintiff resisted efforts to eject him, and that after he was ejected he was injured in an altercation with the passenger, and the court instructed that defendant was not liable for any injury resulting from plaintiff's resistance unless it used more force than was necessary to overcome it. Held, that it was error to refuse requested instructions that plaintiff could not recover for injuries to which his own negligence or default proximately contributed, and that the conductor committed no tort or trespass if he used no more than necessary force, as the instructions should have distinguished between necessary force in ejecting plaintiff and the injuries after ejection, and not having done so, it was misleading. Virginia, etc., R. Co. *v.* Hill, 105 Va. 729, 54 S. E. 872, 6 L. R. A., N. S., 899.

23. Instructions hypothetical in form not misleading.—Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

24. Assuming facts.—See third following text paragraph.

25. Whether ticket limited or unlimited.—In an action against a railroad company by a passenger to recover damages for the alleged wrongful ejection of the plaintiff from one of the defendant's trains, where it is averred in the complaint, and the evidence introduced on the part of the plaintiff tends to show, that he offered the conductor of the defendant's train, upon which the plaintiff was riding, a ticket which was unlimited, and which the plaintiff had bought from the defendant's agent, and that the conductor refused to receive said ticket and ejected the plaintiff, but the evidence for the defendant tended to show that the ticket offered by the plaintiff was indorsed, "Good for continuous passage beginning on the day of sale," and that the ticket so indorsed was presented by the plaintiff some months after sale, this conflict in the evidence makes a question for the determination of the jury; and therefore a charge is properly refused, as being invasive of the province of the jury, which instructs them that "there is nothing whatever on the ticket limiting the time within which it might be used, nor is there anything on it to show the purchaser that it was in his discretion to use the ticket when he was disposed to do so." Louisville, etc., R. Co. *v.* Bizzell, 30 So. 777, 131 Ala. 429.

26. An instruction that if, at the time of plaintiff's alleged injury, he was a passenger on defendant's train on which M. was conductor; that plaintiff was disorderly in that he used profane and vulgar language, which made it necessary for the conductor to eject him, and plaintiff was injured because of his resistance, he could not recover, was properly refused as pretermitting all inquiry as to the degree of force employed to overcome the resistance, and as asserting as a fact that plaintiff's act rendered it necessary for

a railway company for wrongfully ejecting a passenger, an instruction that if the jury believe certain facts it is their duty to assess damages is erroneous as invading the province of the jury, although it would be proper to tell the jury in such case that if they believe such facts they may or are at liberty to assess damages.[27]

Applicability to Pleadings and Issues.—An instruction in a passenger's action for wrongful ejectment must be applicable to the pleadings and issues for the plaintiff can not recover for negligence not alleged in the pleading, nor can the defendant base his defense upon a ground not set up by his plea; where the requested charges are consistent with the allegations of the complaint,[28] do not ignore the defendant's plea,[29] and properly state the issues between the parties, they should be given. But it is proper to refuse an instruction which ignores the plea of the defendant and his evidence in support thereof;[30] one which is based solely on an allegation in a petition in a former suit which had been dismissed and

the conductor to eject him, and that his resistance was the cause of the injury. Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

27. Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584.

28. Applicability to pleadings and issues.—Where the complaint, in an action against a carrier, averred the purchase of a ticket entitling plaintiff to ride between certain points, that her ticket was taken on the train, and that before the train reached her destination the defendant refused to carry her further, and stopped the train at a place other than a station, and in a rude manner ordered her off the train, and upon her refusal, with reckless disregard of the rights, health, and safety of the plaintiff and her two children, wrongfully put them and their baggage from the train, well knowing that the plaintiff was an invalid, and there was evidence in support of such allegations, instructions submitting the case on the theory of whether the plaintiff, "before reaching her station, was caused to alight from the train" by defendant's agents, as she claimed, whether she was a passenger, as alleged, and whether, "before her destination was reached, she was caused to leave the train" are consistent with allegations of the complaint, and not erroneous as a submission on instructions not in conformity to the pleadings and issues. Slatter *v.* Oregon, etc., R. Co., 118 Pac. 831, 39 Utah 596.

Assault—Issue whether plaintiff passenger or on car to sell papers.—Where, in an action against a carrier, the gist of the action was that plaintiff, while a passenger on a street car, had been assaulted by the conductor and ejected therefrom, and that if not a passenger he was entitled to protection from the violence of the employees of the company, and the theory of the company was that plaintiff boarded the car to sell newspapers, and that the conductor did not assault him, but that plaintiff contributed to his own injury by jumping from the car while in motion, an instruction that if the jury believed that plaintiff boarded the car for the purpose of riding as a passenger, and tendered his fare which the conductor without reason refused to receive, and forcibly and wantonly ejected him from the car, the verdict should be for plaintiff, while if he boarded the car to sell papers, the verdict should be for defendant, unless the injury was caused by the conductor wantonly ejecting him from the car, properly submitted the issue. Rosenkovitz *v.* United R., etc., Co., 70 Atl. 108, 108 Md. 306.

Plaintiff carried by station—Attempt to walk back.—Plaintiff, while suffering from partial paralysis, was carried by his station and roughly ejected. He attempted to walk back, but fell and suffered from cold and exposure. There was some evidence that his mental condition was such that he did not understand whence he came or where he was going; but there was other testimony to the contrary, and defendant claimed that, if he was conscious of the condition, he could not recover for injuries resulting from his effort to walk back to his destination. Held, that such issue was properly submitted by an instruction that, if plaintiff knew his condition, and understood whence he came and where he was going, he could not recover damages for what occurred after he was ejected. St. Louis, etc., R. Co. *v.* Day, 86 Ark. 104, 110 S. W. 220.

29. Mobile St. R. Co. *v.* Watters, 135 Ala. 227, 33 So. 42.

30. Ignoring plea of carrier.—Where, in an action against a street railroad for ejection of a passenger from a street car, the allegations of the plea put in issue whether the conductor, owing to the condition of the coin offered as fare, could determine it legal tender, and the conductor testified that he could not tell the coin from a piece of tin, it was error to instruct that, if the coin tendered were legal tender, plaintiff could recover, as ignoring the plea of defendant. Mobile St. R. Co. *v.* Watters, 33 So. 42, 135 Ala. 227.

was introduced in evidence by the defendant,[31] or one which charges that at all events plaintiff is entitled to a recovery of the unused part of his fare.[32] And a charge which invites the jury to leave the real issue out of the case and permits it to consider the question as to the violation of a previous contract of carriage by carrying plaintiff by his destination which had been alleged as a recital to justify plaintiff in refusing to pay fare on the return trip, is error.[33]

Applicability to Evidence and Facts of Case.—An instruction in a passenger's action for wrongful ejectment must be applicable to the evidence and facts of the case. It is erroneous to give an instruction not supported by at least some evidence. The evidence in such action has been held sufficient to justify a charge defining "negligence,"[34] a charge refusing to condition liability for acts of a fellow passenger on the conductor's knowledge of plaintiff's danger,[35] and a charge that a person in good faith boarding the regular freight train in question was a passenger.[36] On the other hand there are many instances where a requested charge was properly refused as not supported by the evidence. Thus, a charge based on the theory that plaintiff would have left the car without the use of

31. Issues under former petition dismissed and introduced by defendant.—Where a plaintiff alleges that he was a passenger on a car, and was carried beyond the point where he had informed the conductor that he intended to alight, and was then ejected from the car in the dark, and, as he started to leave the place where he was put off, he fell over an embankment of the railway company and was hurt, and the plaintiff's evidence tended to substantiate these allegations, and the defendant introduced in evidence the petition in a former suit which had been brought by the plaintiff and dismissed, in which it was alleged that he was pushed from the car by the conductor and fell over the embankment, this did not authorize a charge that if the conductor pushed the plaintiff off the car, and this push of the conductor caused him to fall down the bank, and he got hurt, he could not recover. Purvis *v.* Atlanta Northern R. Co., 72 S. E. 343, 136 Ga. 852.

32. Return of unused part of fare.—Where a passenger suing for wrongful ejection did not, at the time thereof, request the return of the unused part of his fare, and did not count thereon in the declaration, he can not complain of a refusal to instruct that he is, at all events, entitled to a recovery thereof. Gallegly *v.* Kansas, etc., R. Co., 35 So. 420, 83 Miss. 171.

33. A passenger who was awakened when the train approached his destination refused to get off, and the conductor did not deem it safe to put him off, because he seemed to be intoxicated, and he was carried along to another station. The next day he boarded another train to return to his destination, and was ejected for his refusal to pay fare. Held, in an action for such ejection, where no claim is made for carrying him beyond his destination the day before, that the court erred in instructing that defendant was liable if it negligently carried plaintiff beyond his destination, and did not give him fair warning of the train's arrival. Louisville, etc., R. Co. *v.* Lewis, 14 Ky. L. Rep. 770, 21 S. W. 341.

34. Applicability to evidence and facts of case.—Evidence that defendant's brakeman pushed plaintiff from the steps of the train, on which he was a trespasser, while it was going at a speed of from twelve to twenty miles an hour, showing unnecessary acts, which would not have been performed by a reasonable and prudent person, an instruction defining "negligence" is pertinent. Klenk *v.* Oregon, etc., R. Co., 76 Pac. 214, 27 Utah 428.

35. Negligence of conductor after knowledge of danger.—Where the evidence showed the conductor to have been negligent after knowledge of plaintiff's ejection, the court did not err in refusing to condition an instruction on the carrier's liability for the acts of a fellow passenger upon its having knowledge of the danger or of circumstances from which the danger could be reasonably anticipated. Dennis *v.* Columbia Elect. St. R., etc., Co., 76 S. E. 711, 93 S. C. 295.

36. Right to assume freight train would carry passenger.—In an action against a railroad for being put off a freight train which plaintiff had boarded as a passenger, where there is evidence that defendant was in the habit of selling passenger tickets for regular freight trains, it is proper to instruct that, when a railroad company ordinarily carries passengers on its freight trains, "if a passenger in good faith boards such a train, and is not notified to the contrary" before it leaves, he becomes a passenger, and is entitled to ride to the first station, if there is nothing in the condition of the train from which he might infer that it did not carry passengers. Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

force by the defendant's employees,[37] that the ejection was due to the conductor's malice,[38] that the ejection was by the conductor alone,[39] where there is no evidence of such facts, and where the only evidence to support a charge as to the conductor's right to use any amount of force to protect himself was that the passenger attempted to get back upon the car and appeared to have his hand behind him.[40] So, also, in an action by a railroad passenger for his wrongful expulsion from a train in a rude and violent manner, it is error to give an instruction, inapplicable to the facts in evidence, that, in estimating the damages, the jury may consider the position, influence, power, wealth, and duty of the company, and its ability and inclination, as evidenced in the case, to practice tyranny, injustice, and oppression.[41]

Variance as to Place Where Plaintiff "Claims" Accident Occurred.—In an action for ejection of a passenger, an instruction that plaintiff claims he was hurt by being ejected from the right-hand side of the car, and that he fell on the right-hand side of the embankment, and if the jury believe that his injury did not occur in that way, but that he left the car on the left-hand side, he can not recover, is ambiguous in the use of the word "claims," and is not supported by the evidence, unless the variance pointed out was such as to substantially vary the law or the defense applicable to the situation.[42] An instruction in an action for the ejection of a passenger that, if the plaintiff was hurt at substantially the place he says he was hurt, he can recover, but, if he was hurt at substantially a different location from that claimed by him, he can not recover, the word "claimed" is ambiguous, as it may have referred to the allegations of the petition or simply to the testimony of the plaintiff, and in any case the evidence to warrant the charge should tend to show such a substantial difference in location as to make a different transaction or to substantially vary the law or defense applicable to the place where the injury occurred from that which would have been applicable to the place alleged.[43]

Assuming Facts.—An instruction in a passenger's action for wrongful ejection must not assume the very matter in controversy,[44] as that plaintiff's act ren-

37. Use of force by carrier's servants.—In an action by a trespasser against a carrier for being ejected, it is error to instruct the jury that they may find for plaintiff if they believe defendant's employees used force in ejecting plaintiff from its railroad car "when such force was not necessary," as plaintiff was there without right, there being no evidence that he would have left the car without force. Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

38. Charge based on conductor's malice.—A passenger by mistake was furnished a ticket to the wrong destination, and on refusing to pay additional fare, and becoming boisterous and insulting, the conductor ejected him, without insult, injury, or unnecessary force. Held, that the evidence did not justify a charge based on the conductor's malice. Pittsburgh, etc., R. Co. *v.* Slusser, 19 O. St. 157.

39. Ejection by conductor alone.—In an action against a carrier for the wrongful ejection of a passenger, an instruction requiring the jury to find for defendant, unless the conductor threw the passenger off the train, was properly refused; there being no evidence that the ejection was by the conductor alone. Louisville, etc., R. Co. *v.* Perkins, 39 So. 305, 144 Ala. 325.

40. In an action by a passenger for wrongful ejection, an instruction asked by defendant presenting the theory that the conductor acted in self-defense, which was so drawn as to lead the jury to believe that the conductor could use any amount of force, even to the extent of causing death, if there were reasonable grounds for believing that there was danger of his receiving bodily injury, however slight, from the resistance of the passenger, was properly refused, where the only evidence to support such instruction was that, when the passenger attempted to get back on the car, he appeared to have his hand behind him. Devine *v.* Chicago City R. Co., 86 N. E. 689, 237 Ill. 278.

41. Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126.

42. Variance as to place where plaintiff "claims" accident occurred.—Purvis *v.* Atlanta Northern R. Co., 136 Ga. 852, 72 S. E. 343.

43. Purvis *v.* Atlanta Northern R. Co., 136 Ga. 852, 72 S. E. 343.

44. Assumption of facts.—Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

dered it necessary for the conductor to eject him,[45] that the ticket introduced in evidence was the one tendered the conductor by plaintiff,[46] or that the car was in motion at the time of ejection.[47] There are many instances in which it has been held that the court did not erroneously assume facts in dispute, as where the court charged on the assumption that the coin introduced was of legal-tender quality,[48] or that an assault was made.[49] And there are instances where the court properly assumed the existence of some fact, to wit, where plaintiff's evidence plainly shows the use of unnecessary and excessive force, the court may instruct the jury that, if they believe the plaintiff's evidence, "as a matter of law, there was more force used than was necessary to accomplish the result, and the plaintiff is entitled to a verdict," if the court at the same time presents the case as made out by the evidence for the defendant.[50] So, also, that there was a regulation requiring an extra fare for riding on the car from which plaintiff was ejected.[51]

Disregarding Testimony.—Where, in an action by a passenger for ejection from defendant's car by its motorman, the severity of plaintiff's injuries is contested, it is error for the court to charge that defendant does not dispute that plaintiff was injured as alleged, but bases his defense on his nonliability for the injury.[52]

Requests—Necessity.—In a passenger's action for wrongful ejectment, the general rule is that a party can not object to the want of an instruction on an

45. That ejection necessary.—Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984.

46. That ticket introduced was one tendered.—Plaintiff claimed to have paid his fare from D. to W. On the car he handed defendant's conductor a ticket, and was informed that it was not good, and, on his refusal to pay the fare, he was ejected from the car. In an action for assault and battery, a ticket was introduced by the defendant, who requested the court to charge that the ticket offered by plaintiff was not good between D. and W. Held that, as plaintiff's testimony was in conflict with the theory of the request, it was properly modified by the statement that it was true if the ticket was the one given the conductor by plaintiff. Johnson *v.* Detroit, etc., Railway, 90 N. W. 274, 130 Mich. 453.

47. Assuming that car in motion.—Where the issue was whether a conductor put S. off a car while it was in motion, an instruction that if S. had offered to pay his fare the conductor would not be warranted in throwing him off while the train was in motion, held to be error, as assuming the very matter in contest. Michigan, etc., R. Co. *v.* Shelton, 66 Ill. 424.

48. Assumption that coin introduced of legal tender quality.—In an action against a street railroad for ejection of a passenger, the defense was that the coin tendered as fare was so worn that the conductor could not determine it legal tender. The conductor, as a witness, while denying that the dime exhibited in evidence was the same that was offered for plaintiff's fare, testified that the coin so exhibited was a good, visibly lettered dime. Held, that the court was justified in charging on the assumption that the dime introduced was of legal tender quality. Mobile St. R. Co. *v.* Watters, 33 So. 42, 135 Ala. 227.

49. That assault made.—In an action for wrongful ejection from a train and assault by the trainmen an instruction that "in actions of this kind, where a wanton and cruel assault is made, exemplary damages may be allowed," is not erroneous, as assuming that an assault was made. Judgment 75 Ill. App. 579, affirmed in Illinois Cent. R. Co. *v.* Davenport, 52 N. E. 266, 177 Ill. 110.

50. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. Ed. 1049.

51. Regulation requiring extra fare on car.—Civ. Code, § 484, requires railroad companies to have conspicuously posted in their cars their rules regarding fare and conduct of passengers. Plaintiff was ejected from defendant's train for refusing to pay an extra charge for riding in a certain car. Plaintiff alleged that he was wrongfully made to leave the car. He testified that the conductor pointed out to him, posted in the car, the regulations of the company; also that the conductor explained that he was required to collect an extra fare for riding in that car. There was no evidence or pretense that the explanations were not true. Held, that the court properly assumed that there was a regulation requiring an extra fare for riding in that car, and that plaintiff knew and willfully disobeyed it. Wright *v.* Central R. Co., 78 Cal. 360, 20 Pac. 740.

52. Disregarding testimony.—Butler *v.* Detroit, etc., R. Co., 138 Mich. 206, 101 N. W. 232.

issue in the case in the absence of a request by him for a specific instruction on that point, as, for instance, the want of a charge as to defendant's right to remove a passenger who was intoxicated and used profane language,[53] or a specific charge as to the meaning of the words "charge and control." [54]

Discrimination between Acts of Officer While Ejecting Passenger and Afterwards.—In a passenger's action for damages for the violence of a police officer in ejecting him from a car at the instance of the carrier's agent, the instructions should, where the question is raised, discriminate between the acts of the officer while removing the passenger and afterwards.[55]

Instructions Giving Double Advantage.—In an action by a passenger for a wrongful ejection from a train, an instruction to the effect that if he resisted the conductor's efforts to eject him, and such resistance increased the nervous trouble from which he was suffering, "he can not recover any damages on account of such increase of said trouble, and his resistance must be considered in mitigation of the plaintiff's damages," is objectionable, as requiring the jury to give defendant a double advantage, by refusing plaintiff any damages on account of injury caused by his resistance to the conductor, and also by considering that resistance in mitigation of the damages otherwise allowable.[56]

Instructions Must Be Considered as a Whole.—In a passenger's action for wrongful ejection, the instructions must be taken as a whole, and the failure of an instruction to cover a particular point in the case is not error where that point is fully covered by another instruction.[57] And where an instruction which, standing alone, might be erroneous is, when so considered, a correct statement of the law and not misleading, there is no error.[58]

53. Requests—Necessity.—In an action against a railroad company for wrongful ejection there was evidence in behalf of defendant that plaintiff was intoxicated and used profane language. Held, that the want of instructions in relation to defendant's right to remove plaintiff under such circumstances was not the subject of exception, it not appearing that defendant requested specific instructions on such point. Moore *v.* Fitchburg R. Corp. (Mass.), 4 Gray 465, 64 Am. Dec. 83.

54. Where, in an action by a girl fifteen years old and her niece seven years old for a wrongful expulsion from a train, there was evidence that the aunt had tendered insufficient fare for the niece, an instruction to find for the railroad company if the younger child was in the elder's charge and control, and the latter failed to pay the former's fare, is sufficient, without a more specific statement as to the meaning of "charge and control," in the absence of a request for more specific instructions. Warfield *v.* Louisville, etc., R. Co., 55 S. W. 304, 104 Tenn. 74, 78 Am. St. Rep. 911.

55. Discrimination between acts of officer while ejecting passenger and afterwards.—A passenger refused to sign his railway ticket, thus violating its provisions, and drew a pistol to resist an effort to eject him. He was arrested, on complaint of the railway company, and removed from the train by a constable, who kept him in irons for twenty minutes before procuring a warrant. The passenger was acquitted in a criminal prosecution wherein the railway company's agent swore to the complaint. In a suit by the passenger against the company the constable testified that he acted as a peace officer, and on information that a pistol had been drawn. Held, that an instruction that, if the company caused the arrest merely to eject the passenger from the train, the constable was its special agent for that purpose, for whose unnecessary violence the company would be responsible, was erroneous, since it failed to discriminate between the acts of the officer while removing the passenger and afterwards. Southern Pac. Co. *v.* Hamilton, 54 Fed. 468, 4 C. C. A. 441.

56. Instructions giving double advantage.—Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 6 C. C. A. 597.

57. Instructions must be considered as a whole.—In an action against a street railroad company for forcibly ejecting a passenger from its car, where the defense is that the ejection of plaintiff was done because he refused to pay his fare, and used profane and indecent language, it is proper to instruct the jury that, even if plaintiff did not pay his fare, defendant is liable if the conductor, instead of using no more force than was necessary, pushed him off the car while in motion, without any immediate warning, though such instruction says nothing about defendant's right to eject a passenger for misconduct, where the latter point is covered by another instruction. Chicago City R. Co. *v.* Pelletier, 134 Ill. 120, 24 N. E. 770.

58. Right to be carried on wrong part of return ticket.—In an action for eject-

Harmless Error.—In an action by a passenger for ejection from defendant's train because of an alleged failure to pay fare, though the law relating to the extraordinary care due by railroad companies to passengers was not involved, it was not material error that the court instructed in regard thereto.[59]

Curing Error by Expression of Opinion on Facts.—In a passenger's action for wrongful ejection from a car, error of law in instructions can not be cured by an expression of opinion upon the question of fact concerning which the law is announced, because the jury is not bound by and presumably will not follow, the court's opinion concerning the fact which the weight of evidence is to the contrary. This is the rule in the federal courts.[60]

§ 3367. Right to Eject.—Refusal to Pay or Tender Fare.—In an action by a passenger for wrongful expulsion from a train, an instruction that, if the conductor requested of plaintiff his fare or ticket a short time after leaving the depot, as testified by witnesses for defendant, and again requested plaintiff to produce his ticket or pay his fare, and that he failed to do so, whereupon he was required to leave the train, the jury should find for defendant, was properly excluded; a short time being a relative term, which might be either a reasonable time or not.[61] And in an action against a carrier for assaulting and ejecting a passenger, instructions requested by defendant to the effect that, if the passenger failed to pay her fare or present a ticket or transfer, the conductor could eject her, were properly modified by the words "subject to the limitations elsewhere laid down in these instructions;" such limitations referring to the carrier's duty not to eject her recklessly, etc.[62] Plaintiff's right to recover not

ing a passenger it appeared that on the return trip from I. to M. plaintiff presented the going coupon of a round trip ticket from M. to I., which the conductor refused to accept. Plaintiff testified that he then told the conductor that it was the mistake of the conductor on the train on which he went from M. to I.; that he had handed the ticket to that conductor, and he had given him back the part he then had, which he had not looked at, until presenting it on the return trip. The conductor denied that plaintiff had made any explanation. The court instructed that if a conductor takes from a passenger a coupon of a ticket, which ticket entitled him to passage from one station to another and return, and, by mistake or otherwise, takes the coupon which entitled the passenger to return passage, when he should have taken the one entitling the passenger to passage going, this would be neglect of the company, and the passenger would be entitled to use the other coupon on his return passage. The court also, at defendant's request, instructed that "a passenger ticket or coupon reading or calling for passage from M. to I. would not entitle the holder to transportation from I. to M.; and a conductor on a train running from I. to M., if such coupon or ticket was presented to him by a passenger for transportation from I. to M., without any explanation thereof, or any knowledge by such conductor of the reasons why such coupon or ticket is presented for transportation from I. to M., would be justified in refusing to accept such coupon or ticket for such transportation, and might lawfully eject such passenger from said train unless he paid or tendered his fare." Held, that the two instructions, considered together, informed the jury that plaintiff was not entitled to be carried on the wrong end of the ticket without an explanation of the reasons why it was presented. Pennsylvania Co. *v.* Bray, 125 Ind. 229, 25 N. E. 439.

Expressions used to differentiate case at bar.—Plaintiff, by mistake of a station agent, boarded a train which did not stop at the place indicated by the ticket. The conductor stopped the train on discovering the error, and ordered plaintiff to leave. Held, in an action to recover damages for breach of contract of carriage, a charge that, "if there had been any circumstance of unnecessary humiliation or indignity, it would have been an item of charges," is not erroneous, where the expression was evidently used, as shown by other parts of the charge, to differentiate cases of such character from the case at bar. Judgment 58 N. Y. S. 1145, 40 App. Div. 618, affirmed in Miller *v.* King, 59 N. E. 1114, 166 N. Y. 394.

59. Harmless error.—Atlanta Consol. St. R. Co. *v.* Keeny, 99 Ga. 266, 25 S. E. 620, 33 L. R. A. 824.

60. Curing error by expression of opinion on facts.—Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 6 C. C. A. 597.

61. Use of relative terms.—Seaboard, etc., R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706.

62. Modifications by reference to other instructions.—Chicago Consol. Tract. Co. *v.* Mahoney, 230 Ill. 562, 82 N. E. 868.

being based on her ejection from defendant's train, she having lost her ticket and money, but on undue force, if any, of the conductor in ejecting her, and for any insult or indignity offered her by him in ejecting her, an instruction that if the conductor was insulting in manner, word, or tone towards her, or rudely or roughly grabbed her, or used more force than necessary to put her off, the jury should find for her damages not exceeding the amount claimed for ejecting her, is confusing and misleading, to the prejudice of defendant; and in place thereof the jury should have been told that, under the proof, defendant had the right to eject her, if she produced no ticket, or tendered no fare, and that she could recover nothing for being so ejected; but that her right of recovery, if any, was based on some injury to her by the conductor, or because of some insult or indignity to her by him, while he was expelling her.[63]

Persons Carried under Promise to Obtain Tickets at Division Point.—Where a drover traveling in a stock car, was permitted to take two of his assistants in the car to the first division point on promising to purchase tickets for them, which he failed to do, and for this reason the assistants were ejected and arrested, the carrier was entitled to an instruction in an action therefor, in which it was claimed that the carrier was guilty of wanton misconduct in calling on the police to assist in the ejection, that if the drover promised to get tickets for his assistants at the division point it was his duty to do so, and they would be on the car without right after passing such point, though they were asleep at that time.[64]

Error in Ticket—Duty to Examine.—The bracketed words in the requested instruction, given in a case in which plaintiff, having asked defendant's agent for a ticket for S. by way of C., was given one used for trains for S. by way of H., and, having taken the train for S. by way of C., was ejected at the next station, that "it is the duty of a passenger before boarding a train to use all due diligence to ascertain if it is the right train, [the train on which his ticket entitles him to transportation], and, if the passenger fails to use the means of information at his command, he can not complain of the resulting * * * damage, even if, on his refusal to pay the additional fare to the next station, or regular stopping place, he is ejected from the train"—imply that due diligence in ascertaining the right train requires the passenger to examine his ticket in every case to see if it expresses his contract of carriage, and are therefore properly rejected.[65]

Insufficiency of Ticket—Peril in Alighting from Train Because of Infirmity.—And a charge, in an action for injuries to a passenger required to disembark from the train because of the insufficiency of her ticket and her refusal to pay fare, that, if the jury were not reasonably satisfied that the conductor knew of the passenger's infirmity and the peril attending her leaving the train at the time and place, the carrier was not liable for injuries sustained in alighting, was properly refused because misleading.[66]

63. Louisville, etc., R. Co. *v.* Fowler, 29 Ky. L. Rep. 905, 96 S. W. 568.

64. **Persons carried under promise to obtain tickets at division point.**—Texas, etc., R. Co. *v.* Diefenbach, 167 Fed. 39, 92 C. C. A. 501.

65. **Error in ticket—Duty to examine.**—Levan *v.* Atlantic, etc., R. Co., 86 S. C. 514, 68 S. E. 770.

That one asks a ticket agent for a certain ticket, and the agent responds by stating and accepting the price, is evidence of an undertaking by the agent to furnish such ticket, and of a contract by the carrier to transport the passenger to his destination by the route specified; so that, defendant carrier having had no sale tickets for S. by way of C., evidence that its agent in response to a request for such a ticket, handed him instead thereof a ticket for S. by way of H., and that plaintiff, having boarded the train by way of C., was ejected at the next station, and obliged to return, warrants submission of the issues of defendant having contracted with plaintiff for a ticket by way of C., and of having breached the contract to plaintiff's injury. Levan *v.* Atlantic, etc., R. Co., 86 S. C. 514, 68 S. E. 770.

66. **Insufficiency of ticket—Peril in alighting from train because of infirmity.**—Central, etc., R. Co. *v.* Bagley, 173 Ala. 611, 55 So. 894.

Failure of Conductor to Give Passenger Check.—In an action to recover for the ejection of plaintiff from defendant's passenger train, from which she was expelled because no conductor's check was given her in exchange for her ticket, it was not error to instruct that a conductor who is taking up a passenger's ticket is chargeable with extreme care in seeing that the passenger is provided with means of continuing his journey.[67]

Boarding Car with Expectation of Being Put Off.—In an action for the ejection of a passenger, where defendant requested an instruction that, if the plaintiff went on the car with the intention of continuing a previous controversy with the conductor, he did not become a bona fide passenger and could not recover damages for such ejection, the defendant was not prejudiced by a modification of the instruction to the effect that, if he went on the car with the expectation of being put off, he did not become a bona fide passenger and could not recover damages for wounded feelings and pain of mind for being ejected.[68]

Duty to Comply with Regulation Generally.—In a passenger's action for wrongful ejection from a train or car, in which the question of the duty of the passenger to comply with the carrier's regulation arose, it is the duty of the court to instruct on that issue, but it is not error to omit to do so when such issue is not involved.[69] And an instruction that the passenger must obey all needful rules for the regulation of the carrier's conveyance sufficiently instructs the jury that the passenger must show that he was riding peacefully and quietly.[70]

Misconduct Justifying Expulsion Generally.—A charge, based on an assumed state of facts, that a passenger could recover for being expelled from a train, unless the jury should find him guilty of such misconduct as to justify his expulsion, is defective in not informing the jury as to what the facts were which would constitute such misconduct.[71]

Interfering with Apparatus of the Car.—Instructions that it was the duty of a passenger to conduct himself in an orderly manner and to refrain from interfering with the apparatus of the car, and that, if the passenger willfully interfered with the apparatus and conducted himself in a disorderly manner the conductor was justified in ejecting him, were not ground for reversal because of indefiniteness, where it was not shown that they were not cured by the evidence or other instructions.[72]

Intoxicated Passenger.—An instruction, in an action against a railroad company for wrongfully ejecting a passenger for drunkenness, that for one to be in an intoxicated condition he must be under the influence of intoxicants to such an extent as to have lost the normal control of his faculties, "and to evince a disposition of violence and quarrelsomeness," etc., erroneous.[73] Under a stat-

67. **Failure of conductor to give passenger check.**—Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

68. **Boarding car with expectation of being put off.**—Little Rock R., etc., Co. *v.* Dobbins, 78 Ark. 553, 95 S. W. 788.

69. **Duty to comply with regulation generally.**—In an action for wrongful ejection of a passenger from a freight train, and assault by the trainmen, in which the question of the duty of a passenger to comply with the company's regulation in entering a car provided for passengers, and at the door for the use of passengers, was not involved, it was not error to omit to instruct on that issue. Judgment 75 Ill. App. 579, affirmed in Illinois Cent. R. Co. *v.* Davenport, 52 N. E. 266, 177 Ill. 110.

70. In an action against a street railway to recover for an assault and wrongful ejection by its conductor, an instruction that passengers must obey all needful rules for the regulation of defendant's cars, and that smoking, or the use of obscene or abusive language, would justify his ejection, sufficiently instructs the jury that the plaintiff must show that he was riding peacefully and quietly. Denver Tramway Co. *v.* Reed, 4 Colo. App. 500, 36 Pac. 557.

71. **Misconduct justifying expulsion generally.**—Baltimore, etc., R. Co. *v.* Kirby, 88 Md. 409, 41 Atl. 777.

72. **Interfering with apparatus of the car.**—Dobbins *v.* Little Rock, etc., Co., 79 Ark. 85, 95 S. W. 794.

73. **Intoxicated passenger.**—St. Louis, etc., R. Co. *v.* Waters, 105 Ark. 619, 152 S. W. 137.

ute which provides that carriers may eject passengers guilty of improper conduct or dissolute or suspicious characters, and which declares that when a passenger is guilty of disorderly conduct, or uses profane or vulgar language, the conductor may eject him at the next stopping place, an instruction that the mere fact that plaintiff was intoxicated would not authorize ejecting him, unless he was guilty of some misbehavior or had violated some law of the state, is erroneous.[74] But in an action for the death of an intoxicated passenger by reason of his having been ejected at a dangerous place, a charge stating the degree of care a carrier must exercise towards its passengers is not inapplicable.[75] And in an action against a railroad company for the death of a drunken passenger, who was drowned after alighting, it was error to instruct that the jury should not consider his drunkenness, but should view his conduct in the same light as they would that of a sober man in similar circumstances.[76]

Use of Obscene or Abusive Language.—In an action for ejection of a passenger, a request to charge that the conductor of a railroad train is a police officer, whose duty it is to keep order on the train and to eject all persons who use obscene or abusive language in the presence and hearing of passengers, is misleading because of its omission of the qualification that the conductor may use only such force as may be necessary to accomplish the removal.[77] And a statute providing that on the trial of any person for an assault that on the trial of any person for an assault, an assault and battery, or an affray, he may give in evidence any opprobrious words or abusive language used by the person assaulted at or near the time of the assault in extenuation or justification, has no application to an action for ejection of a passenger because of his alleged misconduct.[78]

Refusal to Leave Car after Reasonable Time to Alight.—In a passenger's action for personal injuries by being ejected after he had refused to leave the car platform, where the undisputed evidence showed that all passengers were given a reasonable opportunity to alight, it was error to refuse a requested instruction that if all the passengers, except plaintiff, left the car, and plaintiff had a reasonable time to get off and failed to do so, he ceased to be a passenger, and defendant was not under the obligations of a carrier to him; the prayer not being defective for not requiring that plaintiff have the "opportunity" as well as the time to get off.[79]

Passenger Carried Beyond Destination—Lame Passenger.—A railroad company, having without fault carried a passenger beyond his destination, may put him off at any usual stop; and hence, in an action by a lame passenger, who, having been carried past his destination, was put off a few hundred yards past the succeeding station, an instruction that, if the conductor, knowing that the passenger was lame, stopped the train and ejected him after passing his destination, the passenger might recover for any injury was erroneous, because, in ef-

74. Magill *v.* Seaboard Air Line Railway, 66 S. E. 561, 84 S. C. 416. So holding under Georgia Civ. Code, 1895, § 2296 and Georgia Pen. Code, 1895, § 902.

75. Charge as to degree of care.—In an action for the death of an intoxicated passenger because of his having been put off at a dangerous place, it appeared that he was permitted to alight upon a trestle along the shore of a lake, on a dark night, where there were no guards or barriers, and that subsequently his body was found in the lake, and the court instructed that a common carrier of passengers is required under the law to exercise towards its passengers the highest degree of care and prudence practically consistent with the operation of its road in the carrying of persons and in letting them on and off its cars. Held, that the instruction was not erroneous as inapplicable to the issues. Bennett *v.* Seattle Elect. Co., 105 Pac. 825, 56 Wash. 407.

76. Mobile, etc., R. Co. *v.* Jackson, 92 Miss. 517, 46 So. 142.

77. Use of obscene or abusive language.—Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984. So holding under Ala. Code 1896, § 3457.

78. Nashville, etc., Railway *v.* Moore, 148 Ala. 63, 41 So. 984. So holding as to Alabama Cr. Code, 1896, § 4345.

79. Refusal to leave car after reasonable time to alight.—Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

fect, telling the jury that the conductor could not put him off if he knew his condition.[80]

Agency of Person Making the Ejection—News Agent of Train.—Where, in an action for injuries to a waif by being kicked or pushed from a moving coach, he testified that he was kicked off by an unidentified "big fat man" in uniform, but there was no proof that the news agent of the train had any connection with its operation or was even an employee of the railroad company, an instruction that plaintiff could not recover for being pushed by such news agent, unless the jury found from the evidence that he was one of defendant's employees in charge of and operating the train, was misleading and ground for reversal.[81]

Ejection from Waiting Room by Police Officer.—An instruction that defendant was not liable if plaintiff was ejected from defendant's waiting room by an officer of the law, without regard to the inquiry whether the officer acted under the direction of defendant's servant, was erroneous.[82]

Use of Undue Force—Willful or Wanton Acts of Trainmen.—In a passenger's action for injuries by being ejected by the carrier's servants with unnecessary force, and wantonly or willfully injured or humiliated, it was proper to charge that plaintiff's only right of recovery was for willful injury; that in determining whether the injury was committed willfully the jury could consider, with other circumstances, the manner of the conductor, the force used by him, and the effect of his acts, together with the presumption that every person intends the natural and probable consequences of his wrongful acts; and an unlawful intent may be inferred from "the conduct which shows a reckless disregard of consequences, and a willingness to inflict injury" by purposely doing the act, with knowledge that some one is in a situation to be unavoidably injured thereby.[83] But the charge must not require of the carrier too high a degree of care in protecting its passengers from violence by its trainmen,[84] must not relieve the carrier from liability because the ejected passenger was violent and abusive of the trainmen,[85] and must not declare the use of more than reasonably

80. Passenger carried beyond destination—Lame passenger.—St. Louis, etc., R. Co. *v.* Williams, 100 Ark. 356, 140 S. W. 141.

81. Agency of person making the ejection—News agent of train.—Louisville, etc., R. Co. *v.* Kimbrough, 24 Ky. L. Rep. 2409, 115 Ky. 512, 74 S. W. 229.

82. Ejection from waiting room by police officer.—Rose *v.* Louisville, etc., R. Co., 70 Miss. 725, 12 So. 825, 35 Am. St. Rep. 686.

83. Use of undue force willful or wanton acts of trainmen.—It was so held in an action against a street railway company for personal injuries, the complaint alleged that plaintiff, a boy thirteen years old, stepped on the platform of one of defendant's cars, intending to enter and pay his fare, when the conductor, without asking for such fare, and without cause or warning, recklessly threw plaintiff off the platform to the street, while the car was running at great speed. Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 536, 33 N. E. 627.

84 Degree of care to protect from violence by trainmen.—In a passenger's action for personal injuries by being ejected while intoxicated as claimed by defendant, the court instructed that, if plaintiff was accepted as a passenger, it became defendant's duty to exercise for plaintiff's safety, during his trip to and arrival at destination, "the highest degree of care, skill, and diligence consistent with the nature of its undertaking," and also instructed, as plaintiff's second prayer, that defendant's duty was not limited to furnishing transportation, but it was also bound to accord him good treatment and freedom from personal rudeness and wanton interference with his person by the trainmen, and also instructed, as plaintiff's third prayer, that, even if plaintiff was intoxicated, the intoxication did not relieve defendant from exercising toward plaintiff the highest degree of care, skill, and diligence consistent with the nature of its undertaking. Held, that the first and third instructions were erroneous for requiring the highest degree of "skill, etc.," in discharging passengers and protecting them from violence by its trainmen, when it was only bound to exercise ordinary care in that respect; but the second prayer was not objectionable, not prescribing any degree of care. Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

85. Passenger violent and abusive of trainmen.—In a passenger's action for personal injuries by being ejected while, as claimed by defendant, he was intoxicated, a requested charge that if plaintiff, when requested to leave the car platform,

necessary force to be of itself a wanton and malicious injury and humiliation.[86]

Right to Resist Unnecessary Force.—In a passenger's action for ejection where the plaintiff contended that the force he used was justifiable against blows which defendant's servants struck him, and the defendant requested a ruling that, in resisting the blows, the plaintiff would have no right to resist being expelled from the car, a charge to the jury that this was so, if they could make the distinction upon the evidence; but left them to infer that the burden was on the defendant to establish it, was error because of the omission to guard the instruction against such an inference.[87]

§ 3368. Damages.—Character of Damage under Each of Several Counts.—An instruction in an action for ejection of passenger, in which there were three counts, leading the jury to conclude that they should find damages of the same character under each count is erroneous.[88]

Exemplary or Punitive Damages Generally.—A master is liable to the extent of compensatory damages for the unlawful act of his agent committed in the course of his employment, whether ratified or not, and, in an action against a carrier for the wrongful expulsion of plaintiff from its train, a charge intended to inform the jury as to what constituted evidence tending to show a ratification by defendant of its conductor's act, with a view to its consequent liability, should not be given, unless there is evidence warranting an instruction on exemplary damages.[89] It must plainly tell the jury that malice or such wanton recklessness as amounts to malice must be proved before exemplary damages can be awarded,[90] and must not permit an award of exemplary damages regardless of whether

was abusive of the brakeman, and such conduct induced greater force by the brakeman in ejecting plaintiff than would have otherwise been applied, but that only such force was used as men of ordinary prudence would have used under the provocation of like circumstances, plaintiff could not recover, was properly refused; it being the duty of railroad employees to restrain their temper and use no more force than necessary in the performance of their duty, and abuse and resistance by plaintiff would only mitigate the damages caused by excessive violence in ejecting him and would not defeat recovery. Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

86. In an action for ejecting a passenger, an instruction that if the conductor ejected plaintiff, and used more force than was reasonably necessary, and "thereby" wantonly and maliciously injured and humilated her, as charged, the jury should find for her, was not objectionable as declaring the use of more than reasonable necessary force to be of itself a wanton and malicious injury and humilation. Chicago Consol. Tract. Co. *v.* Mahoney, 82 N. E. 868, 230 Ill. 562.

87. Right to resist unnecessary force.—Coleman *v.* New York, etc., R. Co., 106 Mass. 160.

88. Character of damage under each of several counts.—Louisville, etc., R. Co. *v.* Tilleson, 73 S. E. 839, 137 Ga. 569.

89. Evidence to justify charge as to exemplary damages.—Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

Where there was evidence that in ejecting plaintiff the conductor used insulting language, and was "very impolite and gruff," there was no error in charging the law of vindictive damages. Atlanta Consol. St. R. Co. *v.* Keeny, 25 S. E. 629, 99 Ga. 266, 33 L. R. A. 824.

Instances where compensatory damage only should be allowed.—In an action against a carrier for damages for ejection, it is error to charge that the jury may find for plaintiff any sum he is entitled to, not exceeding the sum claimed in the petition, if they should find certain facts which, if true, entitle plaintiff to compensatory damages only; the jury should have been confined to the actual damage sustained. Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

It was error to instruct that, if the jury found for plaintiff, an injured passenger, to find for him any sum the jury believe he is entitled to, not exceeding $2,000; but in such case the jury should have been told that he was entitled to such damages as would reasonably compensate him for the mental and physical pain and suffering that he endured, if any, by reason of the negligent and wrongful acts of defendant's agents and servants. Chesapeake, etc., R. Co. *v.* Crank, 108 S. W. 276, 32 Ky. L. Rep. 1202.

90. Sufficiency of charge as to necessity for proof of malice or wantonness.—In an action for ejecting a passenger, instructions that, though plaintiff failed or refused to give the conductor a transfer or cash fare, the carrier could not wantonly or maliciously injure her, or use force not reasonably necessary in ejecting her; that she could recover if

defendant was guilty or not of the wrong committed by its servants.[91] It is also error to give in charge a statute providing that in some torts the entire injury is to the peace or feelings of the plaintiff.[92] Punitive damages are not recoverable as a matter of right, but their imposition is discretionary with the jury. Therefore a charge is properly refused, which instructs the jury that the plaintiff, in an action against a railroad company for his wrongful ejection as a passenger, would, under given circumstances, be entitled to recover punitive damages.[93]

Physical and Mental Suffering as Element of Damages.—In an action for wrongful ejection of a passenger, an instruction that in assessing damages the jury were authorized, in their best judgment, to award a fair and reasonable compensation for any physical pain or mental suffering that they might believe plaintiff to have suffered, and also as a punishment to defendant, if they believed such damages should be awarded, was not improper.[94] And an instruction, in a passenger's action for personal injuries by being ejected, that, if defendant's agents "struck and beat plaintiff as alleged in plaintiff's declaration," the jury should consider physical and mental suffering in allowing damages, did not, by using the quoted phrase, conflict with a previous part of the instruction that the finding should be based on all the evidence in the case, and was not misleading.[95]

Evidence to Justify Charge Authorizing Damages for Physical Suffering.—In an action against a railway company for wrongful ejection from its train, evidence that plaintiff was jerked off the car was sufficient to justify an in-

the conductor ejected or attempted to eject her, and used more force than was reasonably necessary, and thereby wantonly and maliciously injured and humiliated her, as charged; and that if the conductor without provocation assaulted and injured her, as charged, and such assault was malicious, aggravated, and wanton, and resulted in physicial injury to plaintiff without her fault, and if justice and the public good required it, the jury could allow exemplary damages—plainly told the jury that malice, or such wanton recklessness as amounted to malice, must be proved before exemplary damages could be awarded. Chicago Consol. Tract. Co. *v.* Mahoney, 82 N. E. 868, 230 Ill. 562.

Charge too favorable to carrier.—In an action against a street railway company for ejection from a car with unnecessary force, an instruction that if defendant's agent was inspired to use excessive force by actual malice or ill will the jury might allow punitive damages was too favorable to defendant, as plaintiff was also entitled to punitive damages if he was recklessly or wantonly thrown from the car. Lexington R. Co. *v.* O'Brien, 84 S. W. 1170, 27 Ky. L. Rep. 336.

Charge confining jury to allowance of compensatory damages.—In an action for forcibly ejecting a passenger, the court charged that: "Where a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, the humilitation, wounded pride, mental suffering, and the like, and to allow such a sum as the jury may say is right." Held, that this charge confined the jury to an allowance for compensatory damages, and did not authorize an allowance of exemplary damages. Shepard *v.* Chicago, etc., R. Co., 77 Iowa 54, 41 N. W. 584.

91. In an action for wrongful ejection of a passenger from a train, an instruction that if the jury found for plaintiff, and that if his ejection was willful and malicious, they might give exemplary damages, was erroneous, as permitting an award of exemplary damages regardless whether defendant was guilty or not of the wrong committed by its servant by directing, participating in, or subsequently approving it. Wells *v.* Boston, etc., Railroad, 71 Atl. 1103, 82 Vt. 108.

92. Charging statute as to injury from torts.—In an action for damages for wrongful expulsion of plaintiff from one of defendant's trains, where plaintiff sues for value of lost time, for expenses incurred, and for punitive damages, it is error to give in charge to the jury Civ. Code § 3907, providing that in some torts the entire injury is to the peace or feelings of the plaintiff, in which case no measure of damage can be prescribed. Central, etc., R. Co. *v.* Almand, 43 S. E. 67, 116 Ga. 780.

93. Louisville, etc., R. Co. *v.* Bizzell, 131 Ala. 429, 30 So. 777.

94. Physicial and mental suffering as element of damages.—Birmingham R., etc., Co. *v.* Lee, 153 Ala. 386, 45 So. 164.

95. Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

struction authorizing damages for physical suffering.[96]

Cost of Procuring Transportation.—An instruction that plaintiff's damages were limited to the cost of procuring transportation from the place where he was ejected from the train to the place indicated by his ticket is properly refused as too general, and not showing whether it referred to transportation by rail or by some other means.[97]

Mitigation of Damages.—In a passenger's action for injury by ejecting plaintiff with unnecessary force, the court may charge that the fact that the passenger was violent and abusive of the trainmen may be considered in mitigation of damages.[98] In the absence of evidence that a carrier exercised diligence or care in employing a brakeman who threw a passenger off a train, an instruction that, if the carrier believed the brakeman a fit person, they might consider that fact in mitigation of damages, is abstract.[99]

Duty to Lessen Damages.—Plaintiff at S. asked defendant's agent for a ticket to A. by way of C., was handed one by way of H., and having boarded a train for A. by way of C., was ejected at W., and there being no train returning to S. for seven or eight hours, and it being a cold day, and the waiting room at W. being unheated, and there being a boisterous crowd about it, returned to S. by carriage. Held, that, as taking from the jury the question whether the circumstances made the trip from W. to S. necessary, it was proper to refuse the bracketed part of the requested instruction: "It is the duty of a passenger who has been inadvertently informed by a ticket agent that a certain train would take her to her destination, if you believe that the agent did give such misdirection, to use all reasonable means known to her or suggested to minimize her damages, [and if she, by waiting at the station a few hours, could have returned to S. and proceeded to her destination on another train, after returning to S., she could have waited and taken that train and not have exposed herself. The law requires that.]" [1]

§ 3369. Verdict and Finding.—Under statutes in some of the states the jury in a passenger's action for personal injuries may be required to find specially upon any material question or question of fact which shall be stated to them in writing. The questions which may be submitted to the jury for such special findings are not questions which relate to mere evidentiary facts, but questions which relate to the ultimate facts upon which the rights of the parties directly depend. A probative fact, from which the ultimate fact necessarily results, would be material.[2]

Framing Issues.—In a passenger's action for personal injuries the framing of the issues to be submitted to the jury for special findings is a matter within the sound discretion of the trial court, and where exceptions are made to the issue, the party complaining must show that the exercise of that discretion operated to his injury. The rule presupposes that such issues as are submitted to the jury are raised by the pleadings. Thus, in an action for an assault committed by an employee on a passenger on defendant's train it is not prejudicial to defendant to change the issue, "Did the defendant, through the conductor and other agents or servants, unlawfully assault and beat the plaintiff?" tendered by plaintiff, by substituting "or" in place of "and," where the complaint alleged that plaintiff was assaulted by the conductor and another person in defendant's employment.[3]

96. Evidence to justify charge authorizing damages for physical suffering.—Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

97. Cost of procuring transportation.—Miller *v.* King, 166 N. Y. 394, 59 N. E. 1114, affirming judgment, 58 N. Y. S. 1145, 40 App. Div. 618.

98. Mitigation of damages.—Maryland, etc., Railroad *v.* Tucker, 115 Md. 43, 80 Atl. 688.

99. Southern R. Co. *v.* Wideman, 119 Ala. 565, 24 So. 764.

1. Duty to lessen damages.—Levan *v.* Atlantic, etc., R. Co., 86 S. C. 514, 68 S. E. 770.

2. Verdict and finding.—Ebsery *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017.

3. Williams *v.* Gill, 122 N. C. 967, 29 S. E. 879.

Amendment of Requested Special Interrogatories.—A requested special interrogatory: "Could the plaintiff, by the exercise of ordinary, reasonable prudence for his own safety, under all the circumstances which * * * surrounded him at the time of the [injury complained of in this case, have removed in time to avoid the injuries complained of]?"—is properly amended by substituting for the bracketed words the words "accident in question, have avoided the accident and injuries complained of;" plaintiff having been injured while riding on the steps of one of defendant's cable cars, by collision with a team, and the proper inquiry being, not whether he might not have removed himself from the car, but could he have avoided the injury by the exercise of ordinary care and prudence.[4]

Sufficiency of Answers to Questions.—In an action against a street car company for an alleged assault upon one of its passengers by its conductor, where a special interrogatory was submitted whether the passenger had alighted when first struck, an answer that he was on the car when first struck was sufficient.[5]

Necessity for Specific Finding That Defendant Negligent.—Where the jury in a passenger's action for personal injury are required to return a special verdict, there is no necessity for a specific finding of negligence where the facts found by the jury, taken in connection with the admitted facts, establish beyond controversy that such was the case. Thus, where it was undisputed that the conductor was on the rear platform as plaintiff was alighting, and saw him in the act, and that the conductor rang the bell to start the car, a special verdict in favor of plaintiff, finding that he was injured while alighting from the car, that the car started while he was alighting, causing him to fall to the pavement, that the starting of the car was the proximate cause of his injury, and that he was not negligent, was sufficient, though it did not specifically find that defendant was negligent.[6]

Affirmative Finding with Respect to One Element of Alleged Negligence.—Where a complaint charged that the place provided by a carrier for plaintiff to alight was not a safe and proper place, in that the platform was too high and too far from the car step, and not sufficiently lighted, and in that defendant's brakeman had no lantern and gave no warning, etc., and the brakeman did not offer to assist plaintiff, the allegation of want of light was but one of the elements in which the platform was alleged to be defective; and hence defendant was not entitled to judgment on a special verdict finding that the platform was reasonably safe, and that the brakeman did have a lantern.[7]

Failure to Find Existence of Defect for Such Time as to Enable Carrier to Repair.—In an action for injury to a street car passenger by the explosion of the controller, findings that the controller at the time of the accident was defective, that the company knew or ought to have known of the defect, and that such negligence was the proximate cause of the injury are not findings of negligence because of the absence of any finding that the defect had existed for such time as to have enabled the company to have repaired it before the accident.[8]

Sufficiency of Finding of Negligence in Action for Injuries in Collision.—In an action for personal injuries, occasioned to the plaintiff by the collision of two electric cars, a finding that the gross negligence of the conductor of the

4. **Amendment of requested special interrogatories.**—West Chicago, etc., R. Co. *v.* McNulty, 166 Ill. 203, 46 N. E. 784, affirming judgment, 64 Ill. App. 549.

5. **Sufficiency of answers to questions.**—Johnson *v.* Washington Water Power Co., 62 Wash. 619, 114 Pac. 453.

6. Jirachek *v.* Milwaukee Elect. R., etc., Co., 139 Wis. 505, 121 N. W. 326.

7. **Affirmative finding with respect to one element of alleged negligence.**—Duell *v.* Chicago, etc., R. Co., 115 Wis. 516, 92 N. W. 269.

8. **Failure to find existence of defect for such time as to enable carrier to repair.**—Gay *v.* Milwaukee Elect. R., etc., Co., 138 Wis. 348, 120 N. W. 283.

forward car was the cause of the collision is unnecessary to the decision of the case; it is sufficient to find negligence.[9]

Sufficiency of Finding to Show Negligence of Defendant, Proximate Cause.—In an action by a passenger for personal injuries received in a derailment accident, where plaintiff claimed that the injuries were caused of its track, whereas defendant claimed that it was due to the wrongful act of third persons in placing an obstruction upon the track, and there was evidence to support each claim, a special verdict merely finding that defendant was negligent in the repair of the track, and that defendant was guilty of negligence which occasioned the injuries, does not sufficiently show that the negligence in the repair of the tracks was the proximate cause of the injuries.[10]

Special Finding Inconsistent with General Verdict for Plaintiff.—Where in a passenger's action for personal injuries, the jury are required pursuant to statute to find specially upon material questions in the case, and their special findings of fact are inconsistent with their general verdict, the former control and the court may render judgment accordingly. The inconsistency between the special finding of fact and the general verdict, as contemplated by the statute, can arise only where the fact found is an ultimate fact, or one from which the existence or nonexistence of such ultimate fact necessarily follows.[11] All the facts stated in the special finding must be taken and construed together, to ascertain their true legal effect, and when so taken and construed together, if they are inconsistent with the general verdict, they must be held to control it; yet, if they can be reconciled, by any fair hypothesis or construction, with the general verdict, it ought to stand.[12] Thus, a general verdict for the plaintiff is inconsistent with the special findings where the facts stated in the special finding negative all negligence on the part of the carrier.[13] But where, by the special findings, the jury required a higher degree of care of the carrier than the law imposed,[14] and where the special finding is to the effect that the same acts are both ordinary and gross negligence, even though the carrier will be liable whether the acts were ordinary or gross negligence,[15] the defendant is entitled to judg-

9. Sufficiency of finding of negligence in action for injuries in collision.—Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481.

10. Sufficiency of finding to show negligence of defendant, proximate cause.—Davis *v.* Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935.

11. Ebsery *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017.

12. Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526.

13. Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526.

In an action against a railroad company for personal injuries to a passenger, special findings that plaintiff was a passenger and was injured by the train being thrown from the track, that an axle in the trucks of the fender broke, that the breaking of the axle contributed to the injury of the plaintiff, that there was a flaw in the axle which could have been discovered by a practical test, that the track was not in good repair, and that the acts of negligence caused the alleged injury, but coupled with finding that the axle had been tested by the most approved methods three months before the injury, that the engine and tender were inspected before the train left on the trip, that the axle was made by a good and reputable manufacturer, and received no unusual strain before it broke, and that the train was not running at an unusual rate of speed, were inconsistent with the general verdict for plaintiff. Grand Rapids, etc., R. Co. *v.* Boyd, 65 Ind. 526.

14. Where the jury found that defendant failed to exercise the highest degree of skill and care which a careful and vigilant man would have observed in like circumstances, and that such failure was the proximate cause of plaintiff's injuries; that plaintiff was not guilty of contributory negligence; that the motorman, by exercising the utmost care in the performance of his duty, could have avoided the collision, it was not error to refuse to set aside a special finding that a prudent person engaged in the business of defendant, and who exercised the utmost care and forethought for the safety of passengers, would not have foreseen that an injury to plaintiff would be the natural and probable result of operating the car as it was operated, and to refuse to enter judgment for plaintiff, since the other findings required defendant to exercise a higher degree of care than that imposed by law. Wanzer *v.* Chippewa Valley Elect. R. Co., 84 N. W. 423, 108 Wis. 319.

15. Where the complaint in an action

ment in its favor, or a reversal on the facts stated in the special finding, notwithstanding the general verdict. But a special finding that the driver of defendant's car did not know plaintiff was on the ground when he started the car is not necessarily inconsistent with a general verdict for plaintiff, as the conductor regulates the movements of the driver, and the complaint alleged that defendant had notice of plaintiff's position, "through its agents and servants." [16] And in an action by a passenger for injuries caused by the alleged negligence of the company in starting its train without giving him time to get off in safety, where the jury finds generally for the plaintiff, a special finding that the train stopped the usual and ordinary length of time will not warrant a judgment for defendant notwithstanding verdict.[17]

Findings of Special Verdict Contradictory of Each Other.—Under the Indiana statute, the rule is that if answers of the jury to special interrogatories or questions of fact are inconsistent with, or contradictory of each other, the special findings will not overthrow the general verdict.[18] A special finding that a passenger, in attempting to alight from the car, stepped on a loose stone, or stones, and sprained her ankle, and a special finding that she stepped off the car and onto the street below, and stepped on broken rock in the street, and was injured, are inconsistent with each other, if the latter finding can be construed to mean that she was injured while walking, after she had alighted from the car, and a general verdict in her favor is not overcome, under the rule that, where answers to questions of fact are inconsistent with or contradictory of each other, the special findings do not overthrow the general verdict.[19] But a special verdict which found that plaintiff was injured in alighting from defendant's street car, which had come to a full stop; that he had sufficient reason to believe it would stop long enough for him to alight using ordinary care; that he did not proceed to alight from the car while in motion; that the motorman did not know he was alighting in time to avoid the injury, and ought not, exercising proper care, to have known he was getting off, and the motorman was not guilty of negligence; that the conductor's negligence proximately caused plaintiff's injury, and that plaintiff was guilty of a want of ordinary care which proximately contributed to the injury, and found the amount of damages is not inconsistent.[20]

Findings of Judge Inconsistent with Judgment.—A finding in a railroad passenger's action for personal injuries that from plaintiff's account as to what occurred at the train, or her subsequent experience, the trial judge could not say that she had satisfied him that she received any substantial injury, is not a finding that the judge believed plaintiff's testimony that she did fall, where he also found that she did not fall at all so as to make the two findings contradictory.[21]

Findings Inconsistent with Pleadings.—The business of the jury on a special verdict in a passenger's action for personal injury in which they return a general verdict for the plaintiff, must not be inconsistent with the pleadings, for the plaintiff can not allege one state of facts and recover on another.[22]

for injury to a passenger only charges ordinary negligence of the brakeman in assisting the passenger to board the train, a special finding that the brakeman was guilty of ordinary negligence for failing to exercise ordinary care, and another special finding that he was guilty of gross negligence because of willful misconduct, are inconsistent, and can not stand, and any judgment rendered thereon must be set aside. Haverlund *v.* Chicago, etc., R. Co., 143 Wis. 415, 128 N. W. 273.

16. Ebsery *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017.

17. Chicago, etc., R. Co. *v.* Wimmer, 72 Kan. 566, 84 Pac. 378, 4 L. R. A., N. S., 140.

18. Findings of special verdict contradictory of each other.—Louisville, etc., Tract. Co. *v.* Walker, 177 Ind. 38, 97 N. E. 151.

19. Louisville, etc., Tract. Co. *v.* Walker, 177 Ind. 38, 97 N. E. 151.

20. Kohler *v.* West Side R. Co., 74 N. W. 568, 99 Wis. 33.

21. Findings of judge inconsistent with judgment.—Baxter *v.* New York, etc., R. Co., 214 Mass. 323, 101 N. E. 1070.

22. Inconsistency with pleadings.—Grant *v.* Spokane Tract. Co., 47 Wash. 112, 91

Where the special findings do not negative the allegations of negligence in plaintiff's petition, which were by the court submitted to the jury, and on which the jury might have predicated its general verdict in plaintiff's favor, a judgment for defendant based on the special findings, is erroneous.[23]

Construction Which Supports General Verdict Gives Special Verdict.—Where a special verdict in a passenger's action for personal injuries, susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict.[24] Thus, where a complaint in an action for personal injuries by a passenger against a street railway company alleged that while the car was motionless, and plaintiff was alighting therefrom, and about the time she placed one foot on the pavement, the other being on the step of the car, the car was negligently started and the jury in a special verdict found that, when the car started, plaintiff was standing with both feet on the steps of the car; the special verdict did not negative the general verdict that the car was started while plaintiff was alighting, which was the gist of the negligence charged.[25]

Resort to Evidence to Support Special Findings as against General Verdict.—On a motion in a passenger's action for personal injury for judgment as against the general verdict based on special findings, every issue raised by the pleadings and not eliminated by the instruction will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings, are supported by sufficient evidence; but the special findings can not be added to or supported by the evidence, and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict.[26]

Conflict between Written Answer and Subsequent Verbal Inquiry.—Where there is an inconsistency between the written answer of the jury to the questions submitted in writing for their determination, and a verbal answer to a subsequent verbal inquiry by the court which was set aside on motion, there was no inconsistency between the general verdict and the special findings.[27]

Pac. 553; Ebsery *v.* Chicago City R. Co., 164 Ill. 518, 45 N. E. 1017.

A special finding in an action by one who, having fallen from a cable car, was run over by it, that, at the time plaintiff fell, the car was in motion, is inconsistent with a general verdict for plaintiff; the negligence alleged by the complaint being that after he had fallen off, and was on the ground, and while the car was not moving, it was suddenly started forward. 61 Ill. App. 265, affirmed in Ebsery *v.* Chicago City R. Co., 45 N. E. 1017, 164 Ill. 518.

23. Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546.

In an action against a street railway company for injuries to a passenger, the petition alleged that the passenger was caused to alight at a dangerous place, which to go to her destination, a designated street, and it appeared that there were two stopping places at either of which it was customary for passengers desiring to reach the designated street to alight. The jury specially found that the passenger informed the conductor that her destination was the designated street, and that the conductor caused her to alight at the first stopping place, which was before she reached her destination, and rendered a general verdict in favor of the passenger on instructions submitting the issue of negligence in causing the passenger to alight at the first stopping place. Held, that the special findings did not negative negligence in causing the passenger to alight at the first stopping place, requiring the court to render judgment on the general verdict notwithstanding the special findings. Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546.

24. Construction which supports general verdict given special verdict.—Grant *v.* Spokane Tract. Co., 47 Wash. 112, 91 Pac. 553.

25. Grant *v.* Spokane Tract. Co., 47 Wash. 112, 91 Pac. 553.

26. Resort to evidence to support special findings as against general verdict.—Conwell *v.* Tri-City R. Co., 135 Iowa 190, 112 N. W. 546.

27. Conflict between written answer and subsequent verbal inquiry.—McManus *v.* Thing, 208 Mass. 55, 94 N. E. 293.

Where, in an action for personal injuries by the sudden starting of a freight elevator, plaintiff claimed that he was rightfully on the elevator, and defendant claimed that his servant, starting the elevator, had exclusive right to the elevator at the time, and the jury rendered a general verdict for defendant, and found that plaintiff was in the exer-

Answer Showing Contributory Negligence on Plaintiff's Part.—In a passenger's action for personal injury where the jury returns a general verdict for the plaintiff and its answers to special interrogatories show contributory negligence on plaintiff's part, judgment in favor of the defendant is to be entered on the answers to the special interrogatories.[28] Where in an action for injuries to a street car passenger, required to leave the car to board another car to complete her journey because of excavations in the track, the complaint alleged that the passenger was required to leave the car at a point where the street was rough and uneven and filled with loose dirt and stones, that she stepped on loose stones and slipped, and was injured, a special verdict that the injury occurred in the afternoon, on a clear day, while the sun was shining, that the street was being improved, that there was earth and broken stone lying loosely on the ground below the step, and covering the ground where the passenger was compelled to step in alighting, that the distance from the step to the broken stone on the ground was about two feet, that there was nothing to prevent her from seeing the condition of the street, and that she did see it before stepping down, and also the distance from the step to the ground, did not show her contributory negligence sufficiently to overcome a general verdict in her favor, since she remained a passenger, entitled to high degree of care for her safety, and her duty to exercise ordinary care in alighting was affected by the conditions and the fact that she could rely on the belief that she would not be required to alight at a dangerous place.[29]

Sufficiency of Evidence to Authorize Finding.—The plaintiff, by his next friend, brought suit against the railroad company, alleging that he was an infant, ten years of age, and was a passenger upon the train of defendant, and that when he arrived at his destination an employee of the defendant, who was standing at the steps of the car from which he was alighting, caught him roughly and caused him to strike his knee against some portion of the car or steps, and, as a result, his knee was bruised, strained, and dislocated, from which he has suffered great pain, and continues to suffer. Held, that the evidence of the plaintiff amply authorized a finding that he was roughly handled by the employee of the railroad company who assisted him from the train, and that, as a result of this treatment, his knee was injured by being struck against some part of the car. It can not be said that the evidence authorized a finding that the injury was permanent, but there was some evidence that pain or inconvenience resulting from the injury might continue for some time.[30]

Conclusiveness of Findings of Elements of Damage.—Where, in an action for the carriage of a passenger beyond his destination, the jury found that the elements of damage were, for loss of time, $1, expenses, $2.50, and inconvenience, $300, the court can not, if there was any evidence on which the finding of damage as to inconvenience could have been based, set the same aside and render judgment for $3.50.[31]

Operation and Effect of General Verdict.—The verdict of the jury in an

cise of due care, that defendant's servant was not guilty of negligence, and was not acting for defendant within the scope of his employment, and was using the elevator when plaintiff came into it, and that both parties had a right to use it at the same time, and the foreman, in response to an inquiry of the court, stated that the jury concluded that both parties had the right to use the elevator at the same time, and the answer to the verbal inquiry was, on defendant's motion, set aside, there was no inconsistency between the general verdict and the special findings. McManus *v.* Thing, 94 N. E. 293, 208 Mass. 55.

28. **Answer showing contributory negligence on plaintiff's part.**—Louisville, etc., Tract. Co. *v.* Walker, 177 Ind. 38, 97 N. E. 151.

29. Louisville, etc., Tract. Co. *v.* Walker, 177 Ind. 38, 97 N. E. 151.

30. **Sufficiency of evidence to authorize finding.**—Alabama, etc., R. Co. *v.* Davis, 127 Ga. 89, 55 S. E. 1046.

31. **Conclusiveness of findings of elements of damage.**—Dalton *v.* Kansas, etc., R. Co., 78 Kan. 232, 96 Pac. 475, 17 L. R. A., N. S., 1226, 16 Am. & Eng. Ann. Cas. 185.

action by a passenger against a carrier for injuries sustained, must govern unless the damages allowed are so excessive as to warrant the belief that the jury was influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.[32]

Findings of Fact by Appellate Court.—Under a statute requiring appellate court to find the facts on which it reverses a judgment in a passenger's action for personal injuries, the court is not required to recite the evidence, or to find the mere evidentiary facts, but only to find the ultimate facts.[33]

§ 3370. Appeal and Error.—On appeal from a judgment in an action for wrongful ejection of a passenger, the supreme court will not determine whether the evidence was sufficient to show that the relation of passenger and carrier existed.[34]

§ 3371. Costs.—Under a statute authorizing plaintiff, on recovery in any action against a railroad company for violation of law regulating transportation of passengers, to recover a reasonable attorney's fee, he is entitled to recover in an action for failure of carrier to carry passenger to his station,[35] but in an action for damages sustained from cold contracted by being compelled to walk back two miles on a rainy day, caused by defendant's negligence in carrying plaintiff beyond his station, plaintiff is entitled to recover attorney's fees.[36]

32. Operation and effect of general verdict.—Nichols *v.* Camden Interstate R. Co., 62 W. Va. 409, 59 S. E. 968.

33. Findings of fact by appellate court.—Weeks *v.* Chicago, etc., R. Co., 198 Ill. 551, 64 N. E. 1039, affirming 99 Ill. App. 518.

On appeal in an action for injuries received by being run over by a train the appellate court found that plaintiff was not injured by the negligence of defendant, but by her own negligence, and on appeal to the supreme court plaintiff contended that the finding, in view of the pleadings and evidence, was not sufficient to preclude the supreme court from finding as a matter of law from the evidence that plaintiff was a passenger of defendant when she was injured, and defendant failed to exercise the care required of it for her safety. Held, that the finding was sufficient, since, even as a passenger, her cause of action was based on the alleged negligence of defendant, which negligence, while she was using due care (as such passenger) for her own safety, operated to cause the injury. Judgment, Chicago, etc., R. Co. *v.* Weeks, 99 Ill. App. 518, affirmed in 64 N. E. 1039, 198 Ill. 551.

34. Appeal and error.—Judgment 75 Ill. App. 579, affirmed in Illinois Cent. R. Co. *v.* Davenport, 52 N. E. 266, 177 Ill. 110.

35. Costs.—St. Louis, etc., R. Co. *v.* Neal, 66 Ark. 543, 51 S. W. 1060.

36. St. Louis, etc., R. Co. *v.* Knight, 81 Ark. 429, 99 S. W. 684.

CHAPTER XXVIII.

Damages.

I. For Breach of Contract of Transportation, §§ 3372-3399.
  A. Elements and Measure of Damages in General, §§ 3372-3389.
    a. In General, § 3372.
    b. Breach of Contract to Furnish Cars for an Excursion, § 3373.
    c. Breach of Contract to Carry to a Certain Place and Return, § 3374.
    d. Breach of Contract to Issue Annual Passes, § 3375.
    e. Breach of Contract Contained in Mileage Book to Issue an Exchange Ticket, § 3376.
    f. Breach of Contract to Reserve Drawing Room in Sleeping Car, § 3377.
    g. Breach of Contract to Hold Train, § 3378.
    h. Change of Schedule of Trains, § 3379.
    i. Refusal to Sell Ticket to One Applying for Transportation, § 3380.
    j. Refusal of Transportation, § 3381.
    k. Failure to Stop for Person Desiring to Take Passage, § 3382.
    l. Failure to Stop According to Previous Notice at a Particular Place at a Time Specified, § 3383.
    m. Failure to Stop a Sufficient Time to Allow Passenger to Get on or Off Train, § 3384.
    n. Failure to Return to Passenger That Part of His Ticket Entitling Him to Transportation by a Connecting Carrier, § 3385.
    o. Delay in Transportation, § 3386.
    p. Getting Off at Wrong Station or Place by Direction of Carrier's Employees, § 3387.
    q. Failure to Carry to Destination, § 3388.
    r. Carrying beyond Destination, § 3389.
  B. Mental Suffering, § 3390.
  C. Special Damage Dependent on Knowledge of Circumstances, § 3391.
  D. Exemplary or Punitive Damages, §§ 3392-3399.
    a. In General, § 3392.
    b. Failure to Stop Train or Car at Station or Where Proper Signal Is Given, § 3393.
    c. Refusal of Transportation, § 3394.
    d. Delay in Transportation, § 3395.
    e. Failure to Carry to Destination, § 3396.
    f. Carrying beyond Destination, §§ 3397-3398.
      (1) When Exemplary or Punitive Damages Are Recoverable, § 3397.
      (2) What May Be Considered in Assessing Damages, § 3398.
  E. Excessive Damages, § 3399.
II. For Personal Injuries, §§ 3400-3407.
  A. Elements and Measure of Damages in General, § 3400.
  B. Elements and Measure of Damages for Assault, Threats, Insult or Abuse, § 3401.
  C. Damages Recoverable for Humiliation Suffered as Result of an Unlawful Arrest, § 3402.
  D. Exemplary or Punitive Damages, §§ 3403-3405.
    a. In General, § 3403.
    b. For Assault, Threats, Insult or Abuse, § 3404.
    c. For Wrongful Arrest, § 3405.
  E. Aggravation and Mitigation of Damages, § 3406.
  F. Excessive Damages, § 3407.

III. For Ejection, §§ 3408-3423.
A. Elements and Measure of Damages in General, § 3408.
B. Mental Suffering, §§ 3409-3410.
a. Ejection from a Railroad Train or Street Car, § 3409.
b. Ejection from a Ferryboat, § 3410.
C. Exemplary or Punitive Damages, §§ 3411-3421.
a. In Actions against Carriers, §§ 3411-3420.
(1) In General, § 3411.
(2) Ejection for Refusal to Pay Fare, § 3412.
(3) Ejection of Passenger Presenting Ticket Not Good on the Railroad or on the Particular Train, § 3413.
(4) Ejection of Passenger Who Has a Ticket to a Station at Which the Train Does Not Stop, § 3414.
(5) Ejection under Mistaken Belief That Passenger's Ticket Is Not Good, § 3415.
(6) Ejection of Passenger Presenting Ticket the Time Limit of Which Has Expired, § 3416.
(7) Ejection of Passenger Presenting an Improper Ticket or One Wrongly Made Out, § 3417.
(8) Ejection from a Moving Train or Street Car, § 3418.
(9) Ejection of Passenger in Consequence of Repudiation of Tickets by General Passenger Agent, § 3419.
(10) Passenger Entering Train or Violating Rule of Carrier for Purpose of Being Ejected and Suing Therefor, § 3420.
b. In an Action against the Conductor of a Railroad Train, § 3421.
D. Aggravation and Mitigation of Damages, § 3422.
E. Excessive Damages, § 3423.

§§ 3372-3399. For Breach of Contract of Transportation—§§ 3372-3389. Elements and Measure of Damages in General—§ 3372. In General.—Damages recoverable for a breach of a contract of transportation are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated when the contract was made as the probable result of a breach.[1] Remote and contingent damages can not be recovered in such case.[2] On libel against a vessel for breach of a contract of transportation libelants are not entitled to recover damages for loss of time after breach of the contract and while waiting for the trial of the case.[3]

Damages Recoverable for Breach of Executory Contract into Which Carrier Was under No Legal Duty to Enter.—The damages recoverable for the violation of an executory contract for transportation, into which the carrier was under no legal duty to enter, are to be arrived at by taking into account the value of the injured person's lost time, the cost of transportation between the two places, and any other loss or expense legitimately flowing from the failure of the company to comply with its undertaking. Physical discomfort, pain, weariness, and injuries to limb or foot, occasioned by walking over the distance

1. **Damages recoverable in general.**—Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274. See also, Montgomery, etc., R. Co. v. Boring, 51 Ga. 582.

2. **Remote and contingent damages not recoverable.**—Yonge v. Pacific Mail Steamship Co., 1 Cal. 353.

The amount of wages or profits which plaintiff alleges he could have earned by securing employment at the place of destination can not be included in the damages recoverable for a carrier's breach of contract of transportation, where plaintiff did not know what his occupation or business would be at the place of destination. Judgment, Morrison v. North American Transp., etc., Co., 85 Fed. 802, reversed in 20 S. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

3. **Damages for loss of time while waiting for trial of case not recoverable.**—The Stanley Dollar, 160 Fed. 911.

between the places above indicated, are not proper elements of damages in such a case.[4]

§ 3373. Breach of Contract to Furnish Cars for an Excursion.—The measure of damages in an action against a railroad company for a breach of a contract to furnish plaintiff a certain number of passenger cars for an excursion is the amount of money lost by the breach of the contract; that is, the amount received by plaintiff by the sale of tickets (which had to be refunded), and the sum he would have received from others in addition thereto had the train gone as proposed, and any other loss sustained, as for advertising and incidental expenses, less the sum agreed to be paid for the cars.[5]

§ 3374. Breach of Contract to Carry to a Certain Place and Return.—Where a carrier specially agrees to carry plaintiff and others to a certain place and return on a certain day, and it fails to furnish the return transportation as agreed, plaintiff's action is for breach of contract; and hence damages for injury to health can not be recovered.[6]

§ 3375. Breach of Contract to Issue Annual Passes.—In estimating damages for the breach of a contract to issue passes to plaintiff annually during his life, a recovery must be confined to the actual loss sustained, and such loss is compensated for by payment of the amounts expended by the promisee for railroad fare.[7] A contract to issue an annual pass, to be renewed from year to year during the pleasure of the promisee, is a divisible contract, and the measure of damages for the breach thereof is the value of the transportation to such promisee during the years the breach has occurred at the commencement of the action.[8]

§ 3376. Breach of Contract Contained in Mileage Book to Issue an Exchange Ticket.—Where a railroad company refused to issue an exchange ticket for transportation, pursuant to a contract contained in a mileage book issued by it, the measure of damages is the time plaintiff lost, and any expense he incurred, and any loss that he directly sustained thereby.[9]

§ 3377. Breach of Contract to Reserve Drawing Room in Sleeping Car.—Compensatory damages may be recovered for physical inconvenience, discomfort and pain resulting from a breach of a contract to reserve a drawing room in a sleeping car for passengers, who in consequence are compelled to sit up the greater part of the night and to change cars twice.[10]

§ 3378. Breach of Contract to Hold Train.—In an action for damages against a carrier for failure to comply with his contract to hold a train for plaintiff and others, the measure of damages is such sum as will fairly compensate plaintiff for any time he lost or expenses he incurred, or personal inconvenience or discomfort he suffered, by reason of the breach of such contract; there being nothing warranting recovery for pain of body or of mind.[11]

4. **Damages recoverable for breach of executory contract into which carrier was under no legal duty to enter.**—Louisville, etc., R. Co. *v.* Spinks, 104 Ga. 692, 30 S. E. 968.

5. **Measure of damages for breach of contract to furnish cars for an excursion.**—Illinois Cent. R. Co. *v.* Demars, 44 Ill. 292.

6. **Damages recoverable for breach of contract to carry to certain place and return.**—Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376.

7. **Measure of damages for breach of contract to issue annual passes.**—Curry *v.* Kansas, etc., R. Co., 60 Pac. 325, 61 Kan. 541.

8. Kansas, etc., R. Co. *v.* Curry, 51 Pac. 576, 6 Kan. App. 561, affirmed in 48 Pac. 579, 58 Kan. 6.

9. **Measure of damages for breach of contract to issue an exchange ticket.**—Schmidt *v.* Cleveland, etc., R. Co., 74 S. W. 674, 25 Ky. L. Rep. 11.

10. **Damages recoverable for breach of contract to reserve drawing room in sleeping car.**—Pullman Co. *v.* Willett, 7 O. C. C., N. S., 173, 17-27 O. C. D. 649, affirmed in 72 O. St. 690, 76 N. E. 1131.

11. **Measure of damages for breach of contract to hold train.**—Southern R. Co. *v.* Marshall, 64 S. W. 418, 111 Ky. 560, 23 Ky. L. Rep. 813.

§ 3379. Change of Schedule of Trains.—Carriers have the right to change the schedules of their passenger trains, but if the schedule be changed, or if a regular train be discontinued, without reasonable notice, a prospective passenger who had arranged his affairs in contemplation of a maintenance of the schedule, may recover the damages actually sustained by him as a result thereof.[12]

§ 3380. Refusal to Sell Ticket to One Applying for Transportation.—Where the agent to whom application for transportation is made knows, or has reasonable grounds to believe, that the person demanding transportation is fit to travel, and he arbitrarily refuses to sell him a ticket, the carrier is liable for compensatory damages.[13]

§ 3381. Refusal of Transportation.—Where a carrier is justified in refusing to receive a person for transportation, such person is not entitled to recover any damages for such refusal.[14] For the breach of contract in refusing transportation to one having a ticket entitling him to transportation over the carrier's line, the actual damages growing out of such breach are recoverable, or nominal damages where no actual damages are shown.[15] In an action against a carrier for breach of contract in refusing transportation to one entitled thereto, the fact that plaintiff was arrested for not paying his fare, and was locked up, and made to submit to indignities, and caused to take cold, can not be shown in enhancement of damages.[16]

§ 3382. Failure to Stop for Person Desiring to Take Passage.—Where a railroad company wrongfully fails to stop its train at a station to take on one who desires to take passage there, and who is entitled to transportation, such person is entitled to recover nominal damages, and such actual damages as he may sustain by reason of such failure.[17] In estimating the damages in such case, in-

12. Damages recoverable for change of schedule without reasonable notice.—Savannah, etc., R. Co. *v.* Bonaud, 58 Ga. 180; Durden *v.* Southern R. Co., 2 Ga. App. 66, 58 S. E. 299.

13. Damages recoverable for refusal to sell ticket.—Illinois Cent. R. Co. *v.* Smith, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642, 107 Am. St. Rep. 293.

Where one applied to a railroad ticket agent for a ticket to a certain station, and the agent, believing that the train about to start did not stop at that station, refused to sell it to him, and he boarded such train and the conductor, in accordance with the rules of the company, charged him extra fare, because he had no ticket, there being nothing in the pleading or evidence to show that either the agent or conductor acted in other than good faith and according to orders, or that the latter was insulting or abusive, the measure of damages is the difference between the regular fare and what the conductor collected. Courts *v.* Louisville, etc., R. Co., 99 Ky. 574, 18 Ky. L. Rep. 415, 36 S. W. 548.

One who missed his train by reason of misdirection by defendant's ticket agent and his refusal to sell him a ticket, can recover against the carrier for any injury proximately caused by being put out of the station into the cold weather, while waiting for the next train. Coleman *v.* Southern R. Co., 138 N. C. 351, 50 S. E. 690.

14. No damages recoverable where carrier is justified in refusing transportation.—St. Louis, etc., R. Co. *v.* Dare, 99 Ark. 486, 138 S. W. 1009.

In such case, the person refused transportation is not entitled to recover the price of his ticket. St. Louis, etc., R. Co. *v.* Dare, 99 Ark. 486, 138 S. W. 1009.

15. Damages recoverable where transportation is wrongfully refused.—So held where the person refused transportation left the car and took the next train. Goins *v.* Western Railroad, 68 Ga. 190. See, also, St. Louis, etc., R. Co. *v.* Groce, 99 Ark. 420, 138 S. W. 879.

16. Facts that can not be shown in enhancement of damages.—Murdock *v.* Boston, etc., R. Co., 133 Mass. 15, 43 Am. Rep. 480.

17. Damages recoverable for failure to stop train for one desiring to take passage.—Brown *v.* Georgia, etc., R. Co., 119 Ga. 88, 46 S. E. 71; Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Thomas *v.* Southern R. Co., 122 N. C. 1005, 30 S. E. 343; Williams *v.* Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

Where plaintiff, who intended to take passage on defendant's railway train, presented himself for such purpose at a flag station a reasonable time before the train was due to arrive, and by reason of the absence of the agent, and the failure of the engineer to see his signal, the train did not stop for him, he was entitled to

convenience, the direct cause of the negligence, may be considered.[18] The cost of the railroad ticket is also an element of the damage.[19] And where the passenger is compelled to remain overnight in an unheated and unlighted station, and sickness results therefrom, damages may be recovered therefor.[20] But it has been held that no recovery can be had for mere chill and fatigue resulting from the passenger having to wait over until the next train.[21] And when the passenger, instead of procuring a comfortable and safe conveyance to the place he desires to reach, or waiting a few hours for another train, goes there on foot, unnecessarily, and thereby brings on sickness, he is not entitled to recover damages on account of such sickness, such damages being too remote.[22]

§ 3383. Failure to Stop According to Previous Notice at a Particular Place at a Time Specified.—In an action against a common carrier for damages resulting from his failure to stop according to previous notice, at a particular place, at a time specified, and take the plaintiff on his vessel as a passenger, which failure occasioned great bodily exposure and mental suffering, the peculiar bodily condition of the plaintiff may be proved in aggravation of damages.[23]

§ 3384. Failure to Stop a Sufficient Time to Allow Passenger to Get On or Off Train.—The measure of damages, where a railroad company fails to stop its train a sufficient time to allow a passenger to get on, is such sum as will fairly compensate him for time lost, expense incurred, or personal inconvenience.[24] Where a railroad company fails to stop its train at a station long enough to allow a passenger to get off, the passenger is entitled to recover for physical suffering which is the direct and immediate consequence of such failure.[25]

§ 3385. Failure to Return to Passenger That Part of His Ticket Entitling Him to Transportation by a Connecting Carrier.—The measure of damages for failure by an initial carrier to return to a passenger that part of his ticket entitling him to transportation over the line of a connecting carrier is the extra fare demanded, where he had sufficient money with him to pay it, and could thereby have avoided ejectment.[26]

such actual damages as he had sustained. Thomas *v.* Southern R. Co., 30 S. E. 343, 122 N. C. 1005; Williams *v.* Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

18. Milhouse *v.* Southern Railway, 52 S. E. 41, 72 S. C. 442, 110 Am. St. Rep. 620.

Where a carrier negligently fails to stop for a person desiring to take passage, such person is not bound to wait till the next train, but, having walked to the next station, is entitled to recover damages resulting from the trouble and inconvenience incident thereto. Williams *v.* Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000. But see Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391.

19. Caldwell *v.* Atlantic, etc., Railroad, 55 S. E. 131, 75 S. C. 74.

20. A railroad company is bound only to keep its waiting room open for a reasonable time before and after the departure of the train, and ticket holders allowed to remain therein during the night have no cause of action because the same is not kept heated and lighted; but, where the gist of the action is the failure to stop the train to take on passengers, they are entitled to recover the damages naturally flowing therefrom, including sickness resulting from being compelled to remain overnight in an unheated and unlighted station. Brown *v.* Georgia, etc., R. Co., 46 S. E. 71, 119 Ga. 88.

21. Martin *v.* Columbia, etc., R. Co., 32 S. C. 592, 53 S. C. 597, 10 S. E. 960.

22. Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391. Compare Williams *v.* Carolina, etc., R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

23. Peculiar bodily condition of plaintiff provable in aggravation of damages.—Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

24. Damages recoverable for failure to stop train a sufficient time.—Mobile, etc., R. Co. *v.* Reeves, 80 S. W. 471, 25 Ky. L. Rep. 2236.

25. Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 668.

26. Failure to return to passenger that part of his ticket entitling him to transportation by a connecting carrier.—St. Louis, etc., R. Co. *v.* Cates, 87 Ark. 162, 112 S. W. 202.

§ 3386. Delay in Transportation.—In the absence of peculiar circumstances, a passenger is entitled only to reasonable compensation for the damages he has sustained by reason of failure to transport him to his destination promptly.[27] The carrier in such case is liable for the damages actually sustained by the passenger as the direct and necessary result of its negligence.[28] This includes the value of the time lost by the passenger,[29] and the reasonable expenses to which he has been put,[30] because of the delay. But the passenger is not entitled to actual damages, unless he shows some pecuniary injury or personal injury,[31] and is not entitled to damages for inconvenience, loss of time, or fatigue, unless some pecuniary damage or personal loss has resulted therefrom.[32] And no damages can be recovered for physical injuries which are not the proximate result of the carrier's negligence.[33]

27. Passenger entitled only to reasonable compensation for damages sustained.—Chicago, etc., R. Co. *v.* Fisher, 66 Ill. 152; Illinois Cent. R. Co. *v.* Head, 119 Ky. 809, 27 Ky. L. Rep. 270, 84 S. W. 751, 15 R. R. R. 283, 38 Am. & Eng. R. Cas., N. S., 283; Southern R. Co. *v.* Marshall, 111 Ky. 560, 23 Ky. L. Rep. 813, 64 S. W. 418; Cooley *v.* Pennsylvania R. Co., 40 Misc. Rep. 239, 81 N. Y. S. 692; Van Buskirk *v.* Roberts, 31 N. Y. 661; Coleman *v.* Southern R. Co., 138 N. C. 351, 50 S. E. 690.

28. Carrier liable for damages sustained as direct and necessary result of its negligence.—A railroad company, which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure for the damages actually sustained by him as the direct and necessary result thereof. Savannah, etc., R. Co. *v.* Bonaud, 58 Ga. 180.

29. Value of time lost by passenger.—Cincinnati, etc., R. Co. *v.* Raine, 130 Ky 454, 113 S. W. 495, 19 L. R. A., N. S., 753.

30. Reasonable expenses to which passenger has been put.—Indianapolis, etc., R. Co. *v.* Birney, 71 Ill. 391; Illinois Cent. R. Co. *v.* Head, 119 Ky. 809, 27 Ky. L. Rep. 270, 84 S. W. 751, 15 R. R. R. 283, 38 Am. & Eng. R. Cas., N. S., 283; Southern R. Co. *v.* Marshall, 111 Ky. 560, 23 Ky. L. Rep. 813, 64 S. W. 418; Cincinnati, etc., R. Co. *v.* Raine, 130 Ky. 454, 113 S. W. 495, 19 L. R. A., N. S., 753; VanHorn *v.* Templeton, 11 La. Ann. 52; Coleman *v.* Southern R. Co., 138 N. C. 351, 50 S. E. 690; Turner *v.* Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, 5 Am. & Eng. R. Cas., N. S., 238.

31. Actual damages not recoverable in absence of pecuniary or personal injury.—Miller *v.* Southern R. Co., 48 S. E. 99, 69 S. C. 116.

32. Miller *v.* Southern R. Co., 48 S. E. 99, 69 S. C. 116.

Loss of vote not an element of damages.—In an action against a carrier for failing to carry plaintiff to a certain place and return him in time to transact certain business and to vote at the general election, the loss of plaintiff's vote could not be included as an element of damages where his right to vote had not been questioned, and no humiliation or indignity was offered him, and the defendant purely through accidental happening failed to return plaintiff in time. Morris *v.* Colorado Mid. R. Co., 109 Pac. 430, 48 Colo. 147, 31 L. R. A., N. S., 1106, 20 Am. & Eng. Ann. Cas. 1006.

Damages that might have been averted by payment for sleeping car accommodation.—A passenger, who purchased a through ticket, but who, through inadvertence of the ticket agent, was not informed as to a necessary change, or that the train for a part of the route was a train carrying only sleeping cars for which there would be an extra fare, but whose damages and inconveniences in waiting overnight in a station might have been averted by the payment of $5 for sleeping car accommodation, and who shows no reason why he did not do so, is entitled to recover no more than $5. Hunter *v.* Southern Railway, 90 S. C. 507, 73 S. E. 1017.

33. Physical injuries not the proximate result of carrier's negligence.—When a passenger was required to alight at night at an intermediate station because she had not been placed on the right train, she appeared to be in good health. She went to a hotel, took a room, and, after a while, ordered a fire, remaining there without sleep all night, when she returned to the place from whence she started. She contracted a violent cold which seriously affected her. Held, that such physical condition was not the proximate result of the carrier's default, and that her measure of damages was the expense incurred and the value of the time lost by the delay. Cincinnati, etc., R. Co. *v.* Raine, 113 S. W. 495, 130 Ky. 454, 19 L. R. A., N. S., 753.

Where a person purchased a ticket on the statement of the ticket agent that the train she was about to take made close connections at a certain point with another train going to her place of destination, which statement was erroneous, and such person, on arriving at such connecting point, was obliged to wait some time for such connecting train, and thereupon, in the face of a storm, and in her delicate state of health, she procured a buggy, and drove over a rough road to her father's house, she could not recover

Negligent Delay in Furnishing Transportation.—Where a railroad company merely contracts to furnish transportation, without being notified what the trip is for, the measure of damages for its negligent delay in furnishing it is mere compensation for the loss of time and for any reasonable expenses incurred during the delay.[34]

§ 3387. Getting Off at Wrong Station or Place by Direction of Carrier's Employees.—Where a passenger, by direction and through the negligence of the carrier's employees, gets off a train or car at a station or place other than his destination, the carrier is liable for at least nominal damages;[35] and the passenger is entitled to substantial damages for any inconvenience, sickness, or injury directly flowing from such negligent action of the carrier's employees.[36]

§ 3388. Failure to Carry to Destination.—Where a carrier fails to complete its contract of carriage, it is liable in damages for what the passenger necessarily expended in completing the trip from the place where he was abandoned,[37] including the amount of his living expenses at such place,[38] to-

for the injuries resulting from such drive. Fowlks *v.* Southern R. Co., 32 S. E. 464, 96 Va. 742.

34. Measure of damages for negligent delay in furnishing transportation.—Illinois Cent. R. Co. *v.* Head, 119 Ky. 809, 27 Ky. L. Rep. 270, 84 S. W. 751, 15 R. R. R. 283, 38 Am. & Eng. R. Cas., N. S., 283.

35. Damages recoverable where passenger gets off at wrong station or place by direction of carrier's employees.—Where a carrier agrees that a passenger may be put off at an intermediate point before reaching the destination to which fare was paid, and the servants of the carrier are guilty of negligence in putting the passenger off at a point not agreed on, the carrier is liable for at least nominal damages. Williamson *v.* Central, etc., R. Co., 56 S. E. 119, 127 Ga. 125.

36. Where the conductor called the name of plaintiffs' destination about three miles before it was reached, and the auditor told them that they were at that station, and to prepare to get off, and, upon the train stopping in the country, they got off in the presence of the conductor and auditor, who did not notify them of their mistake, and had to walk to their destination, they were entitled to substantial damages for the inconvenience, sickness, or injury directly flowing from the action of the conductor and auditor. St. Louis, etc., R. Co. *v.* Pearson, 88 Ark. 200, 114 S. W. 211.

A passenger who has been put off at the wrong station may recover for a sprained ankle which appears to have been caused by the long walk resulting from the mistake, and the carrying of her baggage, rather than by being forced to alight from the moving train as contended by the passenger. Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349, 29 Ky. L. Rep. 1277.

A pregnant woman, passenger on a railway train, was carelessly directed by the brakeman to leave the train at a station three miles short of her destination. This was on a cloudy night. She could not see the station, and, being a stranger there, she walked until she reached her destination. This exertion brought on a miscarriage and sickness. Held, that the defendant was liable for this injury; and the fact that the employees did not know the delicate state of health of plaintiff's wife at the time of the alleged wrong does not relieve defendant from liability for the actual direct consequences of such wrong. Brown *v.* Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

Where the negligent conduct of a street car conductor in calling a street crossing before his car had arrived at the street announced, thereby inducing a lady passenger to alight at night and during a severe rain storm, at a strange place remote from her destination, if she could not by the exercise of ordinary care have discovered that she was invited by the conductor to disembark at a point short of her destination, she is entitled to recover damages because of illness brought about by exposure to the weather after leaving the car. Georgia, R., etc., Co. *v.* McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A., N. S., 1177.

37. Passenger's necessary expenses in completing trip.—Ransberry *v.* North American Transp., etc., Co., 22 Wash. 476, 61 Pac. 154.

The measure of damages recoverable by a passenger who has purchased a through ticket good over the defendant and its connecting roads where the connecting carrier over which his ticket is good has ceased operation, is the amount which it would have cost him to reach his destination by other means and routes than such connecting line, including reasonable pay for delays, and such special damages as he may have sustained by reason of the delay. Central Railroad *v.* Combs, 70 Ga. 533.

38. Living expenses at place of abandon-

gether with compensation for time lost beyond the reasonable length of time which it would have taken the carrier to carry the passenger to his destination,[39] the value of which is to be computed by the reasonable value of the passenger's services in his usual occupation at the place of destination.[40] In case there is no convenient and expeditious method for the passenger to reach his destination from the place at which he is abandoned, and he returns to the place from which he started, the measure of his damages will be his expenses from his starting place to the point where he was abandoned and return together with his expenses while at the place of abandonment, his necessary expenses on the road, and loss of time in making his passage both ways.[41] If by reason of the unhealthfulness of the place at which he is landed the passenger becomes ill, the expenses of such illness, so far as they are occasioned by the carrier's negligence or breach of duty, are recoverable.[42] Where one purchases a ticket to a particular place, from the station agent of a railroad company, and by his direction enters a departing train which does not stop at such place, and is compelled to get off at an intermediate station, he is entitled to recover the actual damages sustained from the mistake of the agent.[43]

§ 3389. Carrying beyond Destination.—Where a passenger is carried beyond his destination without fault on his part, he has a right of action for at least nominal damages,[44] and he is entitled to recover such actual damages as he

ment.—Bullock *v.* White Star Steamship Co., 30 Wash. 448, 70 Pac. 1106.

In a suit against a carrier for landing plaintiff and his employees at a point short of their destination, whereby he was compelled to remain for some time at that point, and to furnish an outfit and supplies to take himself and party to his destination, the amount of his own and the party's living expenses at the point where he was landed, and the cost of the supplies and outfit, were proper elements of damage. Bullock *v.* White Star Steamship Co., 70 Pac. 1106, 30 Wash. 448.

39. Compensation for time lost.—Ransberry *v.* North American Transp., etc., Co., 22 Wash. 476, 61 Pac. 154.

40. How value of time lost is to be computed.—Ransberry *v.* North American Transp., etc., Co., 22 Wash. 476, 61 Pac. 154.

In determining the value of plaintiff's services, the jury should take into consideration the question of whether or not plaintiff would have procured employment, had he been at his place of destination during the time he was delayed. Ransberry *v.* North American Transp., etc., Co., 61 Pac. 154, 22 Wash. 476.

41. Measure of damages where carrier returns to place from which he started.—Central Railroad *v.* Combs, 70 Ga. 533; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333, affirming 29 Barb. 491.

42. Expenses of illness.—Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333, affirming 29 Barb. 941.

In an action against a carrier to recover damages for failing to carry plaintiff from New York to San Francisco via Nicaragua, held, that the time the plaintiff lost by reason of his sickness after he returned to New York, and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence or breach of duty, were legitimate and legal damages, which the plaintiff was entitled to recover. Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333, affirming 29 Barb. 491.

43. Damages recoverable where passenger takes wrong train by direction of station agent.—Alabama, etc., R. Co. *v.* Heddleston, 82 Ala. 218, 3 So. 53.

44. Passenger has right of action for at least nominal damages.—Sappington *v.* Atlanta, etc., R. Co., 127 Ga. 178, 56 S. E. 311; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

A railroad company is liable for nominal damages for negligence for carrying beyond his destination, by failure of the conductor to stop the train at a regular station on its line, a passenger who has paid his fare, even in the absence of a local statute requiring this to be done, and imposing liability for neglect of such duty, as provided in the North Carolina statute. Code, § 1963. Cable *v.* Southern R. Co., 29 S. E. 377, 122 N. C. 892.

In an action for the violation of a contract by a carrier with a passenger by carrying her by her station, where the actual damages consist simply of loss of time and inconvenience, compensatory damages of a nominal amount will be allowed. Judice *v.* Southern Pac. Co., 16 So. 816, 47 La. Ann. 255.

Facts only warranting recovery of nominal damages.—Where a passenger was carried beyond her destination, without circumstances of aggravation or personal injury, and suffered an unimportant delay of two hours, there being nothing to show the value of time and labor lost, nominal damages are all that can be recovered. Texarkana, etc., R. Co. *v.* Anderson, 53 S. W. 673, 67 Ark. 123. See, also, South-

has sustained as the natural and proximate result of the carrier's negligence,[45] which include loss of time,[46] inconvenience,[47] discomfort,[48] bodily pain,[49] illness,[50] and expenses,[51] proximately resulting from the carrier's conduct. But

ern R. Co. *v.* Bryant, 105 Ga. 316, 31 S. E. 182.

Where, in an action against a carrier for failure to stop at a passenger's destination, he alleged that in consequence of such breach of duty he suffered great physical and mental pain and was put to great trouble and expense, and, having a large amount of money on his person, was put in great fear, etc., but the evidence showed that after leaving the train he walked directly to his home and was only compelled to walk about a mile further than he would have walked had he alighted at his destination, and there was no evidence that he suffered mental or physical pain, or that he had a large amount of money as alleged, or was compelled to go through a lonely country, etc., he was, at most, entitled to recover only nominal damages. Blackburn *v.* Alabama, etc., R. Co., 39 So. 345, 143 Ala. 346. See post, "Mental Suffering," § 3390.

45. Actual damages, the natural and proximate result of carrier's negligence, are recoverable.—Central, etc., R. Co. *v.* Dorsey, 116 Ga. 719, 42 S. E. 1024; Brown *v.* Georgia, etc., R. Co., 119 Ga. 88, 46 S. E. 71; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

The measure of damages for carrying a passenger beyond his station is compensation merely for the actual loss sustained, in the absence of some element of gross disregard of his rights, or of facts showing insult or abuse. Central, etc., R. Co. *v.* Morgan, 161 Ala. 483, 49 So. 865.

Facts rendering carrier liable for all damages directly attributable to conductor's tortious conduct.—Relatively to a female passenger on a railway train, who is partially blind, and who informs the conductor of her infirmity and requests him to assist her in alighting from the train when it reaches her destination, which he promises to do, if the conductor, despite his promise, signals the train ahead before the passenger has had a reasonable opportunity to reach the platform of the car, and she is in consequence carried beyond the station and then put off at a point some distance therefrom, the carrier is liable to respond for all damages directly attributable to the tortious conduct of its conductor. Southern R. Co. *v.* Hobbs, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68.

Damages held not to be the natural and proximate result of carrier's negligence.—The damage claimed because of the loss of the services and companionship of the plaintiff's wife, and because of the expense incurred in giving her medical attention, were not the natural consequences of a breach of a duty by a railroad company in failing to stop its train at the station to which the plaintiff had a ticket, in order to give him an opportunity to alight, and were too remote to be the basis of recovery. Sappington *v.* Atlanta, etc., R. Co., 127 Ga. 178, 56 S. E. 311.

When, through the negligence of a conductor, a passenger has been carried beyond her destination, the conductor has no authority, unless it is expressly conferred, to constitute the proprietor of a hotel, who is not connected with the railroad company, its agent for the purpose of providing safe and comfortable lodging for the passenger until it can transport her back to her destination. The company is not liable for any injuries or damage to such passenger sustained while at the hotel, in consequence of any negligence on the part of the proprietor. In such a case its negligence in carrying her past her destination can not be considered the natural and proximate cause of injuries received by her at the hotel. Central, etc., R. Co. *v.* Price, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246.

46. Loss of time.—Simmons *v.* Seaboard, etc., Railway, 120 Ga. 225, 47 S. E. 570; Dalton *v.* Kansas, etc., R. Co., 78 Kan. 232, 96 Pac. 475, 17 L. R. A., N. S., 1226, 16 Am. & Eng. Ann. Cas. 185; Louisville, etc., R. Co. *v.* Gaddie, 31 Ky. L. Rep. 502, 102 S. W. 817; Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512.

47. Inconvenience.—East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315; Southern R. Co. *v.* Humphries, 108 Ga. 591, 34 S. E. 283; Simmons *v.* Seaboard, etc., Railway, 120 Ga. 225, 47 S. E. 570; Dalton *v.* Kansas, etc., R. Co., 78 Kan. 232, 96 Pac. 475, 17 L. R. A., N. S., 1226, 16 Am. & Eng. Ann. Cas. 185; Louisville, etc., R. Co. *v.* Gaddie, 31 Ky. L. Rep. 502, 102 S. W. 817; Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512.

48. Discomfort.—Central, etc., R. Co. *v.* Morgan, 161 Ala. 483, 49 So. 865.

49. Bodily pain.—Memphis, etc., Packet Co. *v.* Nagel, 15 Ky. L. Rep. 742.

50. Illness.—St. Louis, etc., R. Co. *v.* Knight, 81 Ark. 429, 99 S. W. 684; Louisville, etc., R. Co. *v.* Gaddie, 31 Ky. L. Rep. 502, 102 S. W. 817.

Where a railway company carried a passenger past his destination, and put

51. Expenses.—Central, etc., R. Co. *v.* Morgan, 161 Ala. 483, 49 So. 865; Simmons *v.* Seaboard, etc., Railway, 120 Ga. 225, 47 S. E. 570; Dalton *v.* Kansas, etc., R. Co., 78 Kan. 232, 96 Pac. 475, 17 L. R. A., N. S., 1226, 16 Am. & Eng. Ann. Cas. 185; Airey *v.* Pullman Palace Car Co., 50 La. Ann. 648, 23 So. 512.

he can not recover damages augmented by his own act in negligently exposing himself to hardship.[52] A passenger, recovering damages for being wrongfully carried beyond his destination, is not entitled to recover judgment for attorney's fees.[53]

Getting Back to Destination.—A passenger who is carried beyond his destination may recover from the carrier damages for his trouble and inconvenience in getting back to his destination;[54] and if he is compelled to walk back he may recover for injuries caused or appreciably contributed to thereby,[55] including sickness.[56] In estimating the damages resulting from a passenger being compelled to walk back to his destination, his subsequent acts which would probably aggravate his injuries, should be taken into consideration and also the state of his health before the acts complained of.[57] Where a passenger has been inadvertently informed by the ticket agent that a through train stopped at a small station to which he sold him a ticket, he must use all reasonable means suggested by the conductor, on discovering the mistake, to minimize his damages, and should get off at a station preceding his destination and take the next local train following, and can not recover for injury caused by going to the station next beyond his destination and walking back nine miles through the heat and rain.[58]

him off at a water tank, in inclement weather, and he contracted pneumonia in consequence of the exposure, held, that the pain, expense, and business detriment resulting therefrom were proper items of damage. International, etc., R. Co. *v.* Terry, 62 Tex. 380, 50 Am. Rep. 529.

But in Missouri, it has been held that a passenger, negligently carried beyond her destination, but receiving no personal injury or insult, can not recover for the effect thereof on her health. Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

52. Damages augmented by passenger's negligent act.—St. Louis, etc., R. Co. *v.* Evans, 94 Ark. 324, 126 S. W. 1058.

53. Attorney's fees not recoverable.—St. Louis, etc., R. Co. *v.* Evans, 94 Ark. 324, 126 S. W. 1058.

54. Trouble and inconvenience in getting back to destination.—East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315; Southern R. Co. *v.* Humphries, 108 Ga. 591, 34 S. E. 283.

A passenger need not suffer the inconvenience of remaining overnight away from her home and child, where she can by reasonable effort and inconvenience get home earlier, and when she starts from the station where the carrier permitted her to embark she may choose the nearest route, without regard to the distance back to the station of her destination, and she may recover for the inconvenience of traveling the distance, in addition to the distance she must travel if leaving the station of her destination. St. Louis, etc., R. Co. *v.* Evans, 94 Ark. 324, 126 S. W. 1058.

55. Injuries caused or appreciably contributed to by being compelled to walk back to destination.—Southern R. Co. *v.* Humphries, 108 Ga. 591, 34 S. E. 283; Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Where a passenger carried beyond the station of her destination used such judgment in walking back to the station as appeared reasonable under the circumstances, the carrier was liable for the injuries received; while if her act in walking back was not a reasonably proper one, she could only recover the reasonable expense of procuring a conveyance to take her back, together with the sum which would compensate her for the delay in reaching that station. Chesapeake, etc., R. Co. *v.* Lynch, 89 S. W. 517, 28 Ky. L. Rep. 467.

A girl eight years old, who is carried one mile beyond her destination, and put off at a place with which she is not familiar, may recover against the carrier for damages caused by an attempt to walk rapidly along the track back to the station. East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

56. Plaintiff, a passenger on one of defendant's trains, on a rainy day, was, through oversight of defendant, carried two miles beyond his station. When the train finally stopped, plaintiff walked back. Held, that plaintiff's act in walking back was not negligence, precluding him from recovering damages for sickness resulting therefrom, where he was under the impression that he could not get another train back until the next day, and circumstances made it inconvenient for him to remain on the train. St. Louis, etc., R. Co. *v.* Knight, 81 Ark. 429, 99 S. W. 684.

57. Facts to be considered in estimating damages.—Southern R. Co. *v.* Humphries, 108 Ga. 591, 34 S. E. 283.

58. Duty of passenger to minimize damages.—Carter *v.* Southern Railway, 55 S. E. 771, 75 S. C. 355.

Walking to Reach Proper Lodging.—Where a female passenger has been carried beyond her destination and landed at night at a station from which she has to walk some distance to reach a proper lodging she is entitled to recover such damages as were the proximate result of the act of the carrier in carrying her beyond her destination and landing her, at the time and under the circumstances that it did, where she left the train. In order to estimate these damages, the circumstances by which she was surrounded after she left the train and which were of such a nature as to produce inconveniences, suffering, or hardship on her part may be shown.[59]

§ 3390. Mental Suffering.—The authorities are unanimous in holding that in an action for breach of a contract of transportation if the breach is accompanied by, or is the natural and proximate cause of, physical injury to the passenger, damages may be recovered for mental suffering, if such suffering is an element of the physical injury, or is a necessary consequence of it, or is the natural and proximate result thereof.[60] In some jurisdictions it has been held that this is the limit of recovery for mental suffering in such actions.[61] But in

59. Damages recoverable by female passenger compelled to walk some distance to reach proper lodging.—Dorsey *v.* Central, etc., R. Co., 113 Ga. 564, 38 S. E. 958.

Where a female passenger was carried beyond her station at night and the train stopped near the next station, she having to walk through the town unaccompanied to the house of a friend, she may recover for the fatigue resulting from her walk and the damages resulting therefrom. Central, etc., R. Co. *v.* Dorsey, 116 Ga. 719, 42 S. E. 1024.

60. Failure to stop train at station thereby compelling passenger to walk back.—Mental anguish may be considered, in estimating damages against a railroad company for failure of a conductor to stop the train at a station, whereby a woman passenger was compelled to walk back three miles, and was made ill for several weeks. Kentucky Cent. R. Co. *v.* Biddle (Ky.), 34 S. W. 904.

In an action against a railroad company it appeared that the servants of a train failed to notify plaintiff when the station to which she was going was reached, and that she was carried beyond such place, and that the conductor refused to take the train back to the station, but put her off late at night, at a place two miles from her destination, and left her in charge of two strange negroes, to be conducted back to the station, and that she was compelled to walk back over dangerous bridges, and over almost impassable roads, in great danger and in great terror. Held that, in estimating damages, the jury could consider the sex of the plaintiff, the peril in which she was placed, and her mental and physical sufferings on account of the defendant's act. Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Carrying passenger beyond destination and compelling him to leave train between stations.—Where a passenger is carried beyond his destination without fault on his part, he has a right of action for at least nominal damages, and for such actual damages as he may have sustained; and if, without his consent, he is compelled to leave the train between stations, the jury may, in estimating damages, consider not only bodily pain, but connected with it mental suffering, anxiety, and a sense of wrong received as a result of the injury. Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

61. Damages not recoverable for mental suffering unconnected with physical injury.—Kansas, etc., R. Co. *v.* Dalton, 65 Kan. 661, 70 Pac. 645; Black *v.* Atlantic, etc., R. Co., 82 S. C. 478, 64 S. E. 418; Martin *v.* Columbia, etc., R. Co., 32 S. C. 592, 53 S. C. 597, 10 S. E. 960.

Failure to stop at flag station.—Where it was not claimed that a carrier's failure to stop at a flag station for a passenger was accompanied by contumely or personal abuse, no recovery for injury to feelings or insult can be had. Berley *v.* Seaboard, etc., Railway, 65 S. E. 456, 83 S. C. 411.

Carrying beyond destination.—A passenger on a railway, negligently carried beyond her destination, but receiving no personal injury or insult, may not recover for anxiety. Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

In an action for damages in carrying a passenger beyond her destination in the nighttime, no recovery can be had for mental suffering unaccompanied by physical injury. Kansas, etc., R. Co. *v.* Dalton, 70 Pac. 645, 65 Kan. 661; Smith *v.* Wilmington, etc., R. Co., 41 S. E. 481, 130 N. C. 304.

Delay in transportation.—Where plaintiff, a passenger, was merely required to transfer at Y. from a train of defendant railroad not scheduled to stop at P., the station for which she bought a ticket, was delayed only one hour and thirteen minutes in reaching P., and was not delayed in reaching her ultimate destination, and

other jurisdictions a broader rule has been laid down, and damages are allowed for mental suffering that is not connected with physical injury.[62] All

it appeared that the waiting room accommodations at Y. were superior to those at P., and that plaintiff suffered no bodily injury, and was not subjected to any discourtesy, and there was no evidence of wanton misconduct by the company's servants, plaintiff was not entitled to recover for mental suffering. Black *v.* Atlantic, etc., R. Co., 64 S. E. 418, 82 S. C. 478.

But while, in an action for injury to a passenger from delay in carriage, there can be no recovery for mere mental suffering, disconnected from bodily injury resulting from the carrier's negligence, yet she may recover for nervous breakdown directly due to such negligence. Taber *v.* Seaboard, etc., Railway, 62 S. E. 311, 81 S. C. 317.

62. Breach of contract and threat to eject from train.—In an action against a carrier for its breach of contract of transportation and its threat to eject plaintiff from the train, compensatory damages for the humiliation suffered are recoverable. Illinois Cent. R. Co. *v.* Fleming, 146 S. W. 1110, 148 Ky. 473; Illinois Cent. R. Co. *v.* Roberts, 146 S. W. 1113, 148 Ky. 478.

Refusal to accept person holding ticket.—Where a carrier refuses through the mistake of its agents to accept a person holding a ticket, though such refusal is not accompanied by harshness or rudeness, the passenger may recover for wounded feelings. Hughes *v.* Western Railroad, 61 Ga. 131.

Wrongfully and wantonly excluding passenger from car.—Where a person seeking passage in a particular car in a railroad train is wrongfully and wantonly excluded therefrom, he may recover, in addition to the actual damages, something for the indignity, vexation, and disgrace to which he was subjected by reason thereof. Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185, 8 Am. Rep. 641.

Selling wrong ticket to woman unaccustomed to traveling.—A railroad company selling the wrong ticket to a woman unaccustomed to traveling is liable for mental anguish suffered by her while waiting in a city in which she was a stranger, and where she was compelled to ask a hotel man to keep her until she could get money to pay her bill. Texas, etc., R. Co. *v.* Armstrong, 51 S. W. 835, 93 Tex. 31.

Compelling white passenger to ride in coach set apart for negroes.—Where a white passenger is wrongfully compelled by the conductor to go into the colored coach and ride with negroes therein, mortification and humiliation of feeling are elements of damage. Louisville, etc., R. Co. *v.* Ritchel, 147 S. W. 411, 148 Ky. 701, 41 L. R. A., N. S., 958, Ann. Cas. 1913E, 517; Norfolk, etc., R. Co. *v.* Stone, 111 Va. 730, 69 S. E. 927.

Abuse and threats by conductor in requiring passenger to pay fare twice.—Where, in an action by a passenger for substantial damages for being required to pay his railroad fare twice, plaintiff proved that the conductor, in the presence of other passengers, accused plaintiff of trying to cheat the company out of a fare, and threatened to put him off, and that to stop the abuse, but under protest, he paid the fare a second time, and defendant's testimony contradicted this, with the exception of the collection of the fare a second time, which defendant claimed was done under a mistake, the court erred in instructing to find for plaintiff to the amount of the fare collected the second time, there being testimony sustaining plaintiff's cause of action for substantial damages commensurate with the injury. Strull *v.* Louisville, etc., R. Co., 76 S. W. 181, 25 Ky. L. Rep. 678.

Failure to stop at station long enough to allow passenger to get off.—In an action against a railroad company for damages resulting from its failure to stop its train at a station long enough to allow a passenger to get off, plaintiff is entitled to recover for mental suffering which is the direct and immediate consequence of the wrongful act. Dawson *v.* Louisville, etc., R. Co., 6 Ky. L. Rep. 668.

Compelling passenger to leave train away from station.—Plaintiff was ordered by the conductor to leave the train on which she was a passenger at a point several hundred feet from the station, and compelled to walk along a side track crossing a highway on an open culvert. Owing to the darkness, she fell into the culvert, receiving injuries, and was frightened by the backing of trains on the track towards her while attempting to extricate herself. Held, that she could recover for the fright and for such other mental suffering as was the result of defendant's negligence. Stutz *v.* Chicago, etc., R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 739.

Putting passenger off at wrong station.—Though the circumstances connected with the putting off of a passenger at a wrong station may not warrant the assessment of punitive damages, any mortification and humiliation resulting therefrom may properly be considered as an element of damages. Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349, 29 Ky. L. Rep. 1277.

Carrying beyond destination.—In an action by a passenger against a carrier for having been carried beyond the point of destination, mental suffering is an element of compensatory damages. Mem-

the authorities, however, sustain the rule that it is essential to the recovery of damages for mental suffering that such suffering should be the natural and proximate result of the injury for which the suit is brought.[63]

§ 3391. Special Damage Dependent on Knowledge of Circumstances.—In an action against a carrier for breach of its contract of transportation, the general rule is that special damages suffered by the passenger can not be recovered except upon proof that the carrier had notice, at the time of the contract, of the special circumstances out of which such damages arose.[64]

phis, etc., Packet Co. *v.* Nagel, 15 Ky. L. Rep. 742.

Where plaintiff is carried beyond her destination by no fault of her own, but by failure of the carrier's agent to perform his duty, the company is liable in damages for whatever vexation, and anxiety she may have suffered in consequence of such wrongful act in returning to the point of destination. Louisville, etc., R. Co. *v.* Quick, 28 So. 14, 125 Ala. 553.

A young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she is not familiar, would naturally be frightened by her condition and surroundings, and for damages resulting from such fright, a recovery may be had. East Tennessee, etc., R. Co. *v.* Lockhart, 79 Ala. 315.

But in Georgia it has been held that damages for mental anguish or wounded feelings arising solely from the circumstance that the passenger has been negligently carried beyond his destination are not recoverable, where he has sustained no injury to his person or his purse by receiving bodily hurt or being subjected to insult, abuse, or humiliation. Sappington *v.* Atlanta, etc., R. Co., 127 Ga. 178, 56 S. E. 311.

63. Mental suffering held not the natural and proximate result of injury complained of.—Where defendant's conductor failed to give plaintiff's wife a slip authorizing the next conductor to transport the wife to her destination, whereby such second conductor failed to honor her mileage ticket, defendant was not liable for the mental suffering arising out of the fact that the wife was compelled to borrow the sum of $3 from a fellow passenger in order to complete her journey; the injury resulting therefrom not being one which the first conductor would be likely to have foreseen would result from his negligent omission to give the slip. Judgment 91 S. W. 621, reversed in Missouri, etc., R. Co. *v.* Welch, 100 Tex. 118, 94 S. W. 333.

In an action against a carrier for carrying plaintiff beyond her destination, the anxiety caused by her exposure to rain and cold after being returned to her destination are not proper elements of damage. Louisville, etc., R. Co. *v.* Quick, 28 So. 14, 125 Ala. 553.

In an action against a carrier for breach of a contract to carry a passenger to his destination, damages for anxiety on the part of the passenger, caused by the delay, are not recoverable. Turner *v.* Great Northern R. Co., 46 Pac. 243, 15 Wash. 213, 55 Am. St. Rep. 883, 5 Am. & Eng. R. Cas., N. S., 238.

Where a railway passenger is wrongfully refused transportation he is entitled only to nominal damages and costs, where he suffers no actual injury excepting claimed mental anguish on account of being separated from his family. St. Louis, etc., R. Co. *v.* Groce, 99 Ark. 420, 138 S. W. 879.

Plaintiff was delayed eight or ten hours in his journey which he was making to see a sick brother. Held, that mental suffering caused by delay in seeing his brother was too remote to be considered as an element of damage. Hot Springs R. Co. *v.* Deloney, 45 S. W. 351, 65 Ark. 177, 67 Am. St. Rep. 913.

Nervous prostration held not the natural and probable consequence of carrier's negligence.—Plaintiff and two small children were compelled on a dark night to alight from defendant's train away from the station, so that a cattle guard was between them and the depot, and the brakeman informed plaintiff that she would have to cross the cattle guard. A friend of plaintiff saw her alight, and, when the train passed, assisted her across the cattle guard, and accompanied her to her father's house. Plaintiff was acquainted in the village, and knew the location of the depot. Held, that nervous prostration, alleged to have been caused by reason of the fright which plaintiff sustained on discovering that she had to cross the cattle guard, was not the natural and probable consequence of defendant's negligence. St. Louis, etc., R. Co. *v.* Bragg, 64 S. W. 226, 69 Ark. 402, 86 Am. St. Rep. 206.

64. Special damages recoverable only where carrier had notice of the special circumstances.—Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236. See, also, Story *v.* Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349.

In an action against a carrier for failing to stop its train at a passenger's destination, the testimony of the passenger that, when he paid the fare to the ticket collector, he stated that he wanted to go

Where a carrier fails to stop its train to take up a passenger at a flag station, there can be no recovery for any increased injury or suffering arising from the passenger's illness, in the absence of notice thereof to the carrier.[65] In order to hold a carrier for damages beyond those that accrue from his negligent delay naturally and in the order of things, he must be informed of the special circumstances which make promptness on his part important to the passenger and which may occasion exceptional damages as the result of the delay. In other words, both parties to the contract must be fully informed as to the circumstances and the reasons why it is important to the passenger to arrive at his destination on or about schedule time.[66] Thus, where a carrier had no notice of the special engagements or business of a passenger, it is not responsible for a delay in his transportation which might have, if such a notice had been given in time, been avoided.[67] Where a passenger is carried beyond, and put off at a place other than his destination, the carrier is not liable in damages for any injury to him after he has left the train, which is not the natural and probable result of its putting him off where it did, and which arises from circumstances of which it had no knowledge.[68] But where a passenger is negligently carried past his sta-

to the station of his destination, did not alone show that the carrier had notice of the passenger's special business engagement there, and evidence of loss arising from his failure to meet the business engagement was properly excluded under the rule that special damages are recoverable only on allegation and proof that the carrier had notice of the special circumstances at the time of the contract. Martin *v.* Southern Railway, 89 S. C. 32, 71 S. E. 236.

65. Failure to stop at flag station—Increased injury arising from illness.—Berley *v.* Seaboard, etc., Railway, 83 S. C. 411, 65 S. E. 456. See, also, Story *v.* Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349. But see Louisville, etc., R. Co. *v.* Roney (Ky.), 127 S. W. 158.

66. When special damages resulting from delay are recoverable.—North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. Ed. 1061; Booth *v.* Spuyten, etc., Mill Co., 60 N. Y. 487; Cooley *v.* Pennsylvania R. Co., 40 Misc. Rep. 239, 81 N. Y. S. 692; DeLeon *v.* McKernan, 25 Misc. Rep. 182, 54 N. Y. S. 167.

Where a railroad company merely contracts to furnish transportation, without being notified what the trip is for, the measure of damages for its negligent delay in furnishing it is merely compensation for the loss of time and for any expenses incurred during the delay. Illinois Cent. R. Co. *v.* Head, 84 S. W. 751, 27 Ky. L. Rep. 270, 119 Ky. 809, 15 R. R. R. 283, 38 Am. & Eng. R. Cas., N. S., 283.

67. Georgia R. Co. *v.* Hayden, 71 Ga. 518, 51 Am. Rep. 274. In this case it appeared that a theatrical manager purchased tickets for himself and troupe over a railroad, at the terminus of which they were to take a connecting train and proceed to a point at which a performance was to be given; and that there had been tickets sold to such performance. There had been a collision of other trains on the first railroad, and plaintiff's train was delayed, so as to miss connection with the next train, and plaintiff failed to reach his destination, and the amount received for the tickets sold was refunded. At the point of delay, late at night, plaintiff first notified the carrier by telegram of his arrangements, but it did not appear that the telegram was received in time to remedy the situation. It was held that the damages resulting from the character of the business of the passenger, being unknown to the carrier contracting with him, were too remote to be recovered.

The mere fact that a railroad passenger agent knows that a theatrical troupe taking passage expects to play at its destination at a certain time does not make loss of profits on such engagement an element of damages where the train is delayed by accident. Southern R. Co. *v.* Myers, 87 Fed. 149, 32 C. C. A. 19.

Where a carrier's ticket agent is fully and repeatedly informed that it is necessary for one and his attorneys to be in attendance at a certain place by a certain time on a matter of importance, and that if they can not so arrive by his road they will go by another, and he guarantees connection at B., and consequent seasonable arrival at destination, the expense of a special train from B., to overtake the train, which had left there before their arrival, was in the contemplation of the parties when making the contract, so as to be recoverable as damages. Hayes *v.* Wabash R. Co., 128 N. W. 217, 163 Mich. 174, 31 L. R. A., N. S., 229.

68. Injury to passenger carried beyond destination after he has left train.—Central, etc., R. Co. *v.* Dorsey, 116 Ga. 719, 42 S. E. 1024.

Where a female passenger on a railroad was carried beyond her station, and the train stopped near the next station, and the passenger walked at night and without escort through the town to the house of a friend, it was held that she could not

tion, and is compelled to remain in a cold, unlighted depot for several hours, when he drives to the place where he desired to stop, and from the exposure sustains severe injuries, the carrier is liable for any injuries which it should have reasonably foreseen would have resulted from the exposure incident to his return.[69]

§§ 3392-3399. Exemplary or Punitive Damages—§ 3392. In General.—In an action by a passenger against a carrier for breach of its obligations as such, exemplary or punitive damages are not recoverable for mere neglect of duty unaccompanied by circumstances of aggravation.[70] But where

show that she was frightened by hearing loud voices of negro men who were walking behind her, unless it also appeared that the locality was one in which such occasion for fright was likely to occur, and that the railroad company had notice of this. Central, etc., R. Co. *v.* Dorsey, 42 S. E. 1024, 116 Ga. 719. See, also, S. C., 113 Ga. 564, 38 S. E. 958.

But in an action for carrying a passenger past her destination, damages for a miscarriage resulting from her difficulties in reaching home, were held to be recoverable, though notice of her condition was not brought home to defenadnt. Louisville, etc., R. Co. *v.* Roney (Ky.), 127 S. W. 158.

69. St. Louis, etc., R. Co. *v.* Ricketts, 70 S. W. 315, 96 Tex. 68.

70. Exemplary damages not recoverable for mere neglect of duty.—Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

In an action by a passenger against a common carrier for neglect of duty, a mere neglect of duty, unattended with any circumstances of insult, of aggravation of feelings, of injury to the person or property of the passenger, or of bodily or mental suffering, will not justify exemplary damages. Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

In the absence of recklessness, willfulness, or insult, a railroad company is not liable to a passenger for exemplary damages. Chicago R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Error in issuing round trip ticket.—The error of a railway ticket agent in issuing a round trip excursion ticket, so that the same will be void for return passage after a day prior to its issuance is not such gross negligence as warrants the imposition of punitive damages, when the ticket was issued on a call involving great haste, and was taken from him by the purchaser while he was looking it over to correct errors. Illinois Cent. R. Co. *v.* Moore, 79 Miss. 766, 31 So. 436.

Failure to stop train a sufficient time to allow passenger to board it.—In Memphis, etc., R. Co. *v.* Green, 52 Miss. 779, it appeared that plaintiff purchased from defendant carrier a ticket entitling him to a passage on its train from S. to C. He was at the depot at train time, as indicated by the schedule. The train ran sixty yards beyond the platform, halted only a moment, not long enough to afford him time to get aboard. A freight train arrived on the same day, and conveyed him to his destination. No damages were proved except disappointment, delay, and inconvenience. It was held that punitive damages could not be recovered.

Where a passenger having purchased a ticket succeeded in getting her oldest child on the train while it stopped at a depot, when the train moved out and left her and the other two children, and on discovering the child on board the train was stopped 100 to 200 yards from the depot, and the child was put off, and no endeavor was made to run the train back, nor did the passenger make any effort to get to the train when it stopped, she was not entitled to exemplary damages from the railroad company. Choctaw, etc., R. Co. *v.* Cantwell, 78 Ark. 331, 95 S. W. 771.

Failure to wait for passenger where wreck necessitates change of trains.—A wreck necessitated passengers walking about one hundred yards. Plaintiff, a passenger, with her infant, was twice notified by the conductor to alight, but, being reluctant to wait in the open air, remained with an acquaintance who had offered to assist her off, and across to the other train on its arrival. He was a claim agent of the road, but had nothing to do with the operating of the train. Her train had occasion to back some distance, and on its return the other train had come. She hurried to reach it, but failed, and had to return home on the same train, about twenty miles. The conductor knew she was being left, but being behind time, did not wait for her. There was no rudeness on his part, and only slight discomfort and disappointment on her part were shown. It was held that the carrier was not liable for punitive damages. Alabama, etc., R. Co. *v.* Purnell, 69 Miss. 652, 13 So. 472.

Directing passenger into car which is left standing when train leaves.—Where a passenger who has procured a ticket for himself and family is by the negligent mistake of one of the employees of the railroad directed into a car which is cut off and left standing when the train leaves, one of his children with him being sick at the time, he is entitled to compensatory, but not punitive damages. Norfolk,

the carrier or its agents or employees are guilty of willful, reckless, or wanton negligence, or if their negligence is accompanied by wanton or malicious acts or insulting language, exemplary or punitive damages may be recovered therefor.[71]

etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

Removal to inferior car of passenger having a first class ticket.—Punitive damages are not recoverable by a man who, having paid for a first class ticket on a train, was removed politely, and without unnecessary force, to an inferior car, in which all men unaccompanied by ladies were compelled to ride. Holmes *v.* Carolina Cent. R. Co., 94 N. C. 318.

Taking up round trip ticket without returning return ticket.—Where a conductor, through inadvertance, took up a passenger's round trip ticket without returning the return ticket, and there was no wantonness and disregard of the passenger's rights, the carrier was liable only for actual damages. Illinois Cent. R. Co. *v.* Dodds (Miss.), 53 So. 409.

Mistaken direction of conductor as to passenger's station.—A passenger who gets off at the wrong station in reliance on the mistaken assurance and direction of the conductor, who was new to the line, is not entitled to punitive damages. Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349, 29 Ky. L. Rep. 1277.

Putting passenger off at wrong station.—It was necessary that plaintiff and her five year and nine month old children change cars at H., and she testified that on approaching a certain station the flagman told her it was H., and politely assisted her to alight, but the flagman testified that she was standing in the aisle preparing to alight when he called the station, and assisted her to alight without knowing her destination. The station where plaintiff got off was not H., and when she discovered the mistake she, with her children, was driven back to the station, where she boarded the train, and on the next day went to her destination on the same ticket she had used before. Held, in an action for damages for being put off at the wrong station, that plaintiff could not recover punitive damages. Yazoo, etc., R. Co. *v.* Hughes (Miss.), 50 So. 627.

Failure to carry passenger having excursion ticket back to starting point.—Exemplary damages will not be awarded against a railway company because, by reason of a breaking down of a defective engine, it failed to carry a passenger to whom it had sold an excursion ticket back to his starting point, though the company's equipments were inadequate, as the passenger's action is ex contractu, and not in tort, no personal injury or indignity being inflicted on him. Hansley *v.* Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; S. C., 115 N. C. 602, 20 S. E. 528, 44 Am. St. Rep. 474, 32 L. R. A. 543, distinguishing Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

71. When negligence or wrongful acts of carrier or its servants will warrant allowance of exemplary damages.—Chicago R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Insults by carrier's employees and other persons.—The conductor of a train refused to allow a woman to proceed to her destination unless she would pay her fare, her through ticket having been taken up by another conductor. Having no money, she was unable to do this, and was therefore compelled to leave the train, and spend the night in a depot, where she was insulted, both by an employee of the carrier and by others. Held, that the passenger might recover punitive damages if any of the carrier's agents or employees, on duty as such, were insulting in conduct or manner towards the passenger while she was in or about the carrier's train or depot, or if the carrier willfully exposed her to insults of other persons in its depot. Louisville, etc., R. Co. *v.* Grundy, 12 Ky. L. Rep. 293.

Failure to hold train after promising to do so.—Exemplary damages can be recovered against a railroad where the conductor of its passenger train, on being told by the station agent that he had checked plaintiff's baggage, but had not had time to get him a ticket, and that plaintiff would pay him on the train, told the agent to sell plaintiff a ticket, and he would hold the train, and then, when they were in the station getting the ticket, wantonly and willfully caused the train to leave. Gillman *v.* Florida, etc., R. Co., 31 S. E. 224, 53 S. C. 210.

Failure to give transfer tickets and compelling passengers to leave car.—Plaintiff and wife purchased tickets in a horse car for their place of destination, before reaching which it was necessary to make a transfer. They were transferred personally by the conductor of the first car, but were given no transfer tickets, nor did they know any were necesary, and for their refusal to pay in the second car they were compelled to get off in the mud, and in presence of a number of people. Held, that exemplary damages were recoverable against the company. City, etc., R. Co. *v.* Brauss, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324.

Willfully refusing to give information as to change of cars.—Where a carrier's employees willfully refuse to give a passenger information requested as to a

§ 3393. Failure to Stop Train or Car at Station or Where Proper Signal Is Given.—A railroad company is liable for punitive damages, if it willfully fails to stop for passengers at a regular station.[72] And exemplary or punitive damages may be recovered from a railroad company if its employees willfully, maliciously, wantonly, recklessly, or capriciously fail to stop a train when signaled, at a station where trains should stop on signal.[73] But such damages are not recoverable where the neglect of the carrier's employees to stop the train on signal at such a station is not willful, malicious, wanton, reckless or capricious.[74] Where an employee of a street railroad company fails to stop a car on proper signal from a person at a crossing, and afterwards jeers at, insults, and ridicules such person, who has become a passenger on the return trip, the jury are authorized, in assessing the damages, to allow, not only just compensation for the injury, but to inflict a proper punishment for the company's disregard of public duty.[75]

§ 3394. Refusal of Transportation.—Exemplary damages are not recoverable for the refusal of a carrier through a mistake of its servants to re-

change of cars, the passenger may recover exemplary damages. Lilly *v.* St. Louis, etc., R. Co., 122 Pac. 502, 31 Okla. 521, 39 L. R. A., N. S., 663.

Willfully causing passenger to leave train at place other than that agreed on.—Where a conductor willfully causes a passenger to leave the train at a dangerous place in the nighttime, the same being a place other than that at which he has agreed to stop and allow her to alight, the carrier will be liable for punitive damages. Williamson *v.* Central, etc., R. Co., 56 S. E. 119, 127 Ga. 125.

Obstruction of way from train and malicious conduct of carrier's servants.—As a passenger leaving a train at a station is entitled to an unobstructed way to the waiting room for shelter, she may recover damages for injuries from exposure to a rain storm by reason of the fact that the way was obstructed by a freight train; and where she was laughed at and tantalized by defendant's servants on the train while exposed to the storm, an instruction authorizing punitive damages is proper. Louisville, etc., R. Co. *v.* Keller, 104 Ky. 768, 20 Ky. L. Rep. 957, 47 S. W. 1072.

72. Failure to stop at a regular station.—Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

73. Failure to stop train on signal.—Wilson *v.* New Orleans, etc., R. Co., 63 Miss. 352; Southern R. Co. *v.* Lanning, 83 Miss. 161, 35 So. 417; Willaims *v.* Carolina, etc., R. Co., 57 S. E. 216, 144 N. C. 498, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000; Milhouse *v.* Southern Railway, 52 S. E. 41, 72 S. C. 442, 110 Am. St. Rep. 620.

74. Yazoo, etc., R. Co. *v.* Mitchell, 83 Miss. 179, 35 So. 339; Southern R. Co. *v.* Lanning, 83 Miss. 161, 35 So. 417.

Where a person intending to take passage on a train presents himself at a flag station a reasonable time before the train is due, and by reason of the negligence of the engineer in not keeping a proper lookout he failed to see his signal and stop the train, such person is entitled to the actual damages resulting from the failure to stop the train, but not punitive damages. Williams *v.* Carolina, etc., R. Co., 57 S. E. 216, 144 N. C. 498, 12 L. R. A., N. S., 191, 12 Am. & Eng. Ann. Cas. 1000.

In an action against a railroad company for damages for failure to stop and take up passengers at a flag station, it was error to charge that an award of punitive damages might be made if the engineer could, by the exercise of ordinary care and diligence, have seen the signal to stop and understood it. St. Louis, etc., R. Co. *v.* Garner, 96 Miss. 577, 51 So. 273.

In an action for damages for defendant's failure to stop its railway train at a flag station in response to plaintiff's signal, it was proper to refuse to submit to the jury the question of punitive damages, in the absence of evidence sufficient to authorize a finding that the engineer saw him, and intentionally ran by, in violation of defendant's duty to the public and of plaintiff's rights. Thomas *v.* Southern R. Co., 30 S. E. 343, 122 N. C. 1005.

Where, in an action by a passenger for the failure of a railroad train to stop at a flag station, it appeared that the conductor did not see the passenger's signal, and that the engineer stopped a short distance beyond the station in response to a signal which had been given without his knowledge to enable a passenger to alight, and that he started the train in obedience to the signal of the conductor, after such passenger had alighted, believing plaintiff boarded the train, it was error to submit the question of punitive damages to the jury. Yazoo, etc., R. Co. *v.* Faust (Miss.), 32 So. 9.

75. Failure to stop street car at crossing on proper signal.—Jackson Elect. R., etc., Co. *v.* Lowry, 30 So. 634, 79 Miss. 431.

ceive a person holding a ticket for passage on its trains.[76] Nor are such damages recoverable in a suit by a passenger to recover for the refusal of a conductor, when he boarded the train, to honor the return coupon of a ticket, thereby causing him to remain until a later train, on which it was accepted.[77] But if the refusal to receive on a train a person who has a ticket, and is sober, is attended with undue force, calculated to humiliate him, or accompanied with malice or other willful wrong, the jury may award exemplary damages.[78]

§ 3395. Delay in Transportation.—For delay in transportation, a passenger is not entitled to exemplary damages, unless the carrier's conduct was willful, malicious, or wanton.[79]

§ 3396. Failure to Carry to Destination.—Exemplary or punitive damages are not recoverable for failure to carry a passenger to his destination if the conduct of the carrier or its employees was not willful, malicious, or wanton.[80] But if, in such case, the conduct of the carrier or its employees was such as to show a wanton or willful disregard of duty to the passenger, exemplary damages may be awarded.[81]

76. Refusal of transportation.—Hughes *v.* Western Railroad, 61 Ga. 131; Goins *v.* Western Railroad, 68 Ga. 190.

77. Goins *v.* Western Railroad, 68 Ga. 190.

78. Story *v.* Norfolk, etc., R. Co., 45 S. E. 349, 133 N. C. 59.

79. Delay in transportation.—Miller *v.* Southern R. Co., 69 S. C. 116, 48 S. E. 99; Fort *v.* Southern Railroad, 64 S. C. 423, 42 S. E. 196; Black *v.* Charleston, etc., R. Co., 87 S. C. 241, 69 S. E. 230, 31 L. R. A., N. S., 1184.

A party purchasing transportation from a railroad, who was delayed on the way by reason of a washout known to the railroad agent at the time the ticket was bought, and by the change in the route of a certain train, noncontinuance of another, and the wrong directions of agents, so that he reached his destination four days late, can recover only the actual damages suffered, and not exemplary damages. Illinois Cent. R. Co. *v.* Pearson, 31 So. 435, 80 Miss. 26.

A passenger, on a mixed freight and passenger train, takes passage subject to the delays incident to such trains, and for any unreasonable delay he may recover actual damages; but where there was nothing to show that, when he was accepted, the conductor knew or had reasonable cause to believe that he would not be able to run his train that night, or that he would be ordered to lie over at an intermediate point, punitive damages could not be awarded because of a delay caused by an order to lie over at such point. Black *v.* Charleston, etc., R. Co., 69 S. E. 230, 87 S. C. 241, 31 L. R. A., N. S., 1184. See, also, Fort *v.* Southern Railroad, 64 S. C. 423, 42 S. E. 196.

80. Failure to carry to destination.—Plaintiff purchased a ticket, and boarded a mixed train, and was carried near his destination, when the conductor received orders to take the engine back, which he did. Before it returned, plaintiff walked about a mile to his destination. Held that, there being no proof of willfulness, wantonness, or rudeness, plaintiff was not entitled to exemplary damages. Fort *v.* Southern Railroad, 42 S. E. 196, 64 S. C. 423.

There being no evidence that the train operatives were guilty of willfulness or conscious indifference to circumstances from which malice could be inferred in setting down plaintiffs before reaching their destination, punitive damages could not be recovered. St. Louis, etc., R. Co. *v.* Pearson, 88 Ark. 200, 114 S. W. 211.

Where plaintiff, having been compelled to debark from defendant's train short of his desired destination, suffered no other injury than an expenditure of 50 cents for a hack, and the conductor's act in compelling such debarkation was not attended with any element of aggravation, but was due to a mere unintentional error of judgment, plaintiff could not recover punitive damages. Cook *v.* Southern R. Co., 153 Ala. 118, 45 So. 156.

81. Fort *v.* Southern Railroad, 64 S. C. 423, 42 S. E. 196.

Where, in an action for leaving plaintiff, a passenger, at a station short of her destination, there was evidence justifying an inference that defendant's flagman was guilty of wantonness in directing plaintiff to remove to the wrong car, an instruction that punitive damages could not be claimed was properly refused. Southern R. Co. *v.* Wooley, 158 Ala. 447, 48 So. 369.

Where plaintiff was set down at the wrong station, and after the train had started its operatives heard a call from the passenger, and saw the signal from the station agent to stop, but they failed to do so, though aware of the passenger's predicament, she was entitled to recover punitive damages. Campbell *v.* Seaboard, etc., Railway, 65 S. E. 628, 83 S. C. 448, 23 L. R. A., N. S., 1056.

§§ 3397-3398. Carrying beyond Destination—§ 3397. When Exemplary or Punitive Damages Are Recoverable.—Exemplary or punitive damages will not be awarded against a railroad company for mere negligence in carrying a passenger beyond the place of his destination, or for subsequently refusing to stop the train to let the passenger off, or to back it to the place of his destination, if such negligence or refusal are unaccompanied by circumstances of aggravation.[82] In such case, exemplary damages can not be recovered for mental anxiety occasioned by the separation of the passenger from his family, if the carrier's negligence was not willful or attended with circumstances of malice, insult, or oppression.[83] But where the conduct of a carrier or of its employees in carrying a passenger beyond his destination is willful,[84] wanton,[85] or malicious,[86] or where the passenger after being carried beyond his

82. Exemplary damages not recoverable in absence of circumstances of aggravation.—For the negligence of the conductor of a railroad train in failing to stop at a station, whereby a passenger was carried beyond her destination, the railroad company is liable for compensatory damages only. Louisville, etc., R. Co. *v.* Jackson, 18 Ky. L. Rep. 296, 36 S. W. 173.

If the conductor of a railroad train, confused by unusual circumstances, passes a station, and gives a passenger for that station a free return ticket thereto, the railroad company is liable only for compensatory damages. Chicago R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373.

Where a train fails to stop at a flag station which is a passenger's destination, and he jumps from the train, receiving no injury, he can not recover exemplary damages, but can recover nominal damages only. Kansas, etc., R. Co. *v.* Fite, 67 Miss. 373, 7 So. 223.

Plaintiff and wife were prevented from leaving a train at the rear platform, when they attempted it, by the throng getting on; and, being carried by, the conductor refused to stop and let them off, but promised to send them back from the next station on the next train. He failed to make the arrangement, and plaintiff paid fare. Held, that plaintiff could not recover punitive damages, but only compensation. Mississippi, etc., R. Co. *v.* Gill, 66 Miss. 39, 5 So. 393.

A passenger is not entitled to punitive damages for failure of the carrier to notify her of arrival at her destination, and for refusal to back the train on discovering that she had been carried past her destination, in the absence of any intentional injury, harshness, impoliteness, or rudeness. Yazoo, etc., R. Co. *v.* Hardie, 100 Miss. 132, 55 So. 42, 34 L. R. A., N. S., 740, Ann. Cas. 1914A, 323, suggestion of error denied in 55 So. 967, 34 L. R. A., N. S., 742.

Where a passenger buys a ticket to his station, and under direction of the station agent gets on a train which does not stop there, and his station is passed before the conductor comes to take up the ticket, and he offers to take him on and return him to his station on the next train, but at his request the conductor stops the train several miles beyond his station and he walks back, he can not recover punitive damages. Trapp *v.* Southern Railway, 51 S. E. 919, 72 S. C. 343.

83. Exemplary damages not recoverable for mental anxiety.—Dorrah *v.* Illinois Cent. R. Co., 65 Miss. 14, 3 So. 36, 7 Am. St. Rep. 629.

84. Exemplary damages recoverable where conduct of carrier or its employees is willful.—Birmingham R., etc., Co. *v.* Nolan, 134 Ala. 329, 32 So. 715; Memphis, etc., Packet Co. *v.* Nagel, 15 Ky. L. Rep. 742; S. C., 97 Ky. 9, 16 Ky. L. Rep. 748, 29 S. W. 743.

Where, in an action against a carrier for actual and punitive damages, caused by the acts of defendant's servants in putting a passenger off a train at the wrong station, the evidence was such as to furnish reasonable ground for the jury to infer that, although the train hands heard a call from the passenger and saw a signal from the station agent to stop the train, they failed to do so, though aware of the passenger's predicament, the evidence was sufficient to sustain a verdict for punitive damages. Entzminger *v.* Seaboard, etc., Railway, 60 S. E. 441, 79 S. C. 151.

A passenger, recklessly and willfully carried, against her protest, beyond her destination, may recover punitive damages, under the North Carolina statute, Code, § 1963, providing that passengers shall be put off at the destination to which they have paid, and that carriers shall be liable to the party aggrieved for any neglect or refusal in the premises. Hutchison *v.* Southern R. Co., 52 S. E. 263, 140 N. C. 123.

85. Exemplary damages recoverable where conduct of carrier or its employees is wanton.—Memphis, etc., Packet Co. *v.* Nagel, 15 Ky. L. Rep. 742.

86. Willful and malicious conduct entitling passenger to exemplary damages.—In an action against a railroad company by a passenger for damages, it appeared that she purchased a ticket to a certain station; that she was carried beyond the station without an opportunity to alight;

destination is willfully compelled to get off the train under circumstances injurious to his health, and sickness results therefrom,[87] exemplary or punitive damages are recoverable. And such damages are recoverable if the failure or refusal of a carrier's employees to put a passenger off at his destination is accompanied by insulting conduct towards the passenger.[88] In some jurisdictions it has been held that a passenger may recover punitive damages where he is carried beyond his destination through the gross negligence of the carrier or its employees.[89] But in Georgia the contrary rule prevails.[90] In Louisiana, it has been held that for the violation of a contract by a carrier with a passenger by carrying her by her station punitive damages can not be assessed in the absence of bad faith.[91]

§ 3398. What May Be Considered in Assessing Damages.—The jury, in assessing punitive damages against a carrier for willfully carrying a passenger beyond his station, may consider the station, degree, and circumstances of both parties.[92] In an action by a passenger against a carrier for injuries resulting from refusal of the defendant's conductor to permit plaintiff to alight at his proper station, evidence of language or manners of the conductor amounting to indignity, insult, inhumanity, or oppression should be considered by the jury in fixing exemplary damages.[93]

§ 3399. Excessive Damages.—While in determining whether the damages awarded by the verdict, in an action against a carrier for breach of its con-

that, on the discovery of such fact, she requested the conductor to return to the station; that he refused to do so, and ejected her from the train. Held that, in the absence of proof by defendant of some controlling exigency, the refusal to return to the station and the ejection were willful and malicious, and entitled plaintiff to exemplary damages. Samuels *v.* Richmond, etc., R. Co., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

87. Sickness resulting from passenger being willfully compelled to leave train.—In an action by a passenger to recover damages for injuries, the evidence showed that plaintiff purchased a ticket to a certain point on defendant's road, but that it carried her two to four hundred yards beyond the station, and the conductor of the train on request refused to move the train back to the station, but willfully compelled her to get off the train in a heavy rain storm, with a young baby in her arms, and as a result she got thoroughly wet before reaching the station house, and in consequence became sick. Held sufficient to warrant the giving of exemplary damages. Alabama, etc., R. Co. *v.* Sellers, 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17.

88. Insulting conduct of carrier's employees warrants allowance of exemplary damages.—Memphis, etc., Packet Co. *v.* Nagel, 97 Ky. 9, 16 Ky. L. Rep. 748, 29 S. W. 743; S. C., 15 Ky. L. Rep. 742; Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801; S. C., 6 Ky. L. Rep. 668.

89. Gross negligence as basis for recovery of punitive damages.—In Alabama punitive damages may be recovered of a carrier by a passenger, where through gross negligence of the conductor the passenger was carried by the place at which, when paying her fare, she told the conductor she wanted to get off. Birmingham R., etc., Co. *v.* Nolan, 32 So. 715, 134 Ala. 329.

In Kentucky it has been held that where the failure of employees in charge of a steamboat to put a passenger off at the destination for which she bought a ticket was the result of gross neglect by the employees, the owner of the boat is liable in punitive damages. Memphis, etc., Packet Co. *v.* Nagel, 97 Ky. 9, 16 Ky. L. Rep. 748, 29 S. W. 743. See, also, S. C., 15 Ky. L. Rep. 742.

90. In Georgia it has been held that in an action by a passenger against a carrier for being carried beyond her station, and for exposure on the platform of the car for several minutes on a cold night, where she had been taken by the conductor to await the approach of a train from the opposite direction which would carry her back to her station, where at most the conductor was guilty of gross negligence, but there was no evidence indicating any wanton disregard of plaintiff's rights, an instruction on punitive damages was unauthorized. Southern R. Co. *v.* O'Bryan, 45 S. E. 1000, 119 Ga. 147.

91. In Louisiana punitive damages can not be assessed in absence of bad faith.—Judice *v.* Southern Pac. Co., 16 So. 816, 47 La. Ann. 255.

92. Station, degree and circumstances of both parties.—New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

93. Language or manners of conductor.—Dawson *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 801; S. C., 6 Ky. L. Rep. 668.

tract of transportation, are excessive, the court will be guided by the rules and principles previously stated in this chapter, yet the general rule prevails that the question of the amount of damages to be allowed is one that is within the sound discretion of the jury, and such discretion will not be interfered with unless it is abused. In the appended notes have been collected the cases in which the appellate courts of this country have determined whether particular verdicts, in actions against carriers for damages resulting from a breach of a contract of transportation, are so excessive as to warrant an interference with the discretion vested in the jury. These cases include actions in which damages have been claimed for failure to stop a train at a flag station,[94] for refusal of transportation[95] for refusal to validate the return portion of a ticket,[96] for failure to inform a passenger as to the best and quickest route,[97] for compelling a white passenger to ride in a coach set aside for negroes,[98] for failure (of a street railway company) to give a transfer,[99] for failure to notify a passenger where to change

94. Failure to stop at flag station—Verdict excessive.—Where a passenger, unable to board a train at a flag station because of the failure of the train to stop, though signaled, was caught in a rainstorm, and became sick, and suffered personal injury, a verdict for $1,000 actual damages was excessive. Burns *v.* Alabama, etc., R. Co., 93 Miss. 816, 47 So. 640.

Defendant's train failed to stop for plaintiff at a flag station. She testified that her carriage had been sent back, and she was compelled to walk home about three miles in the rain; that she was taken sick, and compelled to go to bed, and was unable to sit up for six weeks, and suffered great pain, and knew she was in danger of dying, and suffered mental anguish. Held, that $3,333 damages was excessive, and should be reduced to $2,000. Yazoo, etc., R. Co. *v.* Faust (Miss.), 34 So. 356.

Verdict not excessive.—Plaintiff went to a flag station to board a train; but upon his signal it refused to stop. It was late at night, the weather cold and bad, and the roads muddy. He had no means of conveyance, and had to walk home, a distance of seven miles, which made him sick; and he was confined to his bed for some time, suffering severe pain. Held, that a verdict of $250 was not excessive. Southern R. Co. *v.* Wallis, 66 S. E. 370, 133 Ga. 553, 30 L. R. A., N. S., 401, 18 Am. & Eng. Ann. Cas. 67

95. Refusal of transportation—Verdict excessive.—A verdict of $1,000 against a railroad company, in favor of a passenger, for the refusal of the conductor to honor a ticket, due to a misunderstanding, and attended by no aggravating circumstances, and resulting merely in the loss by the passenger of a day's time, the pecuniary value of which was $1.30, is excessive. Goins *v.* Western R. Co., 59 Ga. 426.

Verdict not excessive.—Where a railroad company refused to allow a lady to pass over its road on an excursion ticket, from a mistake on the part of its agents, but allowed her to proceed on the next train, a verdict of $50 was not excessive. Hughes *v.* Western Railroad, 61 Ga. 131.

96. Refusal to validate return portion of ticket—Verdict not excessive.—In an action against a carrier for refusal to validate the return portion of a ticket, it appeared that the carrier violated its contract with reference thereto, and that, through its agents, it insulted and humiliated the passenger, from which she suffered great mortification and mental anguish, and that she, being in a weakened physical condition, did not recover from the nervous shock received for many months thereafter. Held, that a verdict for $1,750 would not be set aside as excessive. Baltimore, etc., R. Co. *v.* Hudson, 92 S. W. 947, 29 Ky. L. Rep. 298.

97. Failure to inform passenger as to best and quickest route—Verdict not excessive.—A verdict for $1,500 for failure by a carrier to inform a passenger as to the best and quickest route was not excessive, where as a result of the misdirection the route taken was slower and less desirable than another route, and she was compelled to make four or five stops and as many changes of cars, in one or two instances traveling on a freight train to make connections, and was two days in making the trip, and compelled to stand for a long time, and was greatly shaken, and, being in poor health, which was communicated to the carrier, was made worse by the trip and put to expense for medicine and medical attention. Southern R. Co. *v.* Nowlin, 156 Ala. 222, 47 So. 180.

98. Compelling white passenger to ride in coach set aside for negroes—Verdict not excessive.—Where a young white woman of culture and refinement was wrongfully compelled to ride in a coach set aside for negroes, and the conductor was insulting in his conduct, as a result of which she suffered a nervous shock, a verdict of $3,750 as punitive damages was not excessive. Louisville, etc., R. Co. *v.* Ritchel, 148 Ky. 701, 147 S. W. 411, 41 L. R. A., N. S., 958, Ann. Cas. 1913E, 517.

99. Failure of street railway company to give a transfer—Verdict not excessive.—In an action against a street railway com-

cars,[1] for delay in transportation,[2] for putting a passenger off, or inducing him to get off, at the wrong station,[3] for putting passenger off at a place other than a station,[4] for failure to carry a passenger to his destination,[5] for carrying a

pany for failure to give a transfer it appeared that plaintiff, a girl 11 years old, lived at L. and went to school at N.; that she took a car at N. for C., and paid the fare; that the conductor refused to give her a transfer entitling her to take a car at C. for L.; and that she was obliged to walk home from C. It was a dark evening, and she suffered from fright and from sickness caused by her running home. Held, that a verdict for $425 was not excessive; a recovery for fright and for the sickness being authorized. South Covington, etc., St. R. Co. *v.* Quinn, 110 S. W. 404, 33 Ky. L. Rep. 534.

1. Failure to notify passenger where to change cars—Verdict not excessive.—Where a passenger, as a result of the carrier's failure to notify her where to change cars, was deflected in her journey and compelled to bear added travel and sojourn in hotels, resulting in annoyance, illness, anxiety, and some expense, a recovery of $500 was not excessive. Central, etc., R. Co. *v.* Ashley, 159 Ala. 145, 48 So. 981.

2. Delay in transportation—Verdict excessive.—Where the failure of a railroad company to carry a passenger as agreed only causes him to lose one day's time and a free dinner, and his ticket cost him $4, a verdict of $50 damages is excessive. Eddy *v.* Harris, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88; Eddy *v.* Searcy (Tex.), 15 S. W. 108.

Where a passenger boarded an electric railway car at 6:30 in the evening, and should have arrived at her destination at about 7 o'clock, but was compelled by breach of the contract of carriage to remain in the car at an intermediate point till 1 o'clock the following morning, and reached her home two hours later, by reason of which she suffered some inconvenience and annoyance from the cold and from loss of sleep, lost one day's time, and took a slight cold which caused no considerable inconvenience, an award of $750 damages is excessive, and judgment therefor will be reversed unless all in excess of $100 and the costs of the trial court are remitted. Leclaire *v.* Tacoma R., etc., Co., 113 Pac. 268, 62 Wash. 157.

Where a funeral party was delayed in returning home by a carrier's failure to comply with its contract to hold a train for them, and plaintiff, who was delayed only for a night, secured a bed, and went to sleep, returning home the next morning early, and suffered no pecuniary loss except $22.50 paid as his half the expense of the funeral party for the night, a verdict for $250 is excessive, plaintiff not being entitled to recover for the discomfort or inconvenience of other members of his party. Southern R. Co. *v.* Marshall, 64 S. W. 418, 23 Ky. L. Rep. 813, 111 Ky. 560.

Five hundred dollars is excessive compensatory damages to a passenger who was mistakenly assigned a berth in a sleeping car which was cut off from the main train, and who was thus delayed, and temporarily lost his baggage containing medicines which were required for the proper care of his sick child. Norfolk, etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809, 20 L. R. A. 817.

3. Inducing passenger to get off at wrong station—Verdict excessive.—Where a male passenger was induced by the negligence of the trainmen to get off at the wrong station, and was compelled to walk six miles, carrying a valise weighing 15 or 20 pounds, on a starlight night in balmy weather, a verdict for $100 was excessive, and should be reduced to $25. Louisiana, etc., R. Co. *v.* Rider (Ark.), 146 S. W. 849.

Where a female passenger, accompanied by her husband, left a train at the wrong station, owing to the negligence of the trainmen, and walked home, six miles distant, and suffered nervous prostration, causing her to remain in bed several days, a verdict for $400 was excessive, and must be reduced to $200. Louisiana, etc., R. Co. *v.* Rider (Ark.), 146 S. W. 849.

Putting passenger off at wrong station—Verdict not excessive.—Where a passenger, by being put off at the wrong station, was compelled to walk alone and carry her baggage a distance of over a mile through the country, a verdict in her favor for $250 is not excessive, taking into consideration carelessness of the brakeman in calling the wrong station. Louisville, etc., R. Co. *v.* Jenkins, 15 Ky. L. Rep. 239.

4. Putting passengers off at place other than station—Verdict that should not be disturbed.—In an action by a husband and his wife to recover of a railroad company for putting them, with their two children and baggage, off a passenger train, three-fourths of a mile from a station, at midnight, in December, the evidence was conflicting as to whether he requested the conductor to put them off then and there, she denying any knowledge thereof. Held, that a verdict for the plaintiffs for $1,000, although seeming excessive, should not be disturbed. Baltimore, etc., R. Co. *v.* Pixley, 61 Ind. 22.

5. Failure to carry to destination—Verdict excessive.—Where no special damage was alleged or proved by plaintiff upon the breach of a railroad passenger contract, and the evidence was only that he was put out of the defendant's car at a point about 12 miles from his destination, and 5 miles from the place of departure,

passenger beyond his destination,[6] for indignities inflicted upon a woman pas-

held, that a verdict for $500 damages was greatly disproportionate to the injury proved. Tarbell *v.* Central Pac. R. Co., 34 Cal. 616.

Verdict not indicating passion and prejudice on part of jury.—Plaintiff, an aged lady, was landed at a point not her destination by defendant's steamship, on which she was a passenger, on a stormy day, and was left unprovided with fuel and shelter, and only reached home after two days' exertions; the exposure causing her serious illness. The officers told her that another boat would take her up, but the other boat refused to do so. Held, that a verdict for $600 did not indicate passion and prejudice of the jury sufficient to authorize a reversal of the judgment, though there was much conflict in the evidence. Sievers *v.* Dalles, etc., Nav. Co., 64 Pac. 539, 24 Wash. 302.

Plaintiff, a woman under 21 years of age, and a young man friend took passage on defendant's train, and by the negligence of defendant's employees were put off at a station in the woods, at about 10 p. m., five miles before their destination was reached. There was no depot at the place, or any place where they could remain all night, and they were compelled to walk down the railroad track, most of the way through woods, cuts, and over long trestles, to their destination, where they arrived at about daybreak. Plaintiff testified that she was very much mortified, frightened, and fatigued. Held, that a judgment allowing plaintiff $500 was not so excessive as to indicate passion and prejudice on the part of the jury. Louisville, etc., R. Co. *v.* Covetts, 82 S. W. 975, 26 Ky. L. Rep. 934.

6. Carrying beyond destination—Verdict excessive.—Verdicts for $250 and $300 for carrying passengers beyond their station are excessive. Southern R. Co. *v.* Bryant, 31 S. E. 182, 105 Ga. 316.

A verdict for $1,000 against a railroad company is excessive, for carrying plaintiff six miles beyond her destination, where there were no circumstances of aggravation or malice. Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

In an action against a railway company for carrying a passenger beyond her station, a verdict of $750 merely for the loss of two or three hours' time, and the expense of $1.50 for a returning conveyance, is excessive. Marshall *v.* St. Louis, etc., R. Co., 78 Mo. 610.

Plaintiff, a woman, was carried beyond her destination by defendant railroad company through the inadvertence of the conductor. Plaintiff was compelled to walk back to the station, and thence to her home. The weather was clear and the ground dry. Two days later she assisted in nursing her brother, who was dangerously ill, sitting up with him a portion of the night. The next day she walked a half mile to the station to take a train, and, on arriving at her destination, walked from the depot to her home, about a half mile. She was taken ill immediately on reaching home, and was confined to her bed for some two months. She had previously been in extremely poor health. Held, that a verdict for $500 was excessive. Southern R. Co. *v.* Humphries, 34 S. E. 283, 108 Ga. 591.

In a suit for damages against a railroad company for carrying plaintiff beyond her destination, where there is no evidence of any physical injury, and the utmost damage proven is several hours' delay and the missing of her dinner, and the conduct of the employees was in every respect accommodating, a verdict for plaintiff for $249.50 was excessive. Central, etc., R. Co. *v.* Wood, 44 S. E. 1001, 118 Ga. 172.

In an action against a railroad company for damages, it appeared that plaintiff, a young woman, who lived in the country, and was used to walking, and who testified that she would not think much of a walk of a mile and a half, was told by the conductor to get off the train, which had stopped that distance after passing her station. The only misconduct of the conductor was in addressing her in a loud tone of voice. Plaintiff, as directed by the conductor, walked back along the railroad the distance of one mile and a half, and reached her destination safely. Held, that a verdict awarding her $2,000 damages was so excessive as to demand a new trial. Chattanooga, etc., R. Co. *v.* Lyon, 89 Ga. 16, 15 S. E. 24, 32 Am. St. Rep. 72, 15 L. R. A. 857.

A verdict of $750, in an action for carrying plaintiff beyond her station, was excessive, where plaintiff was put to but little inconvenience, though on the return trip to her station she was compelled by the conductor to ride in the baggage car. Georgia R., etc., Co. *v.* Jett, 95 Ga. 236, 22 S. E. 251.

$1,750 damages was excessive recovery for a street car company's failure to permit passenger to alight at his destination, and for indignities inflicted by employees, though he had to walk half a mile, and had been sick, and was made nervous, and was insulted by the employees, where he suffered no serious or permanent injuries and had habitually taunted the motorman on former trips. North Alabama Tract. Co. *v.* Daniel, 158 Ala. 414, 48 So. 50.

Verdict not excessive.—A verdict of $500 for carrying a passenger nearly three-fourths of a mile beyond his station on a dark and rainy night, and compelling him to walk back, is not excessive. Hig-

gins *v.* Louisville, etc., R. Co., 64 Miss. 80, 8 So. 176.

$4,500 for willfully carrying a passenger 400 yards past his station on a rainy day, from which point he was compelled to walk back in the mud, and carry a small trunk, because the conductor refused to back the train, was not excessive, though large in proportion to the injury. New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660, 74 Am. Dec. 785.

A verdict for $218 against a railroad company for carrying a woman past her destination is not excessive where she was compelled to get off and walk, in a delicate condition, and on a hot day, 400 yards, over a rough and rocky road. Louisville, etc., R. Co. *v.* Guy, 37 S. W. 1043, 18 Ky. L. Rep. 750.

Where a girl 15 years of age, when the train was about halfway between the station of her destination and the next one, called the conductor's attention to the fact that he had passed her station, and asked him to take her back, and he refused to do so, and when the next station was reached she again asked him to take her back, but he refused, and she left the train there, without any money or acquaintance, and the conductor made no arrangements for her, and she walked back, a distance of three miles, in the dark, and became sick by reason of fright, a verdict of $250 was not excessive. Chesapeake, etc., R. Co. *v.* Lynch, 89 S. W. 517, 28 Ky. L. Rep. 467.

Where a married woman, 37 years of age, previous to the injuries complained of, was strong and healthy, and was compelled to leave a train four miles past the station where she wished to alight at midnight, and when she arrived at it she found it closed, and as a result of her exposure was confined to her bed for 6 weeks, suffering severe pain down to the time of the trial, some 14 months thereafter, a verdict for $1,375 is not so excessive as to require reversal. Guthier *v.* Minneapolis, etc., R. Co., 91 N. W. 1096, 87 Minn. 355.

Where it appeared that defendant's train did not stop at plaintiff's destination; that the conductor used rough and insulting language to plaintiff, in the presence of his family, when asked to go back to their destination; that his conduct was such as would have precipitated a fight, but for the interference of a passenger; that plaintiff's conduct was quiet and peaceable, a verdict of $1,000 was not excessive. Fordyce *v.* Nix, 58 Ark. 136, 23 S. W. 967.

A verdict of $100 is not excessive as damages against a railroad company for carrying a woman having two small children with her some distance beyond the station, there being evidence that the weather was inclement, that it was very inconvenient to get back to the station, and that one of the children became sick, causing anxiety and expense of $10 for medical care. Alabama, etc., R. Co. *v.* Wilkinson, 77 Ga. 75.

Plaintiff, a woman, boarded defendant's train, having purchased a ticket. There was evidence that the train passed her destination without stopping; that plaintiff asked to be put off, but the conductor refused, offering to take her on to the next station; that plaintiff got off the train between stations, the conductor not offering to assist her in any way, and his voice and manner being rude and insulting; that she walked back about a mile, carrying a bundle and valise; that her route lay through an uninhabited country; and that, as a result of the walk and the excitement, she was sick for several days. The conductor, brakeman, and others denied the story, and testified that the train stopped 60 yards beyond the station. Held, on a second trial, that a verdict of $3,005 against the railroad company would not be disturbed. Louisville, etc., R. Co. *v.* Ballard, 88 Ky. 159, 10 Ky. L. Rep. 735, 10 S. W. 429, 2 L. R. A. 694.

Where a woman is carried by her destination and is compelled to drive in the dark back to her home over a rough road, in company with a driver unacquainted with the road, and the road is so bad she deems it best for her safety to get out and walk, and she becomes nervous and sick, and suffers with backache, breastache, and bearing-down pains for several weeks, which finally end in a miscarriage, a verdict for $1,000 is not so excessive as to indicate passion and prejudice. Louisville, etc., R. Co. *v.* Roney (Ky.), 127 S. W. 158.

A passenger, wrongfully carried beyond her station, hired a rig and drove a distance of 12 miles to her mother's. She had left her wraps at the station of her destination, and the weather was very cold. Held, that a verdict for $87.50 for the exposure, inconvenience, pain, and suffering occasioned by the wrongful act of the carrier was not excessive. St. Louis, etc., R. Co. *v.* Evans, 94 Ark. 324, 126 S. W. 1058.

A passenger with a ticket boarded a train which did not stop at his station. The conductor refused to stop the train or to slow down to enable the passenger to alight, but he was carried to the next station, where he alighted. He lost several hours there, and was exposed to the cold in the nighttime, and suffered from a cold in the head thereafter. The evidence was conflicting on the issue as to what occurred between the passenger and the conductor and between the passenger and the station agent at the station where he alighted. Held, that a verdict of $500, reduced by the court to $250, was not excessive. Central, etc., R. Co. *v.* Morgan, 161 Ala. 483, 49 So. 865.

Plaintiff, a passenger on one of defendant's trains, on a rainy day, was, through oversight of defendant, carried two miles beyond his station. When the train

senger[7] and for exposing a passenger to the rain.[8]

§§ 3400-3407. For Personal Injuries—§ 3400. Elements and Measure of Damages in General.—In an action by a passenger against a carrier for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence.[9] He is entitled to recover a reasonable sum for pain and suffering,[10] including mental suffering,[11] which has resulted from the defendant's conduct. And where such conduct has resulted in the plaintiff's illness he may recover damages therefor.[12] The plaintiff is also entitled to recover reasonable expenses incurred for medical attendance[13] and a fair compensation for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant.[14] If the evidence fairly shows that the plaintiff will sustain future damages, the jury may include such damages in the verdict.[15]

finally stopped, plaintiff walked back. Held, that plaintiff's act in walking back was not negligence, precluding him from recovering damages for sickness resulting therefrom, where he was under the impression that he could not get another train back until the next day, and circumstances made it inconvenient for him to remain on the train, and hence a judgment for $75, in an action for damages sustained, was not excessive, though plaintiff was earning at the time only $45 a month. St. Louis, etc., R. Co. *v.* Knight, 81 Ark. 429, 99 S. W. 684.

7. Indignities inflicted upon woman passenger—Verdict not excessive.—Where a carrier in breach of its contract awoke a woman passenger at a late hour, and told her that, if she did not pay her fare, she would be ejected, and obliged her to have the porter endeavor to borrow money for her and to offer to pledge her personal effects therefor, and to submit herself to the inspection of another passenger that he might judge from her appearance whether he was warranted in paying her fare, an award of $750 compensatory damages was not excessive. Illinois Cent. R. Co. *v.* Fleming, 148 Ky. 473, 146 S. W. 1110.

8. Exposure to rain—Verdict not excessive.—A verdict for $260 for injuries resulting from a passenger's exposure to the rain by reason of the carrier's negligence is not excessive, punitive damages being authorized. Louisville, etc., R. Co. *v.* Keller, 47 S. W. 1072, 20 Ky. L. Rep. 957, 104 Ky. 768.

9. Measure of damages in general.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 554, 30 L. Ed. 257, 7 S. Ct. 1; Wade *v.* Leroy (U. S.), 20 How. 34, 15 L. Ed. 813.

A passenger in a railway car who has been injured in a collision caused by the negligence of the employees of the company, is not, as a general rule, entitled in an action against the company to recover damages beyond the limit of compensation for the injury actually sustained. Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. Ed. 374.

10. Pain and suffering.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 554, 30 L. Ed. 257, 7 S. Ct. 1; citing Wade *v.* Leroy (U. S.), 20 How. 34, 15 L. Ed. 813; Nebraska City *v.* Campbell (U. S.), 2 Black 590, 17 L. Ed. 271.

11. Mental suffering.—Kennon *v.* Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110.

In order to justify a recovery for mental suffering in an action for injury to a passenger, there must be some facts or circumstances showing a warrant for the mental attitude of the injured party, so that, to warrant recovery of more than nominal damages, wanton or willful disregard of the passenger's rights must be shown. Caldwell *v.* Northern Pac. R. Co., 105 Pac. 625, 56 Wash. 223.

12. Illness.—Where a woman could not by the exercise of ordinary care have discovered that she was invited by the conductor of a street car to disembark at a point short of her destination, she was entitled to recover damages for illness brought about by exposure to the weather after leaving the car. Georgia R., etc., Co. *v.* McAllister, 54 S. E. 957, 126 Ga. 447, 7 L. R. A., N. S., 1177.

13. Medical attendance.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 554, 30 L. Ed. 257, 7 S. Ct. 1; citing Wade *v.* Leroy (U. S.), 20 How. 34, 15 L. Ed. 813; Nebraska City *v.* Campbell (U. S.), 2 Black 590, 17 L. Ed. 271.

14. Injury to earning capacity.—Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 554, 30 L. Ed. 257, 7 S. Ct. 1; citing Wade *v.* Leroy (U. S.), 20 How. 34, 15 L. Ed. 813; Nebraska City *v.* Campbell (U. S.), 2 Black 590, 17 L. Ed. 271.

15. Future damages.—Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

§ 3401. Elements and Measure of Damages for Assault, Threats, Insult or Abuse.—In an action by a passenger to recover for an assault committed upon him by the carrier's agent or servant, the measure of damages is such damages, actual and exemplary or punitive,[16] as would be given against a natural person had he committed such acts, or as would have been given against the agent himself had he been sued as principal.[17] In such an action if the jury find for plaintiff they should take into consideration in assessing damages the nature of the force applied to plaintiff, and his fear, sense of indignity and humiliation, and award him such sum as, under all circumstances of the case, they may deem a fair and reasonable compensation therefor.[18] In an action brought to recover damages for a threat to expel a passenger from a street car, who presented a transfer to the conductor which was defective through no fault of the plaintiff, but who, under the facts of the case, was entitled to a ride on the car, the measure of damages is not limited to the amount paid to prevent an expulsion, but general damages may be recovered as for an inexcusable trespass, even though there be no aggravating circumstances connected with the threat of expulsion.[19] A railroad company is bound to protect a passenger against insult by its conductor or other employee, and a passenger is entitled to recover of the company compensatory damages for mental suffering caused by the unprovoked use by an employee of insulting and abusive language tending to humiliate him.[20] In such case, while

16. As to exemplary or punitive damages, see post, "Exemplary or Punitive Damages," §§ 3403-3405.

17. Measure of damages for assault by carrier's agent or servant.—Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

18. Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433; Philadelphia, etc., R. Co. *v.* Crawford, 112 Md. 508, 77 Atl. 278.

Damages awarded as compensation for the wounded feelings of a passenger who has been assaulted by an agent of the carrier are regulated by the enlightened conscience of an impartial jury; they must be just and not inadequate or excessive. Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep 842.

Plaintiff, whose father was wrongfully assaulted by defendant's conductor and his assistants and thrown violently against plaintiff, causing fright, and injuries to her side, was entitled to such damages as would fairly compensate her for her physical and mental suffering directly resulting from the physical impact and fright. Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433.

When a person has purchased a legal right to enter as a passenger the train of a common carrier, but is notified by an agent of the carrier that his right is denied, he may nevertheless make reasonable efforts bona fide to exercise his right, and physical resistance interposed by the carrier's agents to such efforts will constitute a tort, and in an action therefor the indignity, as well as the personal violence, may be considered by the jury as an element of compensatory damages. Runyan *v.* Central R. Co., 47 Atl. 422, 65 N. J. L. 228.

Outrage and indignity to be considered even where exemplary damages do not lie.—Aside from the doctrine of exemplary damages, mental anguish arising from the nature and character of the assault is a proper element of compensation, and the outrage and indignity which have accompanied an injury are to be estimated in the damages as well as its physical effects, even in cases where exemplary damages do not lie. McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Assault held tortious and passenger not restricted to nominal damages.—Where an invalid when about to get on one of defendant's cars was seized by an employee and pushed into the street gutter, and his neck was bruised, and the effect on plaintiff was to retard his recovery, and some one other than plaintiff had struck the employee, the assault was tortious, and plaintiff was not restricted to nominal damages. Ford *v.* Minneapolis St. R. Co., 107 N. W. 817, 98 Minn. 96.

19. Damages recoverable for threat of expulsion from car.—Georgia R., etc., Co. *v.* Baker, 125 Ga. 562, 54 S. E. 639, 7 L. R. A., N. S., 103, 5 Am. & Eng. Ann. Cas. 484.

20. Damages recoverable for mental suffering caused by insulting and abusive language.—Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111; Bleecker *v.* Colorado, etc., R. Co., 50 Colo. 140, 114 Pac. 481, 33 L. R. A., N. S., 386; Knoxville Tract. Co. *v.* Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

In an action against a railroad company to recover for injuries to feelings, caused by insulting language of a conductor, the jury may consider the humiliation and injury to the feelings. Gillespie *v.* Brooklyn Heights R. Co., 178 N. Y. 347, 70 N.

the language used need not have been defamatory of itself, the fact that it was defamatory can be considered on the question of damages.[21] Allegations of suffering, mortification, and humiliation by the offensive refusal of a conductor to accept a railroad ticket will permit recovery of damages, though no physical injury is alleged or proven.[22] And where a conductor takes up a passenger's ticket illegally and in a public manner in the presence of other passengers under circumstances virtually amounting to an imputation of fraud, the passenger may recover for injury to his feelings and the ignominy thrust upon him.[23] In an action by a passenger against a railroad company to recover for injuries to feelings, caused by the insulting language of a conductor, the jury may not consider any injury to the passenger's character resulting therefrom.[24]

§ 3402. Damages Recoverable for Humiliation Suffered as Result of an Unlawful Arrest.—A passenger unlawfully arrested on a train by one who is the agent and employee of the carrier is entitled to recover such damages as will compensate him for any humiliation suffered as the proximate result of the arrest.[25]

§§ 3403-3405. Exemplary or Punitive Damages—§ 3403. In General.—There is much conflict of authority as to the character of the injury that will warrant a recovery of exemplary or punitive damages in an action by a passenger against a carrier for personal injury resulting from the act or default of the carrier or its agents or servants acting within the scope of their authority. The great weight of authority supports the rule that if the injury is the result of misconduct which is willful, wanton or malicious,[26] or of a reckless indifference to the rights of the passenger equivalent to intentional violation of

E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618, reversing 81 N. Y. S. 1127, 80 App. Div. 640.

Damages for mental suffering independent of other injury, may be recovered for shock to a female passenger by profane and insulting language used in her presence by the carrier's employee. Birmingham R., etc., Co. *v.* Glenn (Ala.), 60 So. 111.

Where a passenger on a street car tendered the conductor an amount more than the fare, and asked for a transfer, and, after the conductor had attended to another passenger, demanded her change, whereupon the conductor in an abusive manner refused to return any change, but called the passenger a deadbeat and swindler, and directed verdict for plaintiff for the amount of the change as the extent of the carrier's liability is reversible error. Judgment 81 N. Y. S. 1127, 80 App. Div. 640, reversed in Gillespie *v.* Brooklyn Heights R. Co., 70 N. E. 857, 178 N. Y. 347, 66 L. R. A. 618, 102 Am. St. Rep. 503.

21. Bleecker *v.* Colorado, etc., R. Co., 50 Colo. 140, 114 Pac. 481, 33 L. R. A., N. S., 386.

22. Damages recoverable for offensive refusal to accept railroad ticket.—Humphrey *v.* Michigan United R. Co., 166 Mich. 645, 132 N. W. 447.

23. Damages recoverable where conductor takes up passenger's ticket under circumstances amounting to imputation of fraud.—Harris *v.* Delaware, etc., R. Co., 77 N. J. L. 278, 72 Atl. 50. See, also, Humphrey *v.* Michigan United R. Co., 166 Mich. 645, 132 N. W. 447.

24. Injury to character may not be considered.—Judgment in 81 N. Y. S. 1127, 80 App. Div. 640, reversed in Gillespie *v.* Brooklyn Heights R. Co., 70 N. E. 857, 178 N. Y. 347, 66 L. R. A. 618, 102 Am. St. Rep. 503.

25. Damages recoverable for humiliation suffered as result of an unlawful arrest.—Louisville, etc., R. Co. *v.* Byrley, 153 S. W. 36, 152 Ky. 35; Louisville, etc., R. Co. *v.* White, 153 S. W. 1199, 152 Ky. 463.

26. Injury resulting from misconduct which is willful, wanton or malicious.—For willful or malicious injuries by a carrier vindictive damages are allowable. Hill *v.* New Orleans, etc., R. Co., 11 La. Ann. 292.

A railroad company is bound, on pain of exemplary damages, to protect passengers from oppression, malice, insult, or other willful misconduct on the part of those in charge of the train. Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 9 Ky. L. Rep. 7, 3 S. W. 530, 7 Am. St. Rep. 600.

Exemplary damages may be recovered of a railroad company for an injury to a passenger resulting from the violation of duty by one of its employees in charge of the train, if such violation of duty be accompanied with insult or other willful misconduct evidencing reckless desregard of consequences. Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

Exemplary damages are allowable in an action against a railway company for willful injury inflicted by the conductor on

them,[27] such damages may be recovered. In many jurisdictions this rule has been held to define the limit of recovery of exemplary damages in such cases,

the passenger without lawful justification. McDade *v.* Norfolk, etc., R. Co., 67 W. Va. 582, 68 S. E. 378. But, see, Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901.

In Wisconsin it has been held that a carrier is not liable to exemplary or punitive damages, for an injury inflicted upon a passenger by an employee of the carrier acting within the scope of his employment, unless the carrier directed the injurious act to be done, or subsequently confirmed it; but that if the act was a malicious one, and the carrier directed it, or, not directing it, if he subsequently adopted or confirmed it, he will be liable to punitory damages. Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437.

In conformity with this rule it has been held that no punitive damages can be assessed against the owner of a steamboat for the misconduct of the captain towards a passenger on the boat, in the absence of evidence of a ratification of such conduct. Mace *v.* Reed, 89 Wis. 440, 62 N. W. 186.

Whether passenger may have punitive damages rests largely in discretion of jury.—Where an injury is wantonly and willfully inflicted on a passenger by a carrier, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages, by way of punishment for the wrongful act, but the party is not "entitled" to such damages as a matter of right, and it is error to so instruct, in any case. Whether the party may have such damages, rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment in this respect. Wabash, etc., R. Co. *v.* Rector, 104 Ill. 296.

27. Injury resulting from reckless indifference to rights of passenger.—Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607; Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367; Kentucky Cent. R. Co. *v.* Dills (Ky.), 4 Bush 593.

Reckless indifference to safety of passengers while boarding or alighting from cars.—A railroad company is bound to provide reasonable means of protection so as to insure the safety of passengers while boarding and alighting from its cars, and a reckless disregard of such duty renders it liable in exemplary damages to a person injured thereby. Appleby *v.* South Carolina, etc., R. Co., 38 S. E. 237, 60 S. C. 48.

A railroad passenger who was ordered by the porter to alight from a train which was going so fast as to make it obviously dangerous for her to do so, thereby showing a reckless disregard of her rights as a passenger, could recover punitive damages for resulting injuries. Dobson *v.* Receivers, 90 S. C. 414, 73 S. E. 875.

Plaintiff's husband placed her on defendant's train, requesting the conductor to inform her when the train reached a certain station, and assist her to alight there. The train arrived at that station after dark, made a very short stop, and moved on with plaintiff on board. Some one informed the conductor that there was a lady on board who desired to leave the train at that station, and the train was stopped about 100 yards from the station. When the train stopped, one of the brakemen approached plaintiff to assist her to alight, and as she was proceeding to the door to leave the coach the engineer negligently and wantonly caused the train to back suddenly, throwing plaintiff against the door, and injuring her. Held, that such facts entitled plaintiff to actual and exemplary damages. Appleby *v.* South Carolina, etc., R. Co., 38 S. E. 237, 60 S. C. 48.

Where a widow, who was self-supporting, was permanently injured while alighting from defendant's train, on which she had been a passenger, by a shock caused by the negligent backing of the engine against the cars with great violence, it was not error to deny a new trial in an action for such injuries, in which punitive damages had been awarded, on the ground that there was an absence of evidence to support a cause of action for punitive damages. Glover *v.* Charleston, etc., R. Co., 35 S. E. 510, 57 S. C. 228.

Failure to provide either a stool or light for a woman passenger in getting off the train at a place away from the station, held some evidence of a wanton disregard of an obvious duty, as regards punitive damages. Lancaster *v.* Southern Railway, 75 S. E. 398, 92 S. C. 177.

The failure of employees of a carrier to stop the train, so as to give a sick passenger opportunity to board the sleeper, evinced a reckless indifference to the rights of the passenger, authorizing punitive damages. Illinois Cent. R. Co. *v.* Smith (Miss.), 59 So. 87.

Running train at great rate of speed over defective track.—In an action against a railroad company, where the running of a train at a great rate of speed over a defective track was alleged, evidence that the train was running at the rate of a mile a minute justified a finding that there was a reckless disregard of the rights of the passengers, authorizing exemplary damages. Griffin *v.* Southern R. Co., 43 S. E. 445, 65 S. C. 122.

Derailment caused by turning switch under moving train.—Where the servant of a railroad company turned a switch under a passenger train which was in mo-

and it has been held that mere negligence, even though it be gross negligence, will not authorize the allowance of such damages, if there is not an entire want of care sufficient to raise a presumption of conscious indifference to consequences.[28] But in other jurisdictions it has been held that injuries resulting from

tion, causing a derailment, punitive damages are properly allowed; the conduct of the servant showing a wanton and reckless disregard of human life. Chicago, etc., R. Co. *v.* Rowell, 151 S. W. 950, 151 Ky. 313.

28. Gross negligence not amounting to entire want of care will not authorize allowance of exemplary damages.—In Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489, 23 L. Ed. 374, which was an action by a passenger against a railroad company for an injury resulting from a collision alleged to have been caused by the negligence of the employees of the company, Mr. Justice Davis, who delivered the opinion of the court, said: "It is insisted, however, that, where there is 'gross negligence,' the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and, if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions. In Steamboat New World *v.* King (U. S.), 16 How. 474, 14 L. Ed. 1019, Mr. Justice Curtis, in speaking of the three degrees of negligence, says: 'It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms "gross negligence" or "ordinary negligence" which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.' Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Redf. on Car., § 376. Lord Cranworth, in Wilson *v.* Brett, 11 M. & W. 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. Beal *v.* South Devon R. Co., 3 H. & C. 327. In the Common Pleas, Grill *v.* General Iron Screw Collier Co., Law Reps., C. P. 1, was heard on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said: 'Confusion has arisen from regarding "negligence" as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. "Gross" is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression "gross negligence" instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up.' 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

Where a railroad company adopts all rules and regulations needful for the safety of the passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, the company, in case of injury to the passengers, happening by reason of the carelessness of a subordinate agent, can not be held liable for punitive damages. Ackerson *v.* Erie R. Co., 32 N. J. L. 254.

To sustain a claim for exemplary damages against a railroad company, there must be not only gross negligence, but a willful, reckless disregard of the rights of a party injured. Oliver *v.* Columbia, etc., R. Co., 43 S. E. 307, 65 S. C. 1.

Gross negligence is not a ground for exemplary damages, unless it be shown that it has proceeded from such conduct as is wanton or oppressive, or from such

gross negligence will authorize the allowance of exemplary or punitive damages.[29]

malice as implies a spirit of mischief, or criminal indifference to civil obligations. Atchison, etc., R. Co. *v.* Chamberlain, 4 Okla. 542, 46 Pac. 499.

Exemplary damages are only allowed where a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. Louisville, etc., R. Co. *v.* Guinan, 79 Tenn. (11 Lea) 98, 47 Am. Rep. 279; East Tennessee, etc., R. Co. *v.* Lee, 90 Tenn. 570, 18 S. W. 268.

Failure to build proper fire in station house.—Where a girl eight years of age, and her brother less than three years of age, were taken by their mother to defendant's station, and, finding no fire in the waiting room, the mother requested defendant's agent to build a fire, which he undertook to do, but which did not burn, there was no willfulness or conscious indifference to consequences from which malice could be inferred, so as to warrant recovery of punitive damages. St. Louis, etc., R. Co. *v.* Evens (Ark.), 148 S. W. 264.

Advice by ticket agent to board moving train.—Where an intending passenger was late at the depot, and the ticket agent advised him, as the train began to move away, to board the same at once, and plaintiff climbed on the steps of the nearest car as the same was moving, and while on the steps was jerked off and injured, the statement of the ticket agent was not an intentional wrong, so as to support a verdict against the railroad company for punitive damages. Pickett *v.* Southern R. Co., 48 S. E. 466, 69 S. C. 445.

Vindictive damages for being thrown from the cars of a railroad are not, as in cases of willful or malicious injuries, allowable, though the company is clearly proved to have been negligent. Hill *v.* New Orleans, etc., R. Co., 11 La. Ann. 292.

Starting train before passenger alights.—A passenger injured while alighting from a train, through the train starting up before he alighted, was not entitled to exemplary damages, where there was nothing to indicate malice or deliberate disregard of his rights on the part of the railroad employees. Atchison, etc., R. Co. *v.* Stewart, 55 Kan. 667, 41 Pac. 961.

Collision.—In an action for injuries through a collision between cars, exemplary damages were improperly allowed, where the evidence showed that the collision was the result only of the negligent operation of the car. Wright *v.* Philadelphia Rapid Trans. Co., 84 Atl. 669, 226 Pa. 132.

Misconduct of train auditor.—In an action by a passenger for injuries alleged to be due to the misconduct of defendant's train auditor toward him, evidence examined, and held to show that the auditor's conduct, while a natural, though improper, result of plaintiff's behavior, fell short of the elements of wantonness or willfulness from which malice is inferred as the basis of an action for exemplary damages. St. Louis, etc., R. Co. *v.* Myzell, 87 Ark. 123, 112 S. W. 203.

29. Gross negligence authorizes allowance of exemplary damages.—*Alabama.*—Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15.

Colorado.—Wall *v.* Cameron, 6 Colo. 275.

Kentucky.—Louisville, etc., R. Co. *v.* Ritter, 2 Ky. L. Rep. 385; Southern R. Co. *v.* Brewer, 32 Ky. L. Rep. 1374, 108 S. W. 936; Kentucky Cent. R. Co. *v.* Dills (Ky.), 4 Bush 593; Louisville, etc., R. Co. *v.* McClain, 23 Ky. L. Rep. 1878, 66 S. W. 391.

New Hampshire.—Hopkins *v.* Atlantic, etc., Railroad, 36 N. H. 9, 72 Am. Dec. 287.

Texas.—Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

A passenger, to recover punitive damages in an action for personal injury not resulting in death, need not show the absence of all care or reckless indifference to the safety of the passenger, or intentional misconduct on the part of the agents and officers of the company. Maysville, etc., R. Co. *v.* Herrick (Ky.), 13 Bush 122.

The act of street car men in knowingly operating on a steep incline a car with a useless brake, and relying entirely on the reverse electric current to control the car, is gross negligence, authorizing punitive damages for injuries to a passenger in a runaway because the electric current was cut off while the car was descending the incline. Lexington R. Co. *v.* Johnson (Ky.), 122 S. W. 830.

Gross negligence causing collision.—In an action against a carrier for injuries occasioned by collision, the court may properly instruct the jury to award punitive damages, if there was gross neglect; there being sufficient evidence to authorize the submission of the question. Louisville, etc., R. Co. *v.* McClain, 66 S. W. 391, 23 Ky. L. Rep. 1878.

Where employees of a railroad company, with full knowledge of the approach of a passenger train, or of the time of its approach, left a switch open, and as a result there was a collision causing injury to a passenger, it constituted such a degree of neglect as to authorize an instruction as to punitive damages. Louisville, etc., R. Co. *v.* Kingman, 18 Ky. L. Rep. 82, 35 S. W. 264.

Where a passenger train was run 300 yards in plain view of a red switch lamp showing that the switch was turned, causing a serious collision between the passenger train and a freight train standing on the siding, and no excuse or reason was given why the danger signal was not

All the authorities hold, however, that injuries resulting from ordinary negligence, or negligence not amounting to gross negligence, will not authorize the imposition of exemplary damages.[30] It is essential to the recovery of exemplary

seen, the evidence established gross negligence, justifying an instruction permitting an award of punitive damages for injuries to a passenger. Southern R. Co. *v.* Brewer, 105 S. W. 160, 32 Ky. L. Rep. 43.

Where the statute required an engineer to stop short for a railroad crossing, but nevertheless, though knowing the location of the crossing, and that trains could not be stopped, after coming in sight of each other, unless they had obeyed the statute, he ran upon the crossing without slackening his speed of 30 miles an hour, and a collision ensued, his employer may be made liable for punitive damages by one injured in the collision. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495.

Derailment of car.—An instruction which limits the authority to impose exemplary damages on a carrier of passengers for injuries sustained by reason of derailment of a car to cases in which there is an "entire want of care" on the part of defendant in the maintenance of its track is properly refused. Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

In an action for personal injuries, sustained by reason of the derailment of defendant's railway car, owing to the breaking of a rail, evidence that the cross-ties near the place of derailment were "unsound," "decayed," "rotten," and the rails old and defective ones, and that they were from time to time replaced by other old rails, warrants the finding of such gross negligence on defendant's part as will authorize an award of exemplary damages. Alabama, etc., R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65, following 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Where a carrier hires as a driver of a stage a man known to be careless and a drunkard, a passenger injured by the overturning of the stage, caused by the carelessness and negligence of the driver, is entitled, in an action against the carrier for his injuries, to recover exemplary damages on the ground of defendant's gross negligence. Frink *v.* Coe, 4 G. Greene 555, 61 Am. Dec. 141; Sawyer *v.* Lamar, 10 Kan. 466.

30. Negligence not amounting to gross negligence does not authorize allowance of exemplary damages.—Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; Wall *v.* Cameron, 6 Colo. 275; Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432; Kentucky Cent. R. Co. *v.* Dills (Ky.), 4 Bush 593.

The employees of a railroad company do not render it liable for punitive damages to a passenger by reason of an error in judgment. Louisville, etc., R. Co. *v.* Ferrell, 7 Ky. L. Rep. 607.

A charge that, if the injuries received were due to the gross negligence of defendant, the jury should consider the question of exemplary damages; that gross negligence was a total want of ordinary care; and that ordinary care was that degree of care which an ordinary person would use under like circumstances, is erroneous, as inducing the belief that the exercise of care but slightly less than ordinary care would render defendant liable in exemplary damages. Missouri Pac. R. Co. *v.* Mitchell, 72 Tex. 171, 10 S. W. 411. See also, Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

Concurrence of latent and known defect.—Punitive damages are not allowable where the accident was due to the concurrence of a latent defect, not discoverable, with a known defect, and where it could not have occurred without such latent defect. Richmond, etc., R. Co. *v.* Vance, 93 Ala. 144, 9 So. 574, 30 Am. St. Rep. 41.

Collision.—In the absence of evidence that a railroad collision was caused by the carrier's gross negligence, punitive damages are not recoverable by one injured therein. Southern R. Co. *v.* Brewer, 108 S. W. 936, 32 Ky. L. Rep. 1374.

Plaintiff, a passenger, was injured in a collision between the car on which he was riding and the engine of another train. Both trains were moving slowly, and the engine merely grazed the side of the car, without breaking the window panes. Plaintiff claimed that the jar threw him against the arm of the seat and injured his back and hip. The cause of the accident appeared to be an error of judgment as to the space within which the incoming train would stop, or to its arriving a few seconds before it was expected. Held insufficient to justify the award of exemplary damages. Cleveland, etc., R. Co. *v.* Offutt, 104 S. W. 359, 31 Ky. L. Rep. 936.

Defects in track.—An instruction that a railroad company is liable to exemplary damages if it knew of the defects in its track, and operated the road indifferent to the passengers, is erroneous, in not limiting such damages to cases where acts of gross negligence contributed to the accident. Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

The fact that the track where an accident occurred was theretofore defective, and that defendant's officers and servants might have known it, does not render defendant liable for punitive damages, unless there was a probable consciousness on their part that such an accident would be the probable consequence of such de-

damages for the wrongful act or negligence of a carrier that the injury complained of should have resulted from such wrongful act or negligence.[31] The punitive damages awarded should bear proportion to the actual damages sustained.[32] A railroad passenger's contributory negligence in alighting from a moving train pursuant to an employee's direction will not preclude his recovering punitive damages, if the employee was guilty of a reckless disregard of his rights in ordering him to alight.[33]

§ 3404. For Assault, Threats, Insult or Abuse.—Exemplary damages may be allowed against a carrier for its failure to protect a passenger against violence, and insults from its servants, from copassengers, and from strangers.[34] Thus, exemplary damages may be awarded against a railroad company for an assault upon a passenger by a conductor of a train or car, or by the person in charge of a car, if the assault was wanton or malicious,[35] or if it was accom-

fects. Richmond, etc., R. Co. *v.* Vance, 93 Ala. 144, 9 So. 574, 30 Am. St. Rep. 41.

Death of a railroad passenger from the car being thrown from the track, in consequence of decay of ties, where there was no unusual negligence in running the train, and the ties were systematically inspected and renewed, held not a case for awarding exemplary damages. Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

A charge that if the road had been out of repair for a long time, to the company's knowledge, or if the general bad condition was so notorious that the company, by exercise of ordinary care, should have known of it, but failed to repair it, the question of exemplary damages may be considered, is erroneous as authorizing exemplary damages, though the road, where the injuries occurred, was but slightly defective. Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

Fast driving causing car to be thrown from track.—Where a passenger in a street car was injured by the car being upset and thrown from the track over an embankment, he is not entitled to recover exemplary damages, though the evidence tended to prove that fast driving was the primary cause of throwing the car from the track. Louisville, etc., R. Co. *v.* Smith (Ky.), 2 Duv. 556.

31. Exemplary damages not recoverable unless injury resulted from wrong complained of.—In an action against a railroad company for personal injuries to a passenger, it is error to charge that exemplary damages are "given as a kind of punishment," leaving the jury to infer that defendant would be liable to such damages if, with knowledge of the general bad condition of the road prior to the accident, it allowed it to remain so, regardless of whether plaintiff's injury resulted from that known general bad condition. Missouri Pac. R. Co. *v.* Brazil, 72 Tex. 233, 10 S. W. 403. See, also, Missouri Pac. R. Co. *v.* Shuford, 72 Tex. 165, 10 S. W. 408.

32. Punitive damages should bear proportion to actual damages sustained.—Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15.

33. Contributory negligence as a defense.—Dobson *v.* Receivers, 90 S. C. 414, 73 S. E. 875.

34. Failure to protect passenger against violence and insults.—Sherley *v.* Billings (Ky.), 8 Bush 147, 8 Am. Rep. 451.

Although there was no loss of time and no hindrance to a passenger in the pursuit of his business and he was occasioned no considerable amount of physical suffering yet where he was subjected to indignity, was degraded in the eyes of his fellow passengers by being assailed with coarse and vituperative language and blows and his feelings were outraged by an employee of the carrier, he may recover exemplary damages, the measure of such damages being referred by express law to the enlightened conscience of an impartial jury. Atlanta, etc., R. Co. *v.* Condor, 75 Ga. 51.

Protection that must be afforded to female passengers.—A railroad company is bound on pain of exemplary damages to protect female passengers from obscenity, immodest conduct, or wanton approach, but not from indecorous conduct. Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 9 Ky. L. Rep. 7, 3 S. W. 530, 7 Am. St. Rep. 600.

35. Wanton or malicious assault by conductor.—White *v.* South Covington, etc., R. Co., 150 S. W. 837, 150 Ky. 681; Lexington R. Co. *v.* Cozine, 111 Ky. 799, 64 S. W. 848, 23 Ky. L. Rep. 1137, 98 Am. St. Rep. 430.

Plaintiff, whose father was wrongfully assaulted by defendant's conductor and thrown violently against her, causing fright, and injuries to her side, on showing that such assault was maliciously committed, was entitled to punitive damages. Chesapeake, etc., Railway *v.* Robinett, 151 Ky. 778, 152 S. W. 976, 45 L. R. A., N. S., 433.

In an action against a railroad company for an assault by its conductor on a passenger, where plaintiff testified that there was no provocation for the assault, and testimony showed that the assault on plaintiff was of a violent character, it was proper to charge that the jury were at

panied by abusive and insulting language;[36] and such damages may be awarded against a steamboat company for such an assault upon a passenger by a mate of a steamboat.[37] And if the conductor of a railroad train is rude and insulting to a female passenger, and unwarrantably threatens to put her off the train, she may recover punitive damages.[38] Punitive damages are also recoverable where a conductor, in the presence and hearing of the other passengers, cursed and threatened in an inexcusable manner a passenger who had boarded the train not knowing that it did not stop at the station to which he had a ticket.[39] But where a forcible act by a conductor toward a passenger, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of a duty, or without any evil or bad intention, there is no ground on which punitive damages can be awarded.[40] Proof of asperities induced by the passenger in a

liberty to consider the character of the assault, and award such exemplary damages as the circumstances in their judgment would require. Baltimore, etc., R. Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

Where a street car conductor kicked plaintiff, a messenger boy 13 years of age, over the heart, as he was boarding the car as a passenger, and plaintiff was only prevented from falling from the car while it was moving by the acts of other passengers in drawing him into the car, such facts justified the recovery of exemplary damages in an action against the carrier. McNamara *v.* St. Louis Trans. Co., 81 S. W. 880, 182 Mo. 676, 66 L. R. A. 486.

Wanton or malicious assault by person in charge of car.—In an action against a carrier to recover for injuries received by an assault by the person in charge of defendant's car, where the act of defendant is shown to have been wanton or malicious so as to indicate that he acted with a reckless disregard of the rights of plaintiff, the jury may award, in addition to compensatory damages, such sum as exemplary damages as they may deem just, but plaintiff is not entitled to such damages as a matter of law. Berg *v.* St. Paul City R. Co., 105 N. W. 191, 96 Minn. 513.

36. Assault by conductor accompanied by abusive and insulting language.—Where a street car conductor unlawfully and without justification assaults a passenger, at the same time humiliating him by abusive and insulting language, the jury in its discretion may award exemplary damages. Birmingham R., etc., Co. *v.* Coleman (Ala.), 61 So. 890.

A railroad conductor without apparent provocation, rudely assaulted a passenger, used to him grossly opprobrious and insulting language, caught hold of him roughly, pulled him to the end of the car, threatened to kill him, appeared about to draw a pistol on him, and spit tobacco juice in his face. Held, that the company was liable for punitive damages. East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778.

37. Assault by mate of steamboat.—Plaintiff was a deck passenger for hire on a steamboat. The mate of the vessel ordered the plaintiff off some freight, and he got upon some other, whereupon the mate kicked him in the mouth, knocking out two of his teeth. Held, that the steamboat company was liable in exemplary damages. Springer Transp. Co. *v.* Smith, 84 Tenn. (16 Lea) 498, 1 S. W. 280.

38. Rudeness, insult and threats by conductor to female passenger.—Plaintiff and another, starting on a journey, were induced to buy "family mileage," which had just been adopted by defendant carrier, had their baggage checked, and boarded the train. The first two conductors accepted the mileage, the second one tearing off sufficient to carry them to their destination. After they had retired for the night, a third conductor, about 3 o'clock in the morning, awakened plaintiff, telling her that the mileage was not good beyond a certain point en route, and that she would have to pay fare from that point to destination. He was rude and insulting, and demanded money, stating that she need not try to bluff him, as she had done the other conductor, that he knew his business, and that unless she paid he would put her off. The conductor finally consented to receive payment in the morning, when the matter was adjusted at their destination. Held, that plaintiff was entitled to punitive damages. Yazoo, etc., R. Co. *v.* Fitzgerald (Miss.), 56 So. 631.

39. Curses and threats by conductor in presence of other passengers.—Cincinnati, etc., R. Co. *v.* Strosnider (Ky.), 121 S. W. 971.

40. When forcible act by conductor is not ground for punitive damages.—Northern Cent. R. Co. *v.* Newman, 98 Md. 507, 56 Atl. 973. See, also, Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

Where a passenger delays a train at the place of his destination by engaging in an altercation with the brakeman on the car platform, and the conductor solely to prevent further delay forcibly jerks him from the platform, the passenger is not entitled to punitive damages in an action against the railroad company. Smith

colloquy between the conductor of a train and a passenger who resists the enforcement of a rule of the railroad company is not sufficient to justify exemplary damages against the company.[41] In a suit for injury to a passenger thrown from the platform of a car, the mere fact that the ticket taker in passing from car to car said with an oath, "Give me your tickets," does not authorize a charge on punitive damages.[42] If, after a brakeman assaults and grossly insults a passenger, the railroad company retains him in its service after his conduct is known to them, they will be liable for punitive damages in an action by the passenger for the injuries sustained.[43] If a passenger on a street car is insulted by the motorman, the fact that the street railroad company was innocent of, and did not authorize or ratify, the acts of the motorman, will not relieve it from liability for punitive damages.[44] Ordinarily, a railroad company should not be held liable to a passenger for exemplary damages for the failure of the conductor of a train to afford him protection against injury by other persons, unless the conductor was guilty of a willful refusal or absolute failure to interfere when called upon, or unless the injury occurred in his presence and he could have prevented it.[45] But where the conductor refuses to interfere at the request of a passenger exposed to violence at the hands of another passenger, the railroad company is liable, and exemplary damages may be given.[46]

§ 3405. For Wrongful Arrest.—In Kentucky it has been held that if an agent, an employee of a carrier, while acting within the scope of his authority,

v. Philadelphia, etc., R. Co., 87 Md. 48, 38 Atl. 1072.

Plaintiff, a peddler, entered defendant company's train with her bundle of goods, and tendered her ticket to the conductor, who demanded 25 cents for the carriage of the bundle. Plaintiff refused this, and the conductor said in a loud, angry voice: "Just wait, and I will get you in the station. I will talk to you at the station." When the station was reached, plaintiff started to leave the car, when the conductor pushed her back into the seat and prevented her exit. The conductor, baggage master, and brakeman surrounded her; and, when she wanted to go, they chased her back, demanding the 25 cents. At length the conductor said: "I will let you go this time, but watch yourself the next time. I will get you if you do not pay." A notice of defendant, posted when plaintiff bought her ticket, recited that peddler's packs would be charged for as excess baggage, no sum to be collected less than 25 cents. A witness testified that on previous occasions the conductor seemed to persecute plaintiff, and wanted to collect for her package, and that his manner was rather dictatorial. Held, that defendant was not liable for punitive damages. Northern Cent. R. Co. *v.* Newman, 56 Atl. 973, 98 Md. 507.

41. Asperities induced by passenger.—Bullock *v.* Delaware, etc., R. Co., 61 N. J. L. 550, 40 Atl. 650.

42. Language of ticket taker not authorizing charge on punitive damages.—Southern R. Co. *v.* Nappier, 138 Ga. 31, 74 S. E. 778.

43. Retaining brakeman in service after he has assaulted a passenger.—Goddard *v.* Grand Trunk Railway, 57 Me. 202, 2 Am. Rep. 39.

44. That carrier did not authorize or ratify acts of motorman no defense.—Knoxville Tract. Co. *v.* Lane, 53 S. W. 557, 103 Tenn. 376, 46 L. R. A. 549.

45. Failure of conductor to afford passenger protection against injury by other persons.—New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

46. Flannery *v.* Baltimore, etc., R. Co., 4 Mackey (15 D. C.) 111.

In an action by a passenger against a railroad company, it appeared that other passengers on the train, who were also defendant's employees, took plaintiff's hat in a rude manner, and he informed the conductor; that such passengers, on being reproved by the conductor, used abusive language towards plaintiff, and a fight ensued, in which plaintiff was shot and wounded; that two of his assailants were knocked senseless; that during the fight the conductor left the car; that plaintiff followed him, and found him on the platform; that the conductor hurried him through several passenger cars to get him beyond the reach of such passengers; that the latter followed, and used abusive epithets towards, and in the hearing of, plaintiff; that the conductor did nothing more to quiet such passengers, or to eject them from the car, but left them in the car where the fight occurred and where plaintiff's luggage was, and in the next car to it; and that defendant investigated the matter, and did not discharge any of such employees, but promoted one of them. Held, that the facts justified the jury in awarding exemplary damages. New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

unlawfully arrests a passenger, and at the time of the arrest is abusive or insulting to the passenger, the jury, in an action against the carrier for the unlawful arrest, may allow punitive damages.[47] But the supreme court of the United States has held that for wrongful arrest of a passenger on a railway train by the conductor, the railroad company is not liable to punitive damages, in addition to such damages as will compensate the passenger for his outlay and injured feelings, merely on the ground that the conductor's illegal conduct was wanton and oppressive, where it is not shown that he was known to the company to be an unsuitable person, or that it participated in, approved, or ratified his treatment of the passenger.[48]

§ 3406. Aggravation and Mitigation of Damages.—Provocation by Passenger for Wrongful Conduct of Conductor.—Though provocation by mere words spoken by a passenger to a carrier's conductor is insufficient to exonerate the carrier from liability for an assault committed by the conductor on the passenger, yet, when sued for the assault evidence of the passenger's insulting language and insolent conduct, which induced the assault, is admissible in mitigation of compensatory damages, if it appears that the provocation and the blow were substantially coincident.[49] Though the fact that an insulting proposal by the conductor of a railway train to a female passenger is provoked by an immodest remark by her to him does not justify such conduct on his part, it may be considered by the jury in determining the amount of plaintiff's damages, in an action against the railroad company for such wrongful act of the conductor.[50]

Effect of Discharge, Retention or Promotion by Carrier of a Servant Who Has Assaulted a Passenger.—The discharge by a carrier of a servant who has assaulted a passenger shows disapproval of his conduct and may mitigate the damages for which the carrier is liable. If, on the other hand, the carrier retains or promotes him its action may go to aggravate the wrong by ratifying the conduct of the wrongdoer.[51]

§ 3407. Excessive Damages.—In an action against a carrier for personal injuries the question of the amount of damages to be allowed is one that is within the sound discretion of the jury, under proper instructions from the court, and such discretion will not be interfered with unless it is abused. In the appended notes have been collected the cases in which the appellate courts have determined whether particular verdicts, in such actions, were so excessive as to warrant an interference with the discretion vested in the jury. These cases include actions in which damages have been claimed for permanent injury,[52] for injuries resulting in permanent disability,[53] for injuries for the loss of a hand resulting from the carrier's gross negligence,[54] for the bad crushing

47. Liability of carrier to punitive damages for wrongful arrest of passenger.—Louisville, etc., R. Co. *v.* Byrley, 152 Ky. 35, 153 S. W. 36.

48. Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 13 S. C. 261, 37 L. Ed. 97.

49. Provocation by passenger for wrongful conduct of conductor.—Jackson *v.* Old Colony St. R. Co., 92 N. E. 725, 206 Mass. 477, 30 L. R. A., N. S., 1046, 19 Am. & Eng. Ann. Cas. 615.

50. Strother *v.* Aberdeen, etc., R. Co., 31 S. E. 386, 123 N. C. 197.

51. Effect of discharge, retention or promotion by carrier of a servant who has assaulted a passenger.—Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216.

52. Permanent injury—Verdict not excessive.—Where a passenger on a railroad train was permanently injured, it was held that, though a verdict for $9,000 was large, yet passion, etc., could not be inferred from that, and there was no ground for reversal for excessive damages. Griffith *v.* Missouri Pac. R. Co., 98 Mo. 168, 11 S. W. 559.

53. Injuries resulting in permanent disability—Verdict not excessive.—Where the injuries resulting to a passenger through the negligence of the carrier have resulted in a permanent disability, rendering the passenger unable to do "any work of any consequence," a verdict for $2,000 is not excessive. Louisville, etc., R. Co. *v.* Constantine, 14 Ky. L. Rep. 432.

In an action by a passenger against a carrier for personal injuries, a verdict for $8,000, where plaintiff was disabled for life, is not excessive. Kentucky Cent. R. Co. *v.* McMurtry, 3 Ky. L. Rep. 625.

54. Loss of hand from gross negligence—Verdict not excessive.—$8,000 was not

of a foot,[55] for a sprained ankle, entailing the loss of two weeks' salary,[56] for injuries resulting in great physical and mental suffering,[57] for serious injury causing prolonged suffering,[58] for injuries causing fright and illness,[59] for injuries resulting in pneumonia,[60] for injuries resulting from an assault committed by a conductor,[61] brakeman,[62] or other employee of the

excessive damages to a passenger, who was a music teacher, and lost his hand by the company's gross negligence, his income thereby being reduced from $200 per month to one-half that amount, and who was compelled to employ an assistant, and had paid $1,000 for medical treatment and expenses. Chicago, etc., R. Co. *v.* Wilson, 63 Ill. 167.

55. Foot badly crushed—Verdict not excessive.—Plaintiff was a passenger on defendant's railroad and ferry. The ferry-boat had been fastened by the chains, but the front chains had been let down, and plaintiff's foot was caught between the boat and the bridge, and badly crushed. Held, that a verdict for $2,500 was not excessive. New Jersey R. Co. *v.* Palmer, 33 N. J. L. 90.

56. Sprained ankle entailing loss of two weeks' salary—Verdict excessive.—Where, to escape an expected collision with two freight cars which had been carelessly uncoupled on a downward grade, a mail agent jumped from a passenger train, and, spraining his ankle, was so confined as to be deprived of two weeks' salary at $1,080 per annum, held, that a verdict against the railway company of $2,500 was excessive, and that no punitory damages should be allowed. Spicer *v.* Chicago, etc., R. Co., 29 Wis. 580.

57. Injuries resulting in great physical and mental suffering—Verdict not excessive.—Where plaintiff endured great physical and mental suffering, and is probably permanently injured by reason of his being thrown from his seat in a passenger coach after a collision occurring by a running switch negligently made by defendant carrier's employees, a verdict for $1,900 is not excessive. Chesapeake, etc., R. Co. *v.* Harlan, 12 Ky. L. Rep. 506.

A verdict for $1,000 as compensatory damages and $1,500 as exemplary damages is not excessive in an action by a passenger against the carrier, where plaintiff fell between two moving trains by reason of the carrier's negligence, and suffered intense mental suffering in consequence, aside from his physical injuries. Louisville, etc., R. Co. *v.* Richeson, 14 Ky. L. Rep. 925.

58. Serious injury causing prolonged suffering—Verdict not excessive.—In an action by a passenger against the carrier for personal injuries, where the evidence tends to show that plaintiff was seriously injured, and suffered for many months, an appellate court will not set aside a verdict for $1,500 on the ground that it is excessive. Illinois Cent. R. Co. *v.* Sandusky, 14 Ky. L. Rep. 767.

59. Injuries causing fright and illness—Verdict not excessive.—Plaintiff, while a passenger on one of defendant's trains, was not given time to leave the train at her proper station, and was afterwards put off beyond a platform on a steep embankment, where she was compelled to jump from three to four feet from the lowest step to the ground. One of her children was helped off by the brakeman so carelessly that it rolled down the embankment. Plaintiff testified that she was so greatly frightened by seeing the child roll down the embankment, and hearing its cries, and by being left in such close proximity to the train as it passed her, that she was confined to her bed during the next day, and had not been well since the occurrence. Held, that a verdict for plaintiff for $1,500 was not excessive. Cincinnati, etc., R. Co. *v.* Richardson, 14 Ky. L. Rep. 367.

60. Injuries resulting in pneumonia—Verdict not excessive.—Where a passenger was injured by the stagecoach on which he was riding, and his injuries resulted in pneumonia, $5,000 damages was held not excessive. Schafer *v.* Gilmer, 13 Nev. 330.

61. Injuries resulting from assault by conductor—Verdict excessive.—A verdict for $4,150 for injuries from assault by a railroad conductor on a passenger held excessive to the extent of $2,000; there being no showing that the injury was permanent or that future earning capacity was impaired. St. Louis, etc., R. Co. *v.* Mallard (Ark.), 148 S. W. 261.

Verdict not excessive.—In an action by a passenger against a common carrier to recover damages for an assault made by the conductor upon one of the defendant's cars, where there is evidence tending to

62. Injuries resulting from assault by brakeman—Verdict not excessive.—In an action by a passenger against a railroad company for an assault by a brakeman with an iron poker, cracking the external table of the skull and threatening final palsy of the optic nerve, a verdict in $4,000, including punitive damages, held to be not so clearly excessive as to justify a reversal of the judgment. Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

A verdict of $3,000 in favor of a passenger who was unjustifiably assaulted by a brakeman, and thereafter illegally arrested and imprisoned at the instance of the conductor, was not excessive. Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465.

carrier,[63] for injuries resulting from an assault by an officer pursuant to request of a station agent,[64] for criminal assault by a hack driver on a female passenger,[65]

show that the plaintiff, who was disabled at the time of the assault, was badly beaten by the conductor, a verdict and judgment fixing the plaintiff's damages at $2,500 can not be said to be excessive. Birmingham R., etc., Co. *v.* Baird, 30 So. 456, 130 Ala. 334, 54 L. R. A. 752, 89 Am. St. Rep. 43.

Plaintiff, a passenger on defendant's train, was pushed off by the conductor while the train was running 15 miles an hour. In the fall he struck in the mud on his head and neck, and then on his hip, and became unconscious. He lost eight days from his work, worth one dollar a day, during which he suffered greatly. He afterwards worked as usual at the same wages. Held, that a verdict for $2,433 should not be disturbed. East Tennessee, etc., R. Co. *v.* Hyde, 89 Ga. 721, 15 S. E. 621.

A verdict for $4,375 will not be disturbed as excessive in an action against a railroad company whose conductor, without provocation, called a passenger a "God damn little son of a bitch," threatened to kill him, pulled him roughly to the end of the car, appeared about to draw a pistol on him, and spit tobacco juice in his face. East Tennessee, etc., R. Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778.

In an action against a street railway company for an assault on plaintiff by one of its conductors, there was evidence that the conductor asked for plaintiff's fare, who told him to wait a moment, while he felt in his pocket for the money; that the conductor immediately struck him, and kicked him off the car; that plaintiff went immediately to the office of the superintendent to complain, but the conductor was there before him, and assaulted him again, and also that at some time in the affray the conductor cut plaintiff with a knife, and that his arm was broken. Held, that the evidence warranted a verdict for plaintiff for $2,000. Savannah St., etc., R. Co. *v.* Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464.

Where a street car conductor kicked plaintiff, a messenger boy 13 years old, over the heart as he was attempting to board defendant's street car as a passenger, and it appeared that the kick produced a bruise and caused plaintiff severe pain, a verdict in favor of plaintiff for $750 punitive damages was not excessive. McNamara *v.* St. Louis Trans. Co., 81 S. W. 880, 182 Mo. 676, 66 L. R. A. 486.

Where a passenger rightfully on a train was assaulted by the conductor, and struck over the head with a pistol, $2,000 actual damages are not excessive. Texas, etc., R. Co. *v.* Graves (Tex.), 2 Posey 306.

In an action against a railroad company for ill treatment of plaintiff's wife, it appeared that plaintiff purchased for her of defendant a first-classed round-trip ticket from D. to S., which contained a condition that, before returning, the ticket should be signed by the holder, and stamped by defendant's agent at S. The evidence showed that the agent at S. refused to stamp the ticket. Held that, where plaintiff's wife, after exhibiting her ticket, and explaining why it was not signed and stamped, and offering to identify herself, was struck on the head by the conductor in the presence of other passengers, and threatened to be removed from the train with her child unless she would surrender to him her watch and chain, a verdict of $2,020.45 was not excessive. Missouri Pac. R. Co. *v.* Martino, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781.

63. Injuries resulting from assault by employee of carrier—Verdict not excessive.—A verdict for $1,100 for injuries received by a passenger from assault by an employee, where the passenger's eyelid was cut and his right thumb was bitten, and there was a cut across the back of his head, was not excessive. Germann *v.* Great Northern R. Co. (Minn.), 135 N. W. 750.

A verdict of $2,500 recovered by a passenger by reason of being pushed off a car by an employee of the railroad company is not excessive, where his left hand was rendered practically useless. Louisville, etc., R. Co. *v.* Ray, 46 S. W. 554, 101 Tenn. 1.

64. Injuries resulting from assault by officer pursuant to request of station agent—Verdict excessive.—Plaintiff while waiting for defendant's train in a station, after having purchased a ticket, was assaulted by an officer in a mistaken attempt to eject him as a trespasser with others pursuant to the request of the station agent. No serious personal injury was inflicted on plaintiff, though he suffered pain for about 36 hours and some inconvenience for about 30 days. He suffered no pecuniary loss or loss of time, and, after the agent discovered that the officer had struck plaintiff, he called attention to the fact that a mistake had been made, and there was no further effort to eject him from the station or to assault him. Held, that a verdict for $1,000 was excessive, and should be reduced to $500. Whitlock *v.* Northern Pac. R. Co., 109 Pac. 188, 50 Wash. 15.

65. Criminal assault by hack driver on female passenger—Verdict not excessive.—A verdict for $2,000 against the owner of a hack operated to convey passengers for hire for a criminal assault by his servant, a hack driver, on a female passenger, whom he had undertaken in the

for an insult by the carrier's ticket agent,[66] for threats by a conductor, accompanied by abuse or insult,[67] for personal indignities by a conductor to a female passenger,[68] for an insulting proposal by a train auditor to a female passenger,[69] for insult by, and indignity suffered at the hands of, a brakeman,[70] for refusal to permit the passenger to ride in the passenger coach,[71] for failure of the con-

night time to convey from the station to her residence was not excessive. Beardmore *v.* Barton, 121 N. W. 228, 108 Minn. 28.

66. Insult by ticket agent—Verdict excessive.—An award of $1,000 damages to a passenger for an insult by a railroad company's ticket agent held excessive by $500. Illinois Cent. R. Co. *v.* Dacus (Miss.), 60 So. 324.

67. Threats by conductor, accompanied by abuse or insult—Verdict excessive.—Plaintiff and another, starting on a journey, were induced to buy "family mileage" which had just been adopted by defendant carrier, and had their baggage checked and boarded the train. The first two conductors accepted the mileage, the second one tearing off sufficient to carry them to their destination. After they had retired for the night, a third conductor about 3 o'clock in the morning awakened plaintiff, telling her that the mileage was not good beyond a certain point en route, and that she would have to pay fare from that point to destination. He was rude and insulting and demanded money, stating that she need not try to bluff him as she had done the other conductor, that he knew his business, and that unless she paid he would put her off. The conductor finally consented to receive payment in the morning when the matter was adjusted at their destination. Held, that a recovery of $2,500 as punitive damages was excessive, and should be reduced to $1,500. Yazoo, etc., R. Co. *v.* Fitzgerald (Miss.), 50 So. 631.

Where defendant's railway conductor wrongfully took up a passenger's commutation book, demanded the fare, and said that, if it was not paid, he would put plaintiff off the car, and subsequently returned to plaintiff's seat, where he punched and threw down a cash ticket, remarking that he would show that he was a gentleman and paid plaintiff's fare, the recovery of $500 for mortification was excessive, and should be reduced to $100. Humphrey *v.* Michigan United R. Co., 166 Mich. 645, 132 N. W. 447.

Verdict not excessive.—In an action against a carrier for personal indignities offered a passenger, the evidence showed that the conductor demanded in a rude manner the payment of her fare, and that she told him she had an order for a ticket which she could not obtain because of the absence of the agent. A subsequent conductor, though informed why she had not procured a ticket in exchange for the order, became abusive, and threatened to put her off the train, and charged her with beating her way, and stated that he would have an officer for her at a station and put her off. The other passenegrs heard the conductor's remarks. The conductor's treatment caused her to become nervous and worried. Held, that a verdict for $1,497 would not be set aside as excessive. Cincinnati, etc., R. Co. *v.* Harris, 91 S. W. 211, 115 Tenn. 501, 5 L. R. A., N. S., 779.

A verdict of $750 was not excessive, where a conductor, in the presence of the other passengers, cursed and threatened in an inexcusable manner a passenger who had boarded the train not knowing that it did not stop at the station to which he had a ticket Cincinnati, etc., R. Co. *v.* Strosnider (Ky.), 121 S. W. 971.

68. Personal indignities by conductor to female passenger—Verdict not excessive.—Where a conductor drew aside the curtain on a passenger's berth, put his lantern in her face, and in a rough and coarse voice told her that her ticket was not good, and that she would have to pay her fare, and again rudely pulled the curtain aside when the passenger was only partly dressed, an award of $250 punitive damages was justified. Illinois Cent. R. Co. *v.* Fleming, 148 Ky. 473, 146 S. W. 1110.

Plaintiff, a lady school-teacher, while an only passenger on defendant's train, was insulted by the conductor, who repeatedly kissed her by force and against her will. Held, that a verdict of $1,000 against the company is not excessive. Craker *v.* Chicago, etc., R. Co., 36 Wis. 657, 17 Am. Rep. 504.

69. Insulting proposal by train auditor to female passenger—Verdict excessive.—An award of $10,000 to a 16 year old girl, for an insulting proposal made to her by a train auditor while she was a passenger on defendant's train, and traveling alone, held excessive, and reduced to $5,000. Southern R. Co. *v.* Walker (Miss.), 55 So. 362.

70. Passenger insulted and subjected to indignity by brakeman—Verdict not excessive.—$1,000 exemplary damages is not excessive in the case of a passenger insulted, interfered with, and subjected to indignity at the hands of one of the defendant railroad company's brakemen, as he was attempting to pass from the ladies' car to the smoking car to get his baggage, although he sustained no such loss of time or physical suffering as would entitle him to actual damages. Atlanta, etc., R. Co. *v.* Condor, 75 Ga. 51.

71. Refusal to permit passenger to ride in passenger coach—Verdict excessive.—Plaintiff, an invalid so crippled that she

ductor to protect the passenger from assault and insult by fellow passengers,[72] for compelling a female passenger to ride in the same car with drunken and disorderly men,[73] for negligently leaving a female passenger on a car platform where she is frightened by drunken men,[74] and for abusive language by a fellow passenger.[75]

§§ 3408-3423. For Ejection—§ 3408. Elements and Measure of Damages in General.—Where a passenger entitled to transportation on a railroad train or street car is wrongfully ejected therefrom he may recover damages for the tort, and can not be restricted to damages for breach of the contract of transportation.[76] He is entitled to compensation for the injury actually in-

was unable to walk in an erect position, being usually propelled in a wheel carriage went to defendant's station to board a train to attend a picnic. She endeavored to get on the cars from the side away from the platform, and the conductor observing her, told her that she should have gotten on from the platform side, where men were employed "to assist such as you." The conductor opened the car door, and allowed her to enter. She refused his assistance, and when the train arrived at her station, the conductor took her in his arms and placed her in her carriage on the platform. On returning, the conductor prepared a room in the end of the combination mail and express car, not then in use except for the storage of brakemen's clothing, and insisted that plaintiff should travel there, seated in her carriage, instead of in the first-class passenger coach, where there was room for her. She protested, and the conductor again said, "This is the place for such as you." Shortly after the train started, she got out of her carriage and rode on the floor, there being no chairs, because she was afraid that the carriage might roll out of the car, though there was no evidence that such was likely. Held that, though plaintiff was entitled as of right to ride in the passenger coach, and was entitled to recover compensatory damages sustained by the conductor's refusal to permit her to do so, a verdict allowing her $1,000 was so excessive as to indicate passion and prejudice. Caldwell *v.* Northern Pac. R. Co., 105 Pac. 625, 56 Wash. 223.

72. Failure of conductor to protect passenger from assault and insult by fellow passengers—Verdict not excessive.—Where a conductor on a passenger train stands by and winks while drunken and violent passengers insult, assault, and beat another passenger, and force him to dance and sing, without using his power and authority to protect such passenger, a verdict for $1,000 in favor of the latter is not excessive. Richmond, etc., R. Co. *v.* Jefferson, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87.

73. Female passenger compelled to ride in car with drunken and disorderly men—Verdict not excessive.—A woman who bought a first-class railroad ticket was compelled to travel in the same car with drunken men, who smoked, swore, sung indecent songs, and fired pistols in the car. She complained to the conductor, who gave her no relief. Held, that a verdict of $500 damages against the company was not excessive. Texas, etc., R. Co. *v.* Sherbert (Tex. Civ. App.), 42 S. W. 639, affirmed in 93 Tex. 741, no op.

74. Female passenger negligently left on car platform and frightened by drunken men—Verdict not excessive.—Plaintiff with her two children and their nurse boarded defendant's train, and, there being no vacant seats in the day coach, entered the sleeper. Subsequently the sleeping car conductor ordered them to the day coach, and at his direction the porter carried the oldest child out, the plaintiff following with the nurse and other child. The door of the day coach was locked, and the porter, stating that he would get a key, left them on the platform. Three drunken men got on the platform when the train stopped at a station and greatly frightened plaintiff, one of them seizing her by the arm. To escape them she entered the smoking room of the sleeper, remaining there until reaching her destination. Held, that a verdict for plaintiff for $900 was not so excessive as to warrant the court in disturbing it on the ground that it indicated passion or prejudice. Cincinnati, etc., R. Co. *v.* Taylor, 85 S. W. 168, 27 Ky. L. Rep. 351.

75. Abusive language by fellow passenger—Verdict not excessive.—A verdict of $250 in favor of a passenger against a railroad company for failing to exercise proper police powers, as a result of which a drunken fellow passenger used abusive language concerning plaintiff, will not, after having been approved by the trial court, be disturbed, as excessive. Lucy *v.* Chicago, etc., R. Co., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551.

76. Passenger wrongfully ejected not restricted to damages for breach of contract.—Central R., etc., Co. *v.* Roberts, 91 Ga. 513, 18 S. E. 315; Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731; Cleveland City R. Co. *v.* Conner, 74 O. St. 225, 78 N. E. 376.

Where a conductor takes up a passen-

flicted upon him;[77] or, as it may be more specifically stated, he may recover compensation for all damages sustained by him as the natural and direct or proximate result of the wrongful ejection,[78] including pecuniary loss,[79] the fare paid

ger's ticket without giving him any check or other evidence of his right to ride, whereby he is expelled by another conductor after changing cars, his right of action will not be limited to the breach of the company's contract, though no force was used in his expulsion, but will include all damages sustained through the company's violation of the duties it assumed in entering into such contract. Sloane *v.* Southern, etc., R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

Where a passenger on a street car has paid his fare and is entitled to a transfer ticket, and by mistake the conductor gives him a transfer not good over the connecting line, he may, if he has exercised ordinary care, insist on being carried on such other line without further payment of fare, and, if without fault he is ejected for refusing to pay fare other than by such transfer ticket, may recover damages for the tort, and can not be restricted to damages for breach of the contract. Cleveland City R. Co. *v.* Conner, 78 N. E. 376, 74 O. St. 225.

In an action by a railroad passenger who has been wrongfully expelled for refusing to pay an excessive rate of fare, his damages are not limited to the difference between the fare demanded and that tendered. The company are liable for the consequences of the wrong. Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1, 92 Am. Dec. 276.

But in Michigan it has been held that where a railway conductor detaches the wrong coupon from a passenger's ticket, and the passenger is afterwards, by another conductor, ejected from the car, without unnecessary force, for failure to pay another fare, the railroad company is liable only to the amount of the additional fare. Brown *v.* Rapid R. Co., 96 N. W. 925, 134 Mich. 591; Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354.

Damages may be recovered for force used in ejection.—Where a passenger is unlawfully ejected from a train, he may recover damages for the force used in ejecting him. Newport News, etc., Co. *v.* Thomas, 12 Ky. L. Rep. 942.

77. Measure of damages in general.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; Arnold *v.* Atchison, etc., R. Co., 81 Kan. 400, 105 Pac. 541; Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71; Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Where a passenger is wrongfully ejected from a train, he may recover as actual or compensatory damages, a fair and just compensation for the wrong. Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731.

A passenger, who is unlawfully expelled, is entitled to such compensatory damages as proof discloses, and in any case to nominal damages. Reasor *v.* Paducah, etc., Ferry Co., 153 S. W. 222, 152 Ky. 220, 43 L. R. A., N. S., 820.

Where a passenger produces a ticket, or stands ready to pay the legal fare, he may recover substantial damages for being evicted from the car. Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514.

78. Where a passenger is illegally ejected from a train, the measure of damages is such sum as will compensate him for injury directly or naturally flowing from the carrier's act. Baltimore, etc., R. Co. *v.* Bambrey (Pa.), 2 Monag. 109, 16 Atl. 67.

One wrongfully ejected from a train or street car is entitled to recover all damages proximately resulting from the wrong. Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671; Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857.

A street railway passenger who has been wrongfully ejected may recover such damages as naturally result from the wrongful act, taking into consideration the humiliation suffered and such special damages as are alleged and proved. Morrill *v.* Minneapolis St. R. Co., 115 N. W. 395, 103 Minn. 362.

A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket, to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or to leave the train, may elect to leave the train, and may recover from the railroad company, not merely the amount of the additional fare which he is obliged to pay in order to reach his destination, but all damages sustained by him as the direct and natural consequence of the fault of the first conductor. Yorton *v.* Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

A carrier is liable for expulsion of a passenger at a dangerous time or place, not only for the injuries directly suffered, but also for subsequent injuries proximately due thereto. Tilburg *v.* Northern Cent. R. Co., 66 Atl. 846, 217 Pa. 618.

79. Pecuniary loss.—Procter *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306; Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731.

by him,[80] the additional fare he is required to pay to reach his destination,[81] the inconvenience, discomfort,[82] and loss of time[83] to which he is subjected, the additional expense to which he is put,[84] and in addition thereto for physical in-

80. Fare paid.—Camden Interstate R. Co. *v.* Frazier, 30 Ky. L. Rep. 186, 97 S. W. 776. See, also, Brown *v.* Rapid R. Co., 134 Mich. 591, 96 N. W. 925; Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354. Compare Pierson *v.* Illinois Cent. R. Co., 159 Mich. 110, 123 N. W. 576.

81. Additional fare passenger is required to pay to reach his destination.—Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; S. C., 127 Ill. 419, 20 N. E. 89; Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; Yorton *v.* Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

A passenger to whom, by mistake of the agent, a ticket perforated with a date prior to its purchase was sold, may recover for the extra fare required to be paid. Arnold *v.* Atchison, etc., R. Co., 105 Pac. 541, 81 Kan. 400.

82. Inconvenience and discomfort.—*Alabama.*—Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857; Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671.

California.—Procter *v.* Southern California R. Co., 130 Cal. 20, 62 Pac. 306.

Georgia.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

Kentucky.—Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71.

North Carolina.—Edwards *v.* Southern R. Co., 162 N. C. 278, 78 S. E. 219.

Virginia.—Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

Wisconsin.—Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

In an action against a carrier for wrongful ejection of a passenger, plaintiff is entitled to recover compensation for inconvenience in reaching his destination. Missouri, etc., R. Co. *v.* Smith, 6 Ind. T. 99, 89 S. W. 668.

But as a general rule a passenger who has been wrongfully ejected from a train can not recover for inconvenience originating after reaching the station to which he was entitled to be carried. Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Plaintiff, a passenger on defendant's train, refused to establish his right to transportation or pay fare, and during the process of ejection a third person, with plaintiff's consent, tendered plaintiff's fare to the next station, which was not plaintiff's destination. Held, that, if the ejection was wrongful, plaintiff was only entitled to recover damages for loss of time and inconvenience, in reaching the station to which his fare was tendered, and that an instruction authorizing a recovery for inconvenience in being compelled to reach his "destination" by other means was erroneous. Missouri, etc., R. Co. *v.* Smith, 152 Fed. 608, 81 C. C. A. 598, 10 Am. & Eng. Ann. Cas. 939.

83. Loss of time.—*Indian Territory.*—Missouri, etc., R. Co. *v.* Smith, 6 Ind. T. 99, 89 S. W. 668.

Kentucky.—Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71.

Minnesota.—DuLaurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

North Carolina.—Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731.

Tennessee.—Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

Virginia.—Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

Wisconsin.—Boehm *v.* Duluth, etc., R. Co., 91 Wis. 592, 65 N. W. 506.

Where a passenger's ticket is wrongfully refused and he is ejected for refusing to pay further fare, he is entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; S. C., 127 Ill. 419, 20 N. E. 89.

But in an action by a passenger for wrongful ejection from a train plaintiff's loss of time can not be considered in assessing his damages, in the absence of evidence as to the value of his time. Chicago, etc., R. Co. *v.* Newburn, 110 Pac. 1065, 27 Okla. 9, 30 L. R. A., N. S., 432.

In an action for ejecting a passenger, damages resulting from the loss of a job of work, occasioned by the passenger's delay at the station at which he was obliged to leave the train, are too remote to be considered. Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688.

84. Expenses.—Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857; Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671; Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238; Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71; Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Expenditures not proximately resulting from ejection.—Plaintiff's son, while riding with his mother on a train, was killed by a boy with a rifle, as the train was passing. The conductor delivered the body to the coroner, and compelled the mother and her other children to leave the train, though she informed the conductor she had no money to pay necessary expenses. The conductor directed her to go to a hotel, and the citizens made

juries and suffering.[85] The physical injuries and suffering for which the com-

up a purse for her, which she used in paying expenses of the stop-over and purchasing clothing. She telegraphed her husband, who arrived on the day before she left the town where she was ejected. She paid a hotel bill amounting to $38, $20 for clothing, $4.50 for telegrams, $5 to a physician, and claimed to have lost $25 on an option on certain real estate caused by the delay. Held, that none of the expenditures proximately resulted from the ejection, and that plaintiffs were only entitled to nominal damages. Leek *v.* Northern Pac. R. Co., 118 Pac. 345, 65 Wash. 453.

Where the plaintiff, a woman, was wrongfully ejected from defendant's train, in which she was a passenger, while her trunk was carried to her destination, several thousand miles distant, leaving her without a change of clothing, by reason of which she was compelled to buy, she is entitled to have the inconvenience and discomfort caused her taken in to consideration in estimating her damages, as well as her pecuniary loss, but the cost of the clothing purchased is not a proper element of damages. Procter *v.* Southern California R. Co., 62 Pac. 306, 130 Cal. 20.

85. Physical injuries and suffering.—*Georgia.*—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Indian Territory.—Missouri, etc., R. Co. *v.* Smith, 6 Ind. T. 99, 89 S. W. 668.

Kentucky.—Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71.

Minnesota.—Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

Pennsylvania.—Baltimore, etc., R. Co. *v.* Bambrey (Pa.), 2 Monag. 109, 16 Atl. 67.

Tennessee.—Choctaw, etc., R. Co. *v.* Hill, 110 Tenn. 396, 75 S. W. 963.

Virginia.—Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

A passenger wrongfully and forcibly ejected from a train, directly causing physical suffering, may recover therefor. St. Louis, etc., R. Co. *v.* Brown, 97 Ark. 505, 134 S. W. 1194.

A passenger, who, buying a ticket to one point, is given one to a less distant point, where he is ejected, may recover compensation for the bodily pain and suffering that results from the injury. Kansas, etc., R. Co. *v.* Foster, 32 So. 773, 134 Ala. 244, 92 Am. St. Rep. 25.

A passenger may recover for personal injuries resulting from a walk necessitated by a wrongful ejectment from defendant's railroad car, if a certain necessity to take the walk was imposed on him by the expulsion, and it was that which ordinary prudence dictated as the better course to pursue to avoid further inconvenience or discomfort. Bland *v.* Southern Pac. R. Co., 65 Cal. 626, 4 Pac. 672.

The jury in estimating the damages for wrongfully ejecting a passenger may consider the fact that she was wrongfully expelled with her baggage at a lonely place on the railroad, where she could not procure shelter, and that she became physically exhausted in attempting to carry her baggage to the depot and in seeking shelter for the night, together with physical and mental suffering endured in consequence thereof. St. Louis, etc., R. Co. *v.* Brown, 97 Ark. 505, 134 S. W. 1194.

One wrongfully ejected from a street car may recover damages arising from his weak physical condition, drawn to the conductor's attention. Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671.

But in Illinois it has been held that where a passenger's ticket is wrongfully refused, and he is ejected from the train for refusing to pay further fare, he is not entitled to recover damages for personal injuries received, unless the expulsion was malicious or wanton. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238.

But it has been held that if, under such circumstances, the conductor or brakeman, in a reckless or wanton manner, use more force than is reasonable and necessary for the purpose of ejecting the passenger, he may recover for the personal injuries resulting directly from such excessive force. Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89, affirming 26 Ill. App. 594.

Expulsion of woman from sleeping-car berth resulting in miscarriage.—Where an unlawful expulsion from a sleeping-car berth is the proximate cause of a married woman's miscarriage, the sleeping-car company is liable, though its servants were ignorant of the woman's condition when they expelled her. Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

Injuries caused by passenger's resistance to ejection.—In the federal courts it has been held that a passenger, who is rightfully on a railroad train, has a right to refuse to be ejected from it, and to make sufficient resistance to denote that he is being removed by compulsion and against his will. Erie R. Co. *v.* Littell, 128 Fed. 546, 63 C. C. A. 44.

And it has been further held that a passenger wrongfully expelled from a railroad train is entitled to compensation for any increased injury due to such resistance as he is entitled to make to show that he is removed against his will. Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 14 C. C. A. 612.

And in Indiana it has been held that where a railroad company wrongfully ejects a passenger from its car it is liable

plainant is entitled to recover include sickness [86] and injury to health [87] result-

for injuries caused by his resistance. Louisville, etc., R. Co. *v.* Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436.

But in Illinois it has been held that a passenger can not recover for injuries which he voluntarily brings upon himself by resisting the efforts of the trainmen to remove him from the train, or undertaking to retain his place on the train by force. Kiley *v.* Chicago City R. Co., 90 Ill. App. 275, judgment affirmed in 59 N. E. 794, 189 Ill. 384, 52 L. R. A. 626, 82 Am. St. Rep. 460.

In a case in this state, plaintiff, having received from a street car conductor a wrong transfer slip, boarded a car on the connecting line, tendered the transfer, which the conductor refused, and declined to pay her fare. The conductor then requested her to leave the car, and, on her refusal, used reasonable force to eject her. Held that plaintiff could not recover for any injuries sustained, it being her duty to peaceably leave the car, and seek redress in the courts. Judgment 90 Ill. App. 275, affirmed in Kiley *v.* Chicago City R. Co., 59 N. E. 794, 189 Ill. 384, 52 L. R. A. 626, 82 Am. St. Rep. 460.

In Minnesota it has been held that it is the duty of a street railway passenger wrongfully ordered to leave a car to comply with the order, and not await the application of actual force, and that, if he resists the efforts to eject him, he can recover no additional damages resulting from the use of such force as is reasonably necessary to eject him. Morrill *v.* Minneapolis St. R. Co., 115 N. W. 395, 103 Minn. 362.

Injuries not caused by acts of carrier's servants.—Plaintiff was ejected from a car for not paying the amount of fare demanded. He testified that the baggage master and others, in pushing him out, were violent, and jammed him against the side of the door. They denied it. Other passengers did not see plaintiff pushed against the door, but saw him pushed face first, as though he made no great resistance. He claimed to have sustained injuries to his lungs and a contusion of the shoulder blade, but had exhibited no indications of serious injury, and made no complaint for some time after he was ejected, and did not consult a physician until after he had attended to business matters. He had previously been afflicted with rheumatism and felt some soreness whenever he caught cold. Held, that the injuries were not caused by acts of the railway company's servants. Chicago, etc., R. Co. *v.* Riley, 74 Ill. 70.

Injuries not proximately caused by ejectment.—If a passenger is ejected from a train, injuries received from exposure in attempting to walk nine miles to his destination, when there was a village where he was put off, are not proximately caused by his ejectment, and so not properly considered in estimating damages. Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 86, 128.

86. Sickness.—Plaintiff was wrongfully ejected from defendant's train at a station where she was a stranger, and where there was no regular station house, on the ground that her ticket was not good on that train. She walked back, a distance of four miles, to the station where she had gotten on the train, and where she must have been to some extent known, and there took a train which she could have taken had she waited at the station where she was put off. She testified that she did not know she could take the train at the latter place. While walking, she was caught in a storm, and sickness resulted. Held, that the consequences of being caught in the storm were not too remote to enter into the computation of damages. Malone *v.* Pittsburgh, etc., R. Co., 152 Pa. 390, 25 Atl. 638.

But where a person was ejected from a train five miles from his home, where there was no passenger station, and was in such good health and so well clothed that he could properly go home afoot, and there was no train that he could wait for, even if there had been a station, an illness contracted by him from the walk had no connection with his ejection, and he could not recover therefor. Caher *v.* Grand Trunk R. Co., 71 Atl. 225, 75 N. H. 125.

87. Injury to health.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490.

Where a passenger on a railway train, who holds a ticket entitling him to ride, is wrongfully expelled from the train by the conductor before reaching his destination, the injury to health caused by exposure to the weather, if the proximate and natural consequence of the expulsion, is a proper element of compensatory damages. Serwe *v.* Northern Pac. R. Co., 48 Minn. 78, 50 N. W. 1021.

But a person upon whom a wrong has been committed is under obligation to lighten the consequential damages as much as he can by the use of ordinary care and diligence. This applies, in case of an expelled passenger, to the time and mode of traveling from the place of his expulsion to the station at which he was entitled to be set down. It applies also to fatigue, hardship, and injury to his health involved in reaching there. Though he can not be compelled to pay fare to avoid wrongful expulsion, after being expelled he can not recover damages for walking and its consequences when he might have reached the station with less injury to his health by riding on the same or a subsequent train, or by securing other conveyance. Nor, as a general rule, can

ing from the wrongful ejection. But in an action for wrongful ejection damages are not recoverable for injury to plaintiff's business or professional reputation.[88] In such an action the carrier is liable for any injury to the passenger without regard to the degree of care exercised in making the ejection.[89] Compensatory damages for the manner of ejecting a passenger, where there is no question of the right to eject, are restricted to the direct consequences of the wrong.[90] They include compensation to the passenger for any loss of time[91] and for any pain and suffering by reason of any undue and unnecessary force used in ejecting him.[92] But the passenger is not, in such case, entitled to compensation for his inconvenience in having to make his way back to his station in the dark.[93] In an action for unlawful ejection from a train, the fact that defendant is a railroad company should have no weight with the jury in determining the amount of damages.[94]

Ejection at Place Other than a Regular Station for Refusal to Pay Fare.—Unless actual damage has ensued, a passenger is entitled only to nominal damages, upon being ejected from a railroad train at a place other than a regular station or usual stopping place, for refusal to pay his fare;[95] and this is so even though the railroad company is forbidden by law to eject passengers except at a station.[96]

Ejection at Place Other than a Usual Stopping Place after Being Carried beyond Destination.—A passenger's measure of damages for being ejected from a train at a point other than a usual stopping place, after being carried beyond the place of his destination, is the actual injury to his person, and the pecuniary loss suffered by him in walking to the usual stopping place.[97]

Removal of Lewd Woman from Waiting Room of Station.—Where a lewd woman, by artifice, gains admission to the ladies' waiting room of a railroad station some hours before the train is to leave which she says she wishes to take, and is removed by the police, but without force, at request of the railroad company's agent, she is entitled to only nominal damages, if any.[98]

Person Banished from Town by Vigilance Committee Put Off Ship Which He Boards to Return to Such Town.—Where a person who has been forcibly expelled from a town by a vigilance committee under threat of death if he return, boards a ship to return to that town and is put off the ship by the captain before reaching the town and sent back to the port at which he boarded the ship, he is entitled to compensation for the injury done him by being put on board the return vessel, so far as that injury arose from the act of the captain of the

he recover for hardship or injury to health originating after reaching the station to which he was entitled to be carried, or needlessly caused by walking and exposure before reaching there. Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

88. Damages not recoverable for injury to business or professional reputation.—Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834, so holding in action for wrongful ejection from a street car.

89. Degree of care exercised in making ejection immaterial.—St. Louis, etc., R. Co. *v.* Osborn, 55 S. W. 142, 67 Ark. 399.

90. Damages recoverable where ejection is lawful but the manner thereof is wrongful.—Texas, etc., R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

91. Louisville, etc., R. Co. *v.* Fowler, 29 Ky. L. Rep. 905, 96 S. W. 568.

92. Louisville, etc., R. Co. *v.* Fowler, 29 Ky. L. Rep. 905, 96 S. W. 568; Texas, etc., R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

93. Texas, etc., R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

94. That defendant is a railroad company should have no weight in determining amount of damages.—Olson *v.* Northern Pac. R. Co., 96 Pac. 150, 49 Wash. 626, 18 L. R. A., N. S., 209.

95. Ejection at place other than a regular station for refusal to pay fare.—St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524; Chicago, etc., R. Co. *v.* Roberts, 40 Ill. 503.

96. Chicago, etc., R. Co. *v.* Roberts, 40 Ill. 503.

97. Ejection at place other than a usual stopping place after being carried beyond destination.—St. Louis, etc., R. Co. *v.* Williams, 100 Ark. 356, 140 S. W. 141.

98. Removal of lewd woman from waiting room of station.—Beeson *v.* Chicago, etc., R. Co., 62 Iowa 173, 17 N. W. 448.

other vessel in putting him there.[99] But he is not entitled to damages for injuries that he suffered from obstructions which he afterwards met with in getting to the place from whence he had been expelled and where he wanted to return; and which injuries were not caused by this act, but were owing to the fact that all to whom he afterwards applied for passage to that place knew the power and determination of the authorities there and were afraid to carry him back.[1]

Entering Train for Purpose of Being Put Off So as to Make a Case for Damages against Carrier.—If one enters a train in possession of a ticket entitling him to ride thereon, not for the purpose of making the journey called for by the ticket, but for the purpose of being put off, so as to make a case for damages against the railroad company, he is, if ejected, entitled to nominal damages only.[2] But if such person enters the train with the bona fide intention of using the ticket for the purpose of making the journey for which it is good, he is entitled to recover whatever damages he may sustain by reason of a wrongful expulsion, although he may, before going upon the train, have had reason to believe the ticket would not be accepted for passage by the conductor thereon.[3]

§§ 3409-3410. Mental Suffering—§ 3409. Ejection from a Railroad Train or Street Car.—A passenger on a railroad train or street car who is wrongfully ejected therefrom by the conductor or other employee of the carrier, acting within the scope of his authority, may, in an action against the carrier, recover compensatory damages for the humiliation, mortification, wounded feelings, annoyance, vexation, or other mental suffering that results from the wrongful ejection;[4] and this is so though the passenger received no physical in-

99. Person banished from town by vigilance committee put off ship which he boards to return to such town.—Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

1. Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447.

2. Entering train for purpose of being put off so as to make a case for damages against carrier.—Southern R. Co. *v.* Barlow, 30 S. E. 732, 104 Ga. 213, 69 Am. St. Rep. 166.

3. Southern R. Co. *v.* Barlow, 30 S. E. 732, 104 Ga. 213, 69 Am. St. Rep. 166.

4. Damages are recoverable for mental suffering resulting from wrongful ejection.—*Alabama.*—Louisville, etc., R. Co. *v.* Hine, 121 Ala. 234, 25 So. 857; McGhee *v.* Cashin (Ala.), 40 So. 63; Kansas, etc., R. Co. *v.* Foster, 134 Ala. 244, 32 So. 773, 92 Am. St. Rep. 25.

Arkansas.—St. Louis, etc., R. Co. *v.* Brown, 97 Ark. 505, 134 S. W. 1194; St. Louis, etc., R. Co. *v.* Hammett, 98 Ark. 418, 136 S. W. 191; St. Louis, etc., R. Co. *v.* Branch, 106 Ark. 269, 153 S. W. 118.

California.—Gorman *v.* Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157.

Georgia.—Georgia R., etc., Co. *v.* Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Atlanta Consol. St. R. Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100; Georgia R., etc., Co. *v.* Baker, 120 Ga. 991, 48 S. E. 355; Mabry *v.* City Elect. R. Co., 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590, 94 Am. St. Rep. 141.

Idaho.—Lindsay *v.* Oregon, etc., R. Co., 13 Idaho 477, 90 Pac. 984, 12 L. R. A., N. S., 184.

Illinois.—Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89, affirming 26 Ill. App. 594.

Indiana.—Chicago, etc., R. Co. *v.* Holdridge, 118 Ind. 281, 20 N. E. 837.

Indian Territory.—Missouri, etc., R. Co. *v.* Smith, 89 S. W. 668, 6 Ind. T. 99.

Iowa.—Curtis *v.* Sioux, etc., R. Co., 87 Iowa 622, 54 N. W. 339.

Kansas.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

Kentucky.—Southern R. Co. *v.* Hawkins, 121 Ky. 415, 28 Ky. L. Rep. 364, 89 S. W. 258; Illinois Cent. R. Co. *v.* Williams (Ky.), 143 S. W. 760; Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209; Camden Interstate R. Co. *v.* Frazier, 30 Ky. L. Rep. 186, 97 S. W. 776; Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71; Louisville, etc., R. Co. *v.* Wilsey, 12 S. W. 275, 11 Ky. L. Rep. 419, 5 L. R. A. 855.

Minnesota.—Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688; Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

New York.—Harding *v.* New York, etc., R. Co., 36 Hun 72.

North Carolina.—Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731; Ed-

jury,[5] and though conductor acted in good faith, and without violence or insult, and no material damage was sustained,[6] and though the facts do not warrant al-

wards *v.* Southern R. Co., 162 N. C. 278, 78 S. E. 219.

Ohio.—Smith *v.* Pittsburg, etc., R. Co., 23 O. St. 10.

Oklahoma.—St. Louis, etc., R. Co. *v.* Yount, 30 Okla. 371, 120 Pac. 627.

Pennsylvania.—Baltimore, etc., R. Co. *v.* Bambrey (Pa.), 2 Monag. 109, 16 Atl. 67.

Tennessee.—Choctaw, etc., R. Co. *v.* Hill, 75 S. W. 963, 110 Tenn. 396.

Texas.—Texas, etc., R. Co. *v.* James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347.

Virginia.—Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

Washington.—Willson *v.* Northern Pac. R. Co., 5 Wash. 621, 32 Pac. 468, 34 Pac. 146.

A passenger who has bought a ticket entitling him to a passage on a train, and is compelled by the conductor, under threat of violence, to leave the train before he arrives at his destination, can claim damages for the indignity, and consequent injury to his feelings, in being required to leave the train under the circumstances. Delaware, etc., R. Co. *v.* Walsh, 4 Atl. 323, 47 N. J. L. 548.

Where a conductor wrongfully and wantonly ejected a passenger from a moving train, causing him to sustain physical injuries, the carrier was liable to compensate him for mental suffering and humiliation. Harkless *v.* Chicago, etc., R. Co. (Mo. App.), 132 S. W. 29.

Where a conductor refuses to recognize a valid ticket in the hands of the holder, and demands of him the regular fare, and attempts to eject him by force for nonpayment thereof, the company is liable in damages for the assault, and the jury in assessing the damages may consider in connection therewith the annoyance, vexation, and indignity suffered by him. Carsten *v.* Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 20 Am. St. Rep. 589, 9 L. R. A. 688.

A passenger received no check from the conductor on surrendering his ticket, and went into another car, and, on his fare being demanded, informed the conductor of such facts, and offered to prove their truth by a passenger who sat with him when the ticket was taken up if the conductor would go with him into the other car, which the conductor refused to do, and, on the refusal of the passenger to pay his fare, ejected him from the train in the night time, eight miles from his residence and one mile from the nearest railroad station. Held, that the passenger was entitled to recover not only those damages ordinarily termed "actual damages," but for whatever injury to his feelings or of indignity, pain, and disgrace such conduct would tend to produce in view of the time, place, and circumstances. Lucas *v.* Michigan Cent. R. Co., 56 N. W. 1039, 98 Mich. 1, 39 Am. St. Rep. 517.

5. *Georgia.*—Mabry *v.* City Elect. R. Co., 42 S. E. 1025, 116 Ga. 624, 59 L. R. A. 590, 94 Am. St. Rep. 141; Georgia R., etc., Co. *v.* Baker, 48 S. E. 355, 120 Ga. 991.

Illinois.—Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584.

Nevada.—Quigley *v.* Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

Texas.—Missouri, etc., R. Co. *v.* Tarwater, 75 S. W. 937, 33 Tex. Civ. App. 116.

In an action for ejecting plaintiff from a street car, no force having been used, it was proper to charge that, if the jury found for plaintiff, they should allow the fare which he paid, if any, and such a reasonable sum as damages as they might believe from the evidence would compensate him for any humiliation or degradation plaintiff suffered by reason of being ejected from the car, not exceeding the amount claimed. Camden Interstate R. Co. *v.* Frazier, 97 S. W. 776, 30 Ky. L. Rep. 186.

Where a passenger is wrongfully ejected from a railroad car, in a forcible and violent manner, but without physical injury, the jury, in assessing his damages, may consider his injured feelings, the indignity endured, his mental suffering and wounded pride. Gorman *v.* Southern Pac. Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157.

6. Where a person is wrongfully ejected from a train, she is entitled to recover for humiliation and mental suffering caused thereby, though the ejection was unaccompanied by violence, insult, or indignities, and though the conductor believed that she had no right to ride on such train, and acted in good faith in ejecting her. Willson *v.* Northern Pac. R. Co., 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. See also, Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

A passenger may recover damages for indignity, humiliation, wounded pride and mental suffering involved in and resulting from his wrongful expulsion from the train, even though the conductor was not actuated by malice or willfulness. Coine *v.* Chicago, etc., R. Co., 99 N. W. 134, 123 Iowa 458.

In an action against a railroad company for wrongful expulsion of a passenger who had been unable to procure a ticket before entering the car, although it was proved that the conductor acted in good faith, and without violence or insult, and that no actual damage was sustained, it was held that the jury, in estimating the damages, might consider not only the annoyance, delay, and risk to

lowance of vindictive damages,[7] and though no one was present at the time of the ejection but the conductor, the brakeman and the passenger.[8] But to warrant recovery for mental suffering in such case such suffering must be the natural and proximate result of the wrong done.[9] In an action by an infant of tender years for wrongful ejection from a railroad car or train, which ejection was willful and intentional, fright and terror are proper elements of damages if the ejection was under such circumstances as would naturally cause fright and terror to the infant.[10] If a young girl who is unaccustomed to travel is wrongfully ejected from a train under circumstances calculated to arouse in her mind feelings of insecurity and danger, she is entitled to recover for mental suffering arising from anticipated danger.[11] Where a conductor in ejecting a passenger from a train uses insulting or abusive language to him, he may, even though he is rightfully expelled, recover damages for the injury to his feelings;[12] but not damages be-

the passenger, but also the indignity in the mere fact of expulsion. Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133. See also, Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584.

Where a passenger presents a proper ticket, but is told by the conductor that it has expired, and that he must either pay the fare or leave the train, and, having no money, he is taken by the collar and led out on the station platform, where a friend supplies him with money for the fare, which he pays to the conductor, and is allowed to complete his journey, he may recover not only the amount of the fare with interest, but actual damages for the injury and indignity, though the conductor acted in good faith. Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

In an action for damages for expulsion from a train, where recovery is warranted by the evidence, plaintiff may recover for insult, injured feelings, and humiliation, together with the actual expense, though the conductor used no violence, and was without fault. St. Louis, etc., R. Co. *v.* Yount, 30 Okla. 371, 120 Pac. 627.

7. In an action against a railroad company by a passenger to recover compensatory damages for wrongful ejection, the humiliation and degradation imposed on plaintiff by such ejection may be considered in estimating the damages, though vindictive damages can not be given. Louisville, etc., R. Co. *v.* Wilsey, 9 Ky. L. Rep. 1008; Lake Erie, etc., R. Co. *v.* Fix, 88 Ind. 381, 45 Am. Rep. 464.

8. Where a passenger is improperly expelled from a train, he is none the less entitled to damages for the humiliation and disgrace suffered because no one was present beside the conductor and the brakeman and the passenger. Kansas, etc., R. Co. *v.* Little, 71 Pac. 820, 66 Kan. 378, 61 L. R. A. 122, 97 Am. St. Rep. 376.

9. Mental suffering must be the natural and proximate result of the wrong done.—Lindsay *v.* Oregon, etc., R. Co., 15 Idaho 477, 90 Pac. 984, 12 L. R. A., N. S., 184.

Mental suffering held the proximate result of unlawful ejection.—Where a husband with his sick wife entered the train and he was unlawfully ejected therefrom and his wife was carried on the train, his anxiety and mental suffering were the proximate result of the unwarranted act which was the direct cause of such suffering. Lindsay *v.* Oregon, etc., R. Co., 90 Pac. 984, 13 Idaho 477, 12 L. R. A., N. S., 184.

Damages too remote to warrant recovery.—Plaintiff, who was wrongfully ejected from defendant's train, can not recover damages for humiliation resulting from his being "guyed" about being put off, by persons who were not present when he was ejected, as such damages are too remote. Louisville, etc., R. Co. *v.* Hine, 25 So. 857, 121 Ala. 234.

10. Ejection of infant—Damages recoverable for fright.—Cincinnati Northern Tract. Co. *v.* Rosnagle, 95 N. E. 884, 84 O. St. 310, 35 L. R. A., N. S., 1030, Ann. Cas. 1912C, 639.

11. In an action against a railroad company for damages for ejecting plaintiff, a passenger, from the train at a small station before reaching her destination, the evidence showed that plaintiff was a girl of 16, unaccustomed to travel, and that she, with a young girl companion, was ejected by defendant at a small town, where she was a stranger, and where she remained an hour before she was discovered by friends. Held that, as the circumstances were calculated to arouse in plaintiff's mind feelings of insecurity and danger, an instruction that she could not recover for mental suffering arising from any "supposed or anticipated" danger was properly refused. Missouri Pac. R. Co. *v.* Kaiser, 82 Tex. 111, 18 S. W. 305.

12. Insulting or abusive language in rightfully ejecting passenger.—Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Though a railroad ticket presented by a passenger does not entitle her to passage, so that, on her being informed of its invalidity and refusing to pay fare, the conductor may remove her, the company is liable for compensatory damages for his using unnecessary and insulting language to her, injuring her feelings and humiliating her. Boling *v.* St. Louis, etc., R. Co., 88 S. W. 35, 189 Mo. 219.

cause the words used tended to bring him into ignominy or disgrace.[13] Where the humiliation resulting from a passenger's wrongful expulsion from a car produced a recurrence of nervous paroxysms to which she had previously been subject, such injury is a legitimate element of damages, whether her susceptibility to nervous disturbance was known to the carrier or not.[14] In assessing damages for humiliation or wounded feelings sustained by a passenger who has been wrongfully ejected from a train or car, the jury may consider his station in life, his reputation in the community,[15] and his professional standing,[16] but they should not take into account either the carrier's wealth or plaintiff's poverty.[17] In an action for the wrongful expulsion of a female passenger, injury to her good name is not an element of damages recoverable.[18] A passenger ejected from a train can not recover damages for insults or humiliation put on other passengers at the time.[19] A passenger can not recover damages for humiliation in an action of ejection where he voluntarily suffers or seeks ejection in order to lay the foundation for damage suit.[20] A railroad company has a right to employ a colored train hand and a conductor may properly call on him to assist in ejecting a passenger who ought to be ejected from the train; and if a white passenger is wrongfully ejected from a train, the fact that a colored train hand was called on to assist in so doing will not make the company liable for greater damages than would be recovered if the train hand had been a white man.[21]

§ 3410. Ejection from a Ferryboat.—If a passenger is ejected from a ferryboat after he has paid his fare, he may recover compensation for the indignity and injury to his feelings.[22]

§§ 3411-3421. Exemplary or Punitive Damages—§§ 3411-3420. In Actions against Carriers—§ 3411. In General.—A railroad company is not liable in exemplary damages for the act of a conductor who unlawfully ejects a passenger from its cars, unless the passenger would have been entitled to recover such damages had the action been against the conductor.[23] To entitle a passenger to exemplary damages for his wrongful expulsion ffom a train or car, such expulsion must be attended by rudeness, insult, or aggravating circumstances calculated to humiliate the passenger.[24] In some jurisdictions an even narrower rule of liability prevails,[25] while in other jurisdictions exemplary

13. Southern Kansas R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

14 Recurrence of nervous paroxysms produced by humiliation resulting from wrongful ejection.—Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

15. Jury may consider plaintiff's station in life and reputation in the community.—Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

16. Jury may consider plaintiff's professional standing.—Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834.

17. Jury should not consider carrier's wealth or plaintiff's poverty.—Hays *v.* Houston, etc., R. Co., 46 Tex. 272.

18. Injury to good name of female passenger not an element of damages.—Procter *v.* Southern California R. Co., 62 Pac. 306, 130 Cal. 20.

19. Passenger ejected can not recover for insults to or humiliation of other passengers.—Louisville, etc., R. Co. *v.* Scott, 133 S. W. 800, 141 Ky. 538, 34 L. R. A., N. S., 206, Ann. Cas. 1912C, 547.

20. Passenger who voluntarily suffers or seeks ejection in order to lay foundation for suit can not recover for humiliation.—Brenner *v.* Jonesboro, etc., R. Co., 82 Ark. 128, 100 S. W. 893, 9 L. R. A., N. S., 1060, 12 Am. & Eng. Ann. Cas. 489; St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354, 15 S. W. 899.

21. Greater damages not recoverable because ejection was by a colored train hand.—Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

22. Passenger wrongfully ejected from ferryboat may recover for indignity and wounded feelings.—Allen *v.* Camden, etc., Ferry Co., 46 N. J. L. 198.

23. Right to recover from conductor test of liability of carrier.—Townsend *v.* New York, etc., R. Co., 56 N. Y. 295, 15 Am. Rep. 419.

24. To warrant exemplary damages ejection must be attended by rudeness, insult or aggravating circumstances.—Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731.

25. In Maryland it has been held that to warrant exemplary damages against a carrier for the wrongful ejection of a passenger there must be an element of fraud, malice, evil intent or oppression forming

or punitive damages are held to be recoverable only when the railroad company directed, authorized, or subsequently ratified the acts or conduct of the conductor, agent, or employee by whom the wrongful expulsion was made.[26] But a preponderance of authority would seem to support the rule that if the acts or conduct of a conductor or other employee of a railroad company, acting within

part of the wrongful act. Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

In Wisconsin it has been held that to justify punitive damages for the wrongful act of a conductor in ejecting a passenger, the facts of vindictiveness and malice must expressly appear. Di Benedetto *v.* Milwaukee Elect. R., etc., Co., 136 N. W. 282, 149 Wis. 566.

Plaintiff, accompanied by a lady, paid his street-car fare with a genuine coin, to defendant's conductor, who claimed it a counterfeit, and asked plaintiff to pay with other money. After plaintiff's refusal, and some dispute, the conductor took plaintiff by the collar, and pulled him, saying, "Come along, you've got to leave this car." Plaintiff and the lady accompanying him went out peaceably. The conductor spoke harshly, and so loudly as to be heard by others in the car when it was in motion. Held, that plaintiff was not ejected from the car under such insulting and cruel circumstances as warranted the trial court's submitting the question of punitive damages to the jury. Vassau *v.* Madison Elect. R. Co., 82 N. W. 152, 106 Wis. 301.

26. A railroad company is not liable to punitive damages for the malicious acts of its conductor in expelling a passenger, if it did not direct the acts or subsequently ratify them. Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 L. Ed. 97; Pittsburgh, etc., R. Co. *v.* Russ, 57 Fed. 822, 6 C. C. A. 597; Turner *v.* North Beach, etc., R. Co., 34 Cal. 594; Sullivan *v.* Oregon R., etc., Co., 12 Ore. 392, 7 Pac. 508, 53 Am. Rep. 364; Hagan *v.* Providence, etc., R. Co., 3 R. I. 88, 62 Am. Dec. 377.

Though the conduct of defendant's conductor in wrongfully ejecting plaintiff from its street car was such as to render the conductor liable to plaintiff for punitive damages, plaintiff could not recover such damages from defendant, unless defendant had authorized or ratified the conductor's conduct. Vassau *v.* Madison Elect. R. Co., 82 N. W. 152, 106 Wis. 301.

A street railroad company is not liable in punitive damages to a passenger who was wrongfully and with unnecessary violence ejected from a car by the conductor, where it did not participate in the wrongful acts, either by authorizing or approving of them. Peterson *v.* Middlesex, etc., Tract. Co., 59 Atl. 456, 71 N. J. L. 296.

In an action for plaintiff's wrongful expulsion from defendant's street car, it appeared that plaintiff was so expelled September 12, 1894; that the only notice to defendant that the conduct of its conductor who expelled plaintiff was malicious was the allegation in the complaint served September 25, 1894; that the conductor continued in defendant's employment till December 18, 1894, when the service was voluntarily ended. The record did not show that the jury were acquainted with the contents of the complaint, and they were instructed that, if the conductor maliciously put plaintiff off the car, plaintiff was entitled to punitory, as well as compensatory damages. Held that, within the rule that punitory damages can be recovered against the principal for the malicious act of the agent only when such act is either authorized or ratified by the principal, the court erred in taking the question of ratification from the jury. Robinson *v.* Superior Rapid Trans. R. Co., 68 N. W. 961, 94 Wis. 345, 34 L. R. A. 205, 59 Am. St. Rep. 897.

Exemplary damages recoverable for wanton assault authorized or approved by carrier.—Where the employees of a railroad company, in removing a passenger from its train for his refusal to pay more than the maximum prescribed by the Wisconsin statute, Acts 1874, chap. 273, commit a wanton and aggravated assault upon him, which is either authorized or approved by the company, a case is presented for exemplary damages. Hinckley *v.* Chicago, etc., R. Co., 38 Wis. 194.

Facts not warranting finding that carrier's superintendent ratified conductor's conduct.—Plaintiff, having paid his street-car fare with a genuine coin, which defendant's conductor claimed was a counterfeit, refused to pay with other money, and was put off the car by the conductor. Thereafter defendant's superintendent told plaintiff that defendant would stand by anything the conductor had done, and that he had a right to put plaintiff off. Held, that the jury was not warranted in finding that the superintendent ratified any malicious or insulting conduct of the conductor, so as to render defendant liable for punitive damages. Vassau *v.* Madison Elect. R. Co., 82 N. W. 152, 106 Wis. 301.

In Georgia the prompt discharge by a railroad company of a conductor who has been guilty of unnecessary violence in evicting a passenger excludes plaintiff's right to recover additional damages, "to deter the wrongdoer from repeating the trespass" (Code, § 3066), but does not prevent his recovery for "wounded feelings." Western, etc., Railroad *v.* Turner, 72 Ga. 292, 53 Am. Rep. 842.

the scope of his authority, in wrongfully ejecting a passenger from a train or car, is malicious or oppressive, or shows a wanton or reckless disregard of the passenger's rights or of the consequences that may ensue,[27] or if the passenger is subjected to unnecessary violence and indignity, to abuse, insult, or profane and threatening language,[28] exemplary damages may be recovered in an action

27. **Malicious acts of servant.**—Exemplary damages may be awarded against a street car company for malicious acts of its servant in ejecting a passenger from a car. Little Rock R., etc., Co. *v.* Dobbins, 95 S. W. 788, 78 Ark. 553.

Malice or oppression by conductor.—Where an offense for which the civil liability of the offender is sought to be enforced is not punishable by the criminal law, as in the case of an unlawful expulsion of a passenger from a train by the carrier's conductor, and malice or oppression weigh in the controversy, exemplary or vindictive damages may be assessed. Louisville, etc., R. Co. *v.* Wolfe, 27 N. E. 606, 128 Ind. 347, 25 Am. St. Rep. 436.

Punitive damages may be awarded in favor of a railroad passenger who, after first remonstrating, offers to pay the full amount of fare demanded by the conductor, who refuses to accept it, and ejects the passenger in a rude and violent manner, tearing his coat, with the malicious intention of bringing him into disgrace and contempt in the eyes of other passengers. Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126.

Recklessness and oppression by conductor acting on an honest mistake of fact.—A passenger ejected by the conductor under circumstances of recklessness and oppression may recover exemplary damages, though the latter acted on an honest mistake of fact. Lucas *v.* Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517.

28. **Passenger treated with unnecessary violence and indignity.**—In a passenger's action against a railroad company for injuries from being ejected, the court properly instructed that if plaintiff was injured by defendant's agents in being ejected as alleged, and was treated with unncessary violence and indignity, the jury could find such further damages as they might think proper to punish and deter defendant in the future. Maryland, etc., R. Co. *v.* Tucker, 80 Atl. 688, 115 Md. 43.

Passenger thrown from car with such violence as to dislocate his hip.—In an action against a railroad company for damages sustained by plaintiff in being forcibly ejected from defendant's car after having paid his fare to ride thereon, where there was evidence that the conductor, with others, threw plaintiff from the car with such violence as to dislocate his hip, an instruction as to punitive damages was proper. St. Louis, etc., R. Co. *v.* Davis, 56 Ark. 51, 19 S. W. 107.

Passenger jerked from train and then held and restrained of his liberty.—In an action against a railroad company for wrongful ejection from its train, in which there was evidence that plaintiff was forcibly jerked from the train, and then held and restrained of his liberty, a charge authorizing punitive damages was not error. Choctaw, etc., R. Co. *v.* Hill, 75 S. W. 963, 110 Tenn. 396.

Passenger handled in a rough manner, kicked and cursed.—Where a carrier's servant, in wrongfully ejecting plaintiff, handled him in a rough manner, kicked and cursed him as he was ejected from the car, and the flagman jerked him from the train, so that he was badly bruised by the fall, the court properly permitted a recovery of punitive damages. Louisville, etc., R. Co. *v.* Cottongim (Ky.), 119 S. W. 751.

Rough and forcible ejection of female passenger.—The jury may award punitive damages for expulsion of a female passenger, where the ejection was rough and forcible, and in the presence of a score of people. Ann Arbor R. Co. *v.* Amos, 97 N. E. 978, 85 O. St. 300, 43 L. R. A., N. S., 587.

Female passenger rudely ejected.—Punitive damages may be awarded to a female passenger who was rudely ejected from a street car by the conductor, and compelled to walk some distance in the mud, because of her refusal to comply with an unwarranted demand of the conductor that she change her seat in the car. Southern, etc., Tract. Co. *v.* Compton, 38 So. 629, 86 Miss. 269.

Abuse and insult.—Where a passenger on a railroad train is abused and insulted by the conductor, who has been informed that he had sold his ticket, which was not transferable, and, without being given reasonable time to produce his ticket, is required to leave the train, he may recover exemplary damages. Louisville, etc., R. Co. *v.* Maybin, 66 Miss. 83, 5 So. 401.

Insulting language.—Evidence tending to show that in ejecting a passenger illegally, the conductor used insulting language and was impolite and gruff, warrants a charge to the jury upon the law of vindictive damages. Atlanta Consol. St. R. Co. *v.* Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

Insult and rudeness to female passenger.—Where, in an action for ejection of a female passenger, several witnesses testified that the conductor was not only insulting in his manner and conduct, but

against the company. In Georgia it has been held that where a passenger is without justification or excuse forcibly expelled from a train by the railroad employee in charge thereof, punitive damages are recoverable.[29] In the same state it has been held that exemplary damages may be recovered by a passenger for his wrongful ejection from a train or car in the night time, at a dangerous place,[30] or at a place with which he is unfamiliar,[31] or for his wrongful ejection at an improper place and in the presence of a number of persons.[32] A passenger who is ejected from a train through mistake of the conductor, but without malice or unnecessary force, can not recover exemplary damages.[33] Nor is an intoxi-

treated plaintiff in a rude and ungentlemanly manner, the court properly submitted an instruction authorizing punitive damages. Louisville, etc., R. Co. *v.* Fowler, 107 S. W. 703, 32 Ky. L. Rep. 1021.

But punitive damages were held not to be recoverable where the ejected passenger, after stating that the agent was insulting, testified only that he returned her ticket, saying that he would not stop at her destination, but would put her off at an intermediate point, and that as they approached that place he picked up her baggage and said: "You get off here. Come on. You've got to get off." Louisville, etc., R. Co. *v.* Summers (Ky.), 118 S. W. 926.

Ejection of female passenger at night accompanied by profane and threatening language.—In an action by H. against a railroad company, there was evidence that she bought a ticket for U. Station, and had her baggage checked for U.; that, upon reaching a station 10 miles short of U.; she was ordered to get off, as the train would not stop at U.; that, upon her refusal, the conductor used profane and threatening language, and sent a brakeman, who took her little girl, compelling H. to follow with her babe at 9 o'clock at night; that she had to wait in the cold half an hour for the freight train, and was made sick by the exposure. Held, that she was entitled to punitive damages. Hicks *v.* Hannibal, etc., R. Co., 68 Mo. 329.

29. Passenger, without justification or excuse, forcibly expelled.—Seaboard, etc., R. Co. *v.* O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A., N. S., 472.

30. Ejection at a dangerous place.—If a conductor is guilty of willful misconduct in causing a passenger to leave the train at a dangerous place in the night time, the same being a place other than that at which he had agreed to stop to allow her to alight, the carrier will be liable for punitive damages. Williamson *v.* Central, etc., R. Co., 127 Ga. 125, 56 S. E. 119.

In an action by a passenger to recover for injuries caused by his illegal ejection where it appears that the plaintiff, who was sixty-five years of age, was ejected from the train on a freezing night, between 9 and 11 o'clock, at a place where there was no depot or stopping place and no shelter or accommodation, and had to follow the track, whereby he fell through a trestle and was injured, he should receive such compensation in damages as will satisfy his own wrongs and injuries and will also deter the wrongdoer from repeating the trespass. Georgia, etc., R. Co. *v.* Bigelow, 68 Ga. 219.

31. Ejection at place with which passenger is unfamiliar.—A passenger, holding a ticket for return passage, which was to be signed and stamped for the return, finding no one present at the station authorized to validate his ticket, boarded the train without having it signed and stamped, and, though he explained the circumstances to the conductor and offered to guaranty the payment of his fare after he reached his destination, was expelled from the train in the early hours of a dark, rainy morning at a place with which he was unfamiliar. Held, that a charge on the subject of punitive damages was proper. Southern R. Co. *v.* Wood, 39 S. E. 894, 114 Ga. 140, 55 L. R. A. 536; Southern R. Co. *v.* Walton (Ga.), 39 S. E. 897.

32. Ejection at improper place in presence of a number of persons.—City, etc., R. Co. *v.* Brauss, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324.

33. Ejection through mistake of conductor without malice or unnecessary force.—Denver Tramway Co. *v.* Cloud, 6 Colo. App. 445, 40 Pac. 779; Fitzgerald *v.* Chicago, etc., R. Co., 50 Iowa 79; Philadelphia, etc., R. Co. *v.* Rice, 64 Md. 63, 21 Atl. 97; Claybrook *v.* Hannibal, etc., R. Co., 19 Mo. App. 432; Tomlinson *v.* Wilmington, etc., R. Co., 107 N. C. 327, 12 S. E. 138.

Where a passenger is wrongfully ejected by a conductor of a street car, acting in good faith, in pursuance of the rules of the company, and upon due notice to him, and with the exercise of no more force than is reasonably necessary, the damages to be allowed, if a recovery is had, are compensatory only. Pine *v.* St. Paul City R. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347.

Two boys, who were in the last stages of consumption, secured a ticket from defendant and had a health certificate, which was necessary to travel because of a yellow fever epidemic, and arrangements had been made with the city officials of H. for them to disembark there; but a quarantine officer of H. boarded the train before they reached that place and or-

cated passenger, ejected from a train, entitled to exemplary damages if no unnecessary force or misconduct is shown.[34] Where a conductor, having in the line of his duty a right to require a female passenger to leave the train, tells her to get off, and she says she does not intend to get off and will make him pay for putting her off, and he merely says that is all right, and pushes her down the steps, his conduct is not so rude or offensive as to authorize punitive damages.[35]

§ 3412. Ejection for Refusal to Pay Fare.—A passenger ejected from a train by the conductor without unnecessary force because of his refusal to pay the proper fare demanded is not entitled to punitive damages.[36] But when trainmen, in removing a passenger from the train for the nonpayment of fare, act in a willful and malicious manner, or with a wanton disregard of the passenger's rights, the jury have a right to assess punitive or exemplary damages, in addition to damages for actual injuries received.[37] It would seem, as a general rule, that exemplary or punitive damages are recoverable for the wrongful expulsion of a passenger from a train or street car, upon his refusal to pay fare illegally demanded,[38] or for compelling him to pay money under threat of wrong-

dered them to get off, and the conductor, who was present, did not know that they had a permit to get off at H., and did not protest, and the boys were so weak by disease that they could not, and were thereby delayed 36 hours, and one of them died 3 days later. Held, that exemplary damages could not be recovered for their ejection, but only actual damages for the violation of their contract of transportation. St. Louis, etc., R. Co. *v.* Roane, 93 Miss. 7, 46 So. 711.

But in Georgia it has been held that where a conductor unlawfully ejects a passenger from a train, exemplary damages may be recovered, although actual force was not used. Georgia R. Co. *v.* Homer, 73 Ga. 251.

34. Ejection of intoxicated passenger without unnecessary force or misconduct.—Selsor *v.* Chesapeake, etc., R. Co., 145 S. W. 1133, 148 Ky. 39.

35. Conduct of conductor to female passenger not authorizing punitive damages.—Louisville, etc., R. Co. *v.* Scott, 141 Ky. 538, 133 S. W. 800, 34 L. R. A., N. S., 206, Ann. Cas. 1912C, 547.

36. Ejection without unnecessary force for refusal to pay proper fare.—Lipman *v.* Atlantic, etc., R. Co., 90 S. C. 517, 73 S. E. 1026. See, also, Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128.

Ejection for refusal to pay fare of infant sister.—Plaintiff, with her sister, 11 years of age, and her father, were passengers on defendant's train. Plaintiff handed to the conductor tickets for herself and her father, the latter being in another part of the car. Upon her refusal to pay the fare of her sister, the conductor ejected both from the train, the father interfering in their behalf, and getting off with them. Held, that the plaintiff was not entitled to recover punitive damages. Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223.

37. Trainmen acting in willful and malicious manner or with wanton disregard of passenger's rights.—Kiley *v.* Chicago City R. Co., 90 Ill. App. 275, affirmed in 59 N. E. 794, 189 Ill. 384, 52 L. R. A. 626, 82 Am. St. Rep. 460.

38. Wrongful expulsion upon refusal to pay fare illegally demanded.—Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344; Smith *v.* Southern Railway, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708. Compare Kibler *v.* Southern Railway, 62 S. C. 252, 40 S. E. 556.

Where a passenger buys a ticket to a station which the agent tells him is on the main line, and, on changing cars, is shown by a person in uniform a train for his destination, but after it starts is told by the conductor that it is a through train and will not stop, and is put off with only such force as was necessary, on refusal to pay the additional fare to the next stopping point, and is again received on payment of his fare, and carried to the station beyond, he is entitled to punitive damages. Richardson *v.* Atlantic Coast Line Railroad, 51 S. E. 261, 71 S. C. 444.

Wrongful ejection accompanied by mistreatment by carrier's employees.—Where defendant erroneously ejected plaintiff from its train because he refused to pay fare except by a tender of mileage coupons, and such ejection was accompanied by mistreatment on the part of defendant's employees, plaintiff was entitled to recover punitive damages. Dorsett *v.* Atlantic, etc., R. Co., 72 S. E. 491, 156 N. C. 439.

Wrongful expulsion accompanied with grossly insulting conduct evincing wanton malice.—Plaintiff's ticket for passage over defendant railroad company's line provided that, when presented to the conductor for passage, plaintiff should sign his name thereto, and "otherwise identify" himself as the original purchaser of such ticket. Held, that, where defendant's conductor refused plaintiff's offer to identify himself by signing the ticket, he had no right to require him to "otherwise

ful expulsion,[39] and this upon the ground that a corporation is presumed to act with greater deliberation than an individual, in its dealings with the public.[40] And it has been held that exemplary damages are recoverable for the wrongful expulsion of a passenger who had previously delivered his ticket to the conductor, upon his refusal thereafter to pay fare, although the expulsion was not accompanied by any force or violence, but was done in a kindly manner.[41] But there is a conflict of authority as to whether a street car passenger, who was entitled to be transferred from one car to another without the payment of additional fare, and who failed to receive a transfer ticket, can recover exemplary damages for being ejected upon his refusal to pay additional fare.[42] Where a passenger who failed to procure, or was unable to purchase, a railroad ticket is ejected from a train upon his refusal to pay more than the regular fare, he can not recover exemplary damages, unless his expulsion was characterized by malice, rudeness, or willful wrong.[43] And exemplary damages ought not to be allowed,

identify" himself, and defendant was liable to exemplary damages for the conductor's expulsion of plaintiff from the train for refusal to pay fare, where such expulsion was accompanied with conduct grossly insulting to plaintiff, and evincing wanton malice. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

39. Smith *v.* Southern Railway, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A., N. S., 708. Compare Kibler *v.* Southern Railway, 62 S. C. 252, 40 S. E. 556.

40. Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

41. Expulsion of passenger who had previously delivered his ticket to conductor.—Georgia R. Co. *v.* Homer, 73 Ga. 251.

42. Ejection of passenger entitled to transfer for refusal to pay additional fare.—In a Georgia case City, etc., R. Co. *v.* Brauss, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324, it appeared that plaintiff and his wife entered a street car, and presented to the conductor tickets entitling them to ride to their destination. They were transferred to another car by the conductor of the first car personally, but were given no transfer tickets, nor did plaintiff know that they were necessary. Subsequently the conductor of the transfer car called for a transfer ticket or another payment of fares, and in default thereof ejected plaintiff and his wife, requiring them to get off the car in the mud a short distance from a street crossing, and in the presence of a number of people. It was held that exemplary damages were recoverable.

In a New York case it appeared that plaintiff, having paid his fare, was riding on one of defendant's cars, and, having for some reason been transferred to another car, the conductor of the latter demanded a second fare, and, on plaintiff's refusal to pay it, ejected him, using no unnecessary force. It was held that plaintiff was not entitled to exemplary damages; it appearing that the second conductor honestly believed that the fare had not been paid. Hamilton *v.* Third Ave. R. Co., 53 N. Y. 25, reversing 35 N. Y. Super. Ct. 118.

43. Ejection of passenger who failed, or was unable, to procure a ticket.—Toledo, etc., R. Co. *v.* Patterson, 63 Ill. 304; Forsee *v.* Alabama, etc., R. Co., 63 Miss. 66, 56 Am. Rep. 801; Ammons *v.* Southern R. Co., 140 N. C. 196, 52 S. E. 731.

Plaintiff, who had boarded a train without buying a ticket, refused to pay an excess over the regular fare which was illegally, but in good faith, demanded of him by the conductor of the train, whereupon he was ejected, without violence, and walked two miles, though lame, reaching his destination an hour late. Held, that the case was not one for exemplary damages. Louisville, etc., R. Co. *v.* Guinan, 79 Tenn. (11 Lea) 98, 47 Am. Rep. 279.

Where a passenger on a freight train who has failed to procure a ticket, as required by the railroad company, is put off at any other than a regular station, if no circumstances of aggravation are shown, and no evil motive imputed, he can recover only actual, and not vindictive, damages. Toledo, etc., R. Co. *v.* Patterson, 63 Ill. 304.

Where exemplary damages may be awarded.—Where a passenger is prevented from procuring a railway ticket by no fault of his own, but by the willfulness, mistake, or inadvertence of the ticket agent employed by the company, he may either pay to the conductor on the train, under protest, the excess of fare demanded from passengers having no tickets, and afterwards recover it back by suit, or insist upon his right to be carried at the ticket rate, and hold the company responsible in damages for refusing so to carry him; and if, when insisting to be so carried, the conductor puts him off the train, in a spirit of oppressive malice or wantonness, he is entitled to a verdict for exemplary damages, which will rarely be set aside for excess. And such damages may be given him, by reason of the time, place, circumstances, and manner of

in an action by a passenger against a railroad company, for the mere threat of a conductor to put him out of the car for want of a ticket, even though the passenger's being without a ticket was the fault of the company.[44] But if the conductor of a railroad train after accepting from a passenger, who has lost his ticket, the ticket fare, without demanding more, thereafter ejects the passenger from the train on his refusal to pay an additional amount necessary to make the train fare, though he might have had the right originally to demand the train fare, yet if the passenger was treated in an insulting manner or if force was used in ejecting him, punitive damages may be recovered.[45] Exemplary damages may be recovered for ejecting a passenger who entered a train expecting in good faith to pay his fare with a tax receipt where, on refusal to pay his fare because he had no money, the conductor ejected him after another passenger offered to pay his fare for him.[46] A passenger who presents a pass obtained by fraud practiced on an agent of the railroad company can not recover punitive damages for being ejected from the train upon his refusal to pay the required fare.[47] Where a passenger is over eighty years old, ignorant of traveling, and partially paralyzed, and asserts truly that he has a ticket in a certain pocket, and the conductor searches for it so perfunctorily as to overlook it, the railroad company may be liable in exemplary damages for the act of the conductor in ejecting the passenger upon his refusal to pay fare.[48]

§ 3413. Ejection of Passenger Presenting Ticket Not Good on the Railroad or on the Particular Train.—Where one who has purchased a ticket good on one railroad gets by mistake on the train of another, and having no money can not pay fare, and is ejected, he can not recover punitive damages.[49] Where a railroad ticket is not good on a certain train, the refusal of the conductor to carry the holder does not entitle the latter to exemplary damages from the railroad company, though his evidence tends to show that the ticket was sold to him by the agent of the company as being good on any train.[50] But where a passenger is wrongfully ejected by reason of his having received the wrong ticket through the mistake of the carrier's agent, and the ejection is accompanied by circumstances of aggravation, exemplary damages may be recovered.[51] Prior

his expulsion, though no harsh or unnecessary means were resorted to in order to effect it. Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116, 10 Am. Rep. 103.

44. Threat of conductor to eject passenger for want of ticket.—Paine *v.* Chicago, etc., R. Co., 45 Iowa 569.

45. Ejection after acceptance of ticket fare upon passenger's refusal to pay more.—Louisville, etc., R. Co. *v.* Joplin, 21 Ky. L. Rep. 1380, 55 S. W. 206.

46. Ejection after another passenger has offered to pay the fare.—Louisville, etc., R. Co. *v.* Garrett, 76 Tenn. (8 Lea) 438, 41 Am. Rep. 640.

47. Ejection of one presenting pass fraudulently obtained and refusing to pay required fare.—In an action by A. and his wife against a railroad company to recover damages for ejecting the wife from the train, the evidence showed that A., having a special contract with the road for the transportation of stock, which provided that none but the owner or persons in charge of the stock should be entitled to a return pass, had applied to the agent for a pass for his wife, falsely representing that she was the owner of a part of the stock. The agent issued the pass, "on account of stock account surrendered," but stated to A. that he had no authority to issue it, and did not believe the conductor would accept it. The pass bore on its back an indorsement by the wife accepting it subject to its conditions, and with the express stipulation that the company should not be liable for any injury to her person or property. The conductor refused to recognize the pass when offered on the train, and upon the wife's refusal to pay the required fare, he handed her, without any violence or incivility, from the train. The fare was then paid, and she re-entered the train. Held that punitive damages could not be recovered. Brown *v.* Missouri, etc., R. Co., 64 Mo. 536.

48. Ejection of paralyzed old man after perfunctory search for ticket he has in his pocket.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128.

49. Passenger, by mistake taking train on wrong line.—Patry *v.* Chicago, etc., R. Co., 77 Wis. 218, 46 N. W. 56.

50. Refusal to carry one holding ticket not good on train.—Yazoo, etc., R. Co. *v.* Rodgers, 31 So. 581, 80 Miss. 290.

51. Ejection accompanied by circumstances of aggravation.—Georgia R. Co. *v.* Olds, 77 Ga. 673. In this case the conductor used terms of insult and vilification, refused to put the plaintiff off when

to a certain date a railroad company had carried passengers on freight trains both east and west of a certain point. On that date a regulation took effect prohibiting the custom east of that point, but making no change west. No public notice was given, and none given a station agent at a town west of the point, who sold plaintiff a ticket on a freight train to a town east of the point, which was the end of a division. The agent had sold tickets thus for two months after the change, and during the same time the conductor put the passengers off. Plaintiff rode to the end of the division, and then changed cars, and was put off before reaching his destination. It was held that the facts warranted the recovery of exemplary damages.[52]

§ 3414. Ejection of Passenger Who Has a Ticket to a Station at Which the Train Does Not Stop.—Ordinarily, a person who enters a railroad train which does not stop at the station to which he purchased a ticket, and who refuses to pay fare to any other station, is not entitled to recover punitive damages for being ejected, where it is done without insolence, and no unnecessary force is used.[53] But a passenger may recover punitive damages for ejection from a railway train at the last stop before reaching his destination, which was not a regular stop, where he acted in good faith under a special contract made by the carrier's agent entitling him to have the train stop at his destination, and the carrier's employees conformed to the contract until the last conductor threw the tickets in the passenger's lap, after having taken them up, telling him he must alight, and refused to listen to any explanation, saying, "I have heard that before," and where a trainmaster who was on the train refused to have the train stopped at the passenger's destination, though authorized to do so; it appearing that the train had been frequently stopped there, with and without orders, to discharge passengers.[54]

§ 3415. Ejection under Mistaken Belief That Passenger's Ticket Is Not Good.—A passenger who presents a proper ticket, and is ejected from the train on the ground that the ticket has expired, may recover exemplary damages if the conductor is guilty of such reckless indifference to his rights as amounts to gross negligence in examining his ticket and ejecting him.[55] But it has been

the mistake was first discovered but carried him to the next station from which point he had to proceed on foot, although old and lame, and his ejection was in the presence of others.

For an ejection at a way station of one to whom a station agent sold a wrong ticket, the passenger, being old and infirm, may recover additional damages, under the Georgia statute, Code, § 3066, allowing such where there are aggravating circumstances. Georgia R., etc., Co. *v.* Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. Rep. 499.

52. Facts warranting recovery of exemplary damages.—Kansas Pac. R. Co. *v.* Kessler, 18 Kan. 523.

53. Ejection of passenger who has a ticket to a station at which the train does not stop.—Allen *v.* Wilmington, etc., R. Co., 25 S. E. 787, 119 N. C. 710.

But in Virginia it has been held that where a sick man who held a ticket for a station at which the train did not stop, was refused the privilege of riding to an intermediate station, and was put off against his consent, in a low swamp, in the rain at a place where no habitation was near, and from the exposure, two months' sickness resulted, in consequence of which he lost his position, he was entitled to punitive damages. Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130, 52 Am. Rep. 620.

54. Illinois Cent. R. Co. *v.* Reid, 93 Miss. 458, 46 So. 146, 17 L. R. A., N. S., 344.

55. Ejection under mistaken belief that passenger's ticket is not good.—Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 769.

It is proper to charge on the subject of punitive damages when it appears that a passenger who had a legal right to ride on the defendant's train was expelled therefrom in the early hours of a dark, rainy morning, at a place with which he was unfamiliar, after explaining the circumstances surrounding the purchase of the ticket to the conductor and offering to secure his fare and to prove to the conductor the validity of his ticket, and where he was also held up by his expulsion before the other passengers as one who was trying to ride by unlawful means. Southern R. Co. *v.* Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536; Southern R. Co. *v.* Moses, 114 Ga. 145, 40 S. E. 1037.

held that where a conductor, in ejecting a passenger from the train because of the apparent invalidity of his ticket, does not act in a rough or unkind manner, and does not apply to him force or threats, or even place his hand upon him except to assist him down the car steps, punitive damages can not be recovered.[56]

§ 3416. Ejection of Passenger Presenting Ticket the Time Limit of Which Has Expired.—Where a passenger presents a ticket purchased the day before, which is refused on account of a condition thereon limiting its use to the day of purchase, and he makes no efforts to obtain money to pay his fare from fellow passengers, and is peaceably ejected not more than eight miles from his destination, which he reaches a few hours later than he would have done by train, and without additional expense, he is not entitled to exemplary damages.[57] So where a street railway conductor improperly refuses to accept a passenger's transfer because it is too late, and requires the passenger to pay another fare or leave the car, but in doing so acts in obedience to the rules of the company, as he understands them, and is guilty of no unnecessary rudeness, the passenger is not entitled to recover exemplary damages.[58] But in an action against a railroad company to recover exemplary damages for ejecting a passenger from its train, where it appeared that the conductor, because of the alteration, refused to accept plaintiff's limited ticket, which had been extended by defendant's authorized agent, it was held proper to instruct the jury that plaintiff was entitled to exemplary damages if there was a "willful violation of plaintiff's rights." [59]

§ 3417. Ejection of Passenger Presenting an Improper Ticket or One Wrongly Made Out.[60]—Where a railroad company through its agent negligently delivers to a passenger an improper ticket or one wrongly made out, which the conductor refuses to accept, and ejects the passenger on his refusal to pay fare, the passenger is entitled to recover punitive damages only on a

56. Southern R. Co. *v.* Hawkins, 89 S. W. 258, 121 Ky. 415, 28 Ky. L. Rep. 364.

Where plaintiff, a passenger on defendant's train, voluntarily left the train because the conductor refused to accept his ticket, it was error to give an instruction authorizing the jury to award punitive damages, as the conductor was honestly mistaken in supposing that the ticket had expired, and was led into the mistake by the indistinctness of the date stamped on the ticket, and by a warning he had received to look out for an unused ticket of the date that appeared to bear. Louisville, etc., R. Co. *v.* Champion, 68 S. W. 143, 24 Ky. L. Rep. 87.

A passenger on a railroad train asked the conductor, before the train started, if his ticket was good, and the conductor said to him, "It is worth nothing; you must either pay some money, get off and get another ticket, or I will put you off," whereupon the passenger left the train and purchased another ticket, which was accepted by the conductor. The passenger did not sustain any personal inconvenience, sickness, loss of capacity to earn money or physical or mental suffering in consequence. Held, that he was not entitled to exemplary damages. Louisville, etc., R. Co. *v.* Storms, 15 Ky. L. Rep. 333.

57. Ejection of passenger presenting ticket the time limit of which has expired.—Louisville, etc., R. Co. *v.* Turner, 100 Tenn. (16 Pickle) 213, 47 S. W. 223, 43 L. R. A. 140.

58. Little Rock Tract., etc., Co. *v.* Winn, 87 S. W. 1025, 75 Ark. 529.

Where one boards a street car with a transfer, which he had received on another car where he had paid his fare, and which should have been punched to show him entitled to a ride at the time he boarded the second car, but which was in fact punched so as on its face to show it was presented too late, the conductor may expel him, using no more force than necessary, on his refusing to pay fare, and the company will be liable only for breach of contract; but where without fault of the passenger the conductor calls him a deadbeat and assaults him there is a tort making the company liable not only for actual, but for punitive damages. Little Rock R., etc., Co. *v.* Goerner, 95 S. W. 1007, 80 Ark. 158, 7 L. R. A., N. S., 97.

59. Spellman *v.* Richmond, etc., R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858.

60. See ante, "Ejection under Mistaken Belief That Passenger's Ticket Is Not Good," § 3415; "Ejection of Passenger Presenting Ticket the Time Limit of Which Has Expired," § 3416.

showing of malice, recklessness, or wantonness.[61]

§ 3418. Ejection from a Moving Train or Street Car.—There is a conflict of authority as to whether the act of a conductor or other employee of a carrier in ejecting a passenger from a moving train or street car, if unaccompanied by circumstances of aggravation, will authorize the recovery of exemplary or punitive damages from the carrier. The weight of authority, however, would seem to sanction the rule that such act will not warrant the assessment of such damages unless it was characterized by malice, wantonness or recklessness.[62]

§ 3419. Ejection of Passenger in Consequence of Repudiation of Tickets by General Passenger Agent.—Where the general passenger agent of a railroad company deliberately repudiates a large number of mileage tickets which have been issued and sold to the public by his authority, and in consequence of his orders a person, who has purchased one of such tickets in good faith, is ejected from the company's train, such action, by one of its controlling officers, is in such wanton and reckless disregard of the company's duties, and of the rights of its ticket holders, as to be equivalent to an intentional violation of such rights, and to warrant the imposition of exemplary damages.[63]

61. **Ejection of passenger presenting an improper ticket or one wrongly made out.**—St. Louis, etc., R. Co. *v.* Baty, 88 Ark. 282, 114 S. W. 218; Vicksburg R., etc., Co. *v.* Marlett, 78 Miss. 872, 29 So. 62.

A rule of the defendant company required a transfer ticket to be punched, showing the time of its issue, and the car and line on which the holder desired to ride. A conductor marked the places on defendant's transfer with pencil, because he had lost his punch, and the conductor on the designated car refused to accept the transfer. Plaintiff testified that the conductor's manner in ejecting him was insulting. Held that, though plaintiff was entitled to compensation for the wrongful ejectment, it was error to award him punitive damages. Vicksburg R., etc., Co. *v.* Marlett, 29 So. 62, 78 Miss. 872.

But where plaintiff, the original purchaser of a return railroad ticket, was ejected by the conductor because the selling agent had erroneously punched the ticket for a female, instead of a male, and the conductor said, it was a "bogus ticket," and ejected him without giving him an opportunity for an explanation, such facts warranted a recovery of both actual and exemplary damages. Illinois Cent. R. Co. *v.* Gortikov (Miss.), 45 So. 363, 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650.

62. **Ejection of passenger from moving train or street car.—In Georgia** it has been held that when, in the trial of an action against a railroad company, it appears that the plaintiff, who was a passenger, was pushed by the conductor from a train which was in motion, though moving slowly, at a station at which he did not desire to alight, and, as a result, he sustained injury, an instruction to the jury on the subject of punitive damages is not inappropriate. Atlanta, etc., R. Co. *v.* Potts, 128 Ga. 397, 57 S. E. 686.

In Indiana it has been held that in an action against a street-railway company for personal injuries resulting from plaintiff's ejection from a moving car, it is proper to instruct the jury that they may add exemplary damages if they find that the conductor inflicted the injury in a spirit of oppressive malice, or that his acts were of such a character as to indicate a heedless disregard of consequences. Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627.

In Kentucky it has been held that where, after an intoxicated person had boarded a car in violation of the conductor's orders, the conductor pushed him off while the train was moving and he was injured, the carrier was responsible, but only for the compensatory damages for the injury sustained, unless the conductor's conduct was such as to indicate wantonness and recklessness, justifying punitive damages. Louisville, etc., R. Co. *v.* McNally, 105 S. W. 124, 31 Ky. L. Rep. 1357.

In a Louisiana case it appeared that plaintiff alighted from one of defendant's trains at M. on business, and when he attempted to board the train again while it was stationary his way was blocked by the brakeman, who refused to permit him to get aboard, and finally, as the train was moving, shoved him off, because he believed erroneously that plaintiff had no ticket. It was held that such facts did not give rise to the right to an allowance for exemplary damages. Bowers *v.* Kansas, etc., R. Co., 131 La. 915, 60 So. 615.

63. **Ejection of passenger in consequence of repudiation of tickets by general passenger agent.**—Judgment, Winters *v.* Cowen, 90 Fed. 99, affirmed in 96 Fed. 929, 37 C. C. A. 628.

§ 3420. Passenger Entering Train or Violating Rule of Carrier for Purpose of Being Ejected and Suing Therefor.—One who takes passage on a railroad train for the purpose of being ejected for the violation of a rule of the company which he believes to be unlawful, and which he intends to violate, and for the purpose of instituting an action to recover damages for such ejectment, can recover only the actual damages sustained by him.[64] So where one tendered to the agent of a railroad company the amount which he claimed to be, and what was finally held to be, the legal rate, and demanded a ticket, which was refused, whereupon he entered the train without a ticket, tendered the conductor the amount offered the agent, and, upon refusal to pay more, was ejected from the cars, without unnecessary violence, it further appearing that, at the time of entering the cars, he knew the established rates, and took passage expecting to be ejected, and with the intention of bringing suit to test the right of the company to charge its established rates, it was held that he was entitled only to compensatory damages.[65]

§ 3421. In an Action against the Conductor of a Railroad Train.—Exemplary damages will be allowed, in an action by a railroad passenger against a conductor for ejecting him, with violence and opprobrious language, from the car, on an allegation that he had not paid fare, when in fact he had.[66]

§ 3422. Aggravation and Mitigation of Damages.—Intentions and Good or Bad Faith of Conductor.—In a case in a federal court it has been held that the extent of the injury of a passenger who has been wrongfully expelled from a railroad train, and the amount of damages recoverable, do not depend at all upon the intentions or good faith of the conductor in executing a rule of the company, but only upon what was done and the consequent injury.[67] But in Georgia it has been held that while the good faith of a conductor, who improperly ejects a passenger, will not defeat the right to recover damages therefor, yet it may be considered in fixing the amount of such damages; and bad faith on the part of the conductor may be considered to increase the damages.[68]

Words of Provocation Used by Passenger.—In an action against a railroad company for wrongful ejectment and assault on passenger, words of provocation may be considered in mitigation of punitive, but not of compensatory, damages.[69]

Wrongful Attempt by Passenger to Impose on Carrier a Void Ticket.—Where a passenger wrongfully attempts to impose on a carrier a ticket which is void because it has been punched, and the conductor ejects him at a point several miles from a regular station, but in so doing acts with no malice, but in a gentlemanly manner, and the passenger sustains no special injury beyond having to walk several miles, the passenger's acts should mitigate damages, which, under the circumstances, can only be nominal.[70]

Apprehension of Danger to Passenger if Taken to Port of Destination.—Where the captain of a vessel, acting from a humane motive, and from a belief that if a passenger is landed at the port of his destination he will be hanged

64. **Passenger entering train or violating rule of carrier for pupose of being ejected and suing therefor.**—Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 15 Ky. L. Rep. 380, 23 S. W. 509.

65. Cincinnati, etc., R. Co. *v.* Cole, 29 O. St. 126, 23 Am. Rep. 729.

66. **Exemplary damages in action against conductor of railroad train.**—Dalton *v.* Beers, 38 Conn. 529.

67. **Intentions and good or bad faith of conductor.**—Pittsburgh, etc., R. Co. *v.* Russ, 67 Fed. 662, 14 C. C. A. 612. See, also, Southern Kansas R. Co. *v.* Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

68. Georgia R. Co. *v.* Homer, 73 Ga. 251.

69. **Words of provocation used by passenger.**—Mahoning Valley R. Co. *v.* De Pascale, 71 N. E. 633, 70 O. St. 179, 65 L. R. A. 860.

70. **Wrongful attempt by passenger to impose on carrier a void ticket.**—Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188, 74 Am. Dec. 96.

by a vigilance committee, upon meeting a return steamer of the line to which his own vessel belongs, stops his vessel and sends the passenger aboard the returning one, to be taken to the port where he embarked, the apprehended danger mitigates the act, and the damages must be small.[71]

Disease Aggravating Injuries Sustained by Ejection.—The liability of a railroad company, for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure.[72]

§ 3423. Excessive Damages.—While in determining whether the damages awarded by the verdict, in an action against a carrier for wrongful ejection, are excessive, the court will be guided by the rules and principles previously stated, yet the general rule prevails that the question of the amount of damages to be allowed is one that is within the sound discretion of the jury, and such discretion will not be interfered with unless it is abused.[73] In the appended notes have been collected the cases in which the appellate courts of this country have determined whether particular verdicts, in actions against carriers for damages resulting from the unlawful ejection of a passenger, were so excessive as to warrant an interference with the discretion vested in the jury. These cases include actions in which the ejection was shown to have been forcible, but without malice,[74] in which the ejection was shown to have been unaccompanied by any indignity or rudeness,[75] in which no great violence was shown to have been

71. Apprehension of danger to passenger if taken to port of destination.—Pearson *v.* Duane (U. S.), 4 Wall. 605, 18 L. Ed. 447. In this case a person who had been forcibly expelled from a town by a vigilance committee under threat of death if he returned got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the history of the case until after the vessel was at sea, on meeting a return steamer, of a line to which his own vessel belonged—stopped his own and sent the man aboard the returning one, to be taken to the port where he embarked. The court, on appeal from a decree which had given four thousand dollars damages, modified it by allowing but fifty dollars, with directions, moreover, that each party should pay his own costs on the appeal.

72. Disease aggravating injuries sustained by ejection.—Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588.

73. Measure of damages within sound discretion of jury.—Where damages are sought for the wrongful ejection of a passenger, in estimating damages for injury to the feelings whether the entire injury or only a part of it consists of that element, no measure of damages can be prescribed except the enlightened conscience of impartial jurors. Atlanta Consol. St. R. Co. *v.* Hardage, 93 Ga. 457, 21 S. E. 100.

The measure of damages for the ejection of a holder of a ticket or transfer, by a conductor or other officer from a car of the company by which it was issued, contrary to the terms thereof, and refusal to carry him, on his failure to pay an additional fare, is such a sum as the jury believes the plaintiff entitled to recover, provided the amount be not so large or small that the action of the jury, in awarding it, must be attributed to passion, partiality, corruption, prejudice, or some mistaken view of the case. De Board *v.* Camden Interstate R. Co., 57 S. E. 279, 62 W. Va. 41.

74. Ejection forcible, but without malice—Verdict excessive.—Where a colored woman was forcibly ejected from a street car by the conductor, and the court below awarded her $750 for damages, held that, there being no evidence of malice on the part of the conductor, the damages were excessive. Turner *v.* North Beach, etc., R. Co., 34 Cal. 594.

75. No indignity offered or rudeness shown—Verdict excessive.—A verdict of $400 for ejection from a train, there being no indignity offered or rudeness shown, and but a loss of a day's time and $2 or $3 in money, is excessive. Louisville, etc., R. Co. *v.* Blair, 55 S. W. 154, 104 Tenn. (20 Pickle) 212.

Where, in an action to recover for a wrongful ejection from a train, it appeared that plaintiff was treated with proper courtesy by defendant's conductor, and no force was used in ejecting her, and that the only cause for mental suffering was the publicity given to her ejection, in having the attention of the other passengers called thereto, and in being compelled to accept financial aid from a stranger, a verdict for $1,900 is excessive, and the court acted within its discretion in reducing the amount to $500. Willson *v.* Northern Pac. R. Co., 5 Wash. 621, 32 Pac. 468, 34 Pac. 146.

In an action against a railroad company for wrongful ejection from a train about four miles from plaintiff's desti-

used, and there was no permanent or serious injury,[76] in which no more force was shown to have been used than was necessary, and where there was no insult,[77] in which no special damage was shown,[78] in which no physical injury or pecuniary loss was shown,[79] and in which no physical injury was shown, and but slight delay and pecuniary loss;[80] actions for a wrongful ejection in the presence of a large number of passengers,[81] for ejection for refusal, or alleged refusal, to pay fare,[82] for ejection of a passenger who had paid his fare under the mis-

nation, where the conductor summoned a colored train hand who stood ready to assist if necessary, and the conductor took hold of plaintiff's arm walked him out, without using any other force, and plaintiff did not suffer any particular inconvenience by the ejection, a verdict for $1,500 is so excessive as to suggest bias or prejudice on the part of the jury, and can not be sustained. Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352.

In an action for the wrongful expulsion of a female passenger, no violence was shown, and there was little evidence of rudeness on the conductor's part; and it appeared that, after plaintiff had walked about a mile towards a town where she had friends, she was taken up by a passing vehicle, and carried the rest of the way, suffering no direct physical injury from her walk. Held, that a verdict for $1,400 was excessive. Sloane *v.* Southern California R. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

The testimony in this case failing to show any improper treatment of the plaintiff by the employees of the railway company in expelling her from its train, or that the expulsion was in an improper manner or at an improper place, a verdict for $500 damages was not only excessive but contrary to law and evidence. Wenz *v.* Savannah, etc., R. Co., 108 Ga. 290, 33 S. E. 970.

76. No great violence and no permanent or serious injury—Verdict excessive.—In an action against a carrier for ejecting a passenger, where no great violence was used, and no permanent or serious injury was shown, a verdict of $2,500 was excessive. Chicago, etc., R. Co. *v.* Riley, 74 Ill. 70.

Where a passenger who had purchased a ticket for a particular berth in a sleeping car, and had lost the same, but gave satisfactory assurance that he had purchased it, was expelled from the sleeping car, there being no abusive language or personal violence used by the conductor in charge, in an honest purpose to execute a reasonable rule of the company, but through a mistaken judgment, held, that a verdict, in a suit by the passenger against the company, for $3,000 damages, was grossly excessive. Pullman Palace Car Co. *v.* Reed, 75 Ill. 125, 20 Am. Rep. 232.

77. No more force used than necessary and no insult—Verdict excessive.—Where a conductor, in ejecting a passenger who refused to pay fare, used no more force than was necessary, and was not insulting to the passenger, and a delay of five hours could have been avoided by the passenger, had he chosen to do so, a recovery for $400 was excessive; the passenger not being entitled to compensation for anything he might have avoided by ordinary care. Cincinnati, etc., R. Co. *v.* Carson, 145 Ky. 81, 140 S. W. 71.

78. No special damage—Verdict not excessive.—A verdict for $500 damages for ejecting a passenger from a railway train is not, in the absence of evidence of special damage, excessive. Du Laurans *v.* First Division, 15 Minn. 49, Gil. 29, 2 Am. Rep. 102.

79. No physical injury or pecuniary loss—Verdict excessive.—Where there is no evidence that plaintiff suffered any physical injury or pecuniary loss by reason of his wrongful ejection from defendant's train, a verdict for $500 is excessive. Louisville, etc., R. Co. *v.* Breckinridge, 99 Ky. 1, 17 Ky. L. Rep. 1303, 34 S. W. 702.

In an action to recover for wrongful ejection from a train, where the passenger was not injured thereby, and did not suffer any financial loss, and he was a man of mature years, and there were only several passengers on the train so that, if they saw his ejection, it could not reflect on him in any way, it being apparent there was a mistake of some kind, a verdict of $800 was clearly excessive for the naked violation of his mere technical right to transportation. Olson *v.* Northern Pac. R. Co., 96 Pac. 150, 49 Wash. 626, 18 L. R. A., N. S., 209.

80. No physical injury and but slight delay and pecuniary loss—Verdict excessive.—A verdict of $1,000 in favor of a railway passenger wrongfully ejected from a train is excessive where he was not personally injured, and was delayed only one day in reaching his home, and his pecuniary loss was not over $10. Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584.

81. Ejection in presence of large number of passengers—Verdict not excessive.—Where a passenger was wrongfully ejected from a train in the presence of 30 to 35 passengers, and was compelled to walk 5 miles, $650 damages were not excessive. Chamberlain *v.* Lake Shore, etc., R. Co., 81 N. W. 339, 122 Mich. 477.

82. Ejection for refusal to pay fare—Verdict excessive.—A verdict of $1,300 in favor of a passenger who was wrongfully ejected from a train for an alleged

taken belief that he had not done so,[83] for ejection because of the apparent invalidity of the passenger's ticket,[84] for ejection in the belief that the passenger's

refusal to pay his fare was excessive, where the ejection took place at a station, and was unaccompanied by force or improper language, and the traveler was able to resume his journey on the following day, and no pecuniary loss was shown, except the amount of the fare from the station where he was ejected to the place from which he started. Comer *v.* Foley, 25 S. E. 671, 98 Ga. 678.

Where it appeared that a passenger, when the conductor laid his hand on his arm, and told him he must get off, on refusal to pay fare, walked quietly out to the platform with the conductor, a verdict for $1,165 was excessive. Texas, etc., R. Co. *v.* Demilley (Tex. Civ. App.), 41 S. W. 147, affirmed in 42 S. W. 540, 91 Tex. 215.

In an action for damages for ejection from a train, it appeared that plaintiff refused to pay his fare unless given a seat; that the conductor told him he could furnish none, because they were all filled; and that he ejected plaintiff, without injuring him, at a flag station, more than two miles from a regular station. Held, that an order setting aside a verdict for plaintiff for $800 unless he would remit $400, was a proper exercise of the court's discretion. Hardenbergh *v.* St. Paul, etc., R. Co., 41 Minn. 200, 42 N. W. 933.

A passenger holding an imperfect ticket was ejected on his refusal to pay fare. He was given an opportunity to pay fare, and he had the money with which to pay it. He was told that he was ejected solely on the ground that under the rules of the carrier his ticket could not be accepted. Held, that a verdict for $1,000 was excessive, and would be reduced to $250. St. Louis, etc., R. Co. *v.* Baty, 88 Ark. 282, 114 S. W. 218.

83. Ejection under mistaken belief that passenger had not paid fare—Verdict excessive.—A railroad conductor, in the honest belief that plaintiff had not paid his fare or surrendered a ticket, put him off a mile from his destination. No serious insult was offered, and no special damages resulted, except a gentlemanly holdup, alleged to have occurred during the mile walk, wherein plaintiff was relieved of $12.50. Held, that a verdict for $850 was excessive. Masterson *v.* Chicago, etc., R. Co., 78 N. W. 757, 102 Wis. 571.

Verdict not excessive.—A passenger on a railroad train gave the conductor his ticket to his destination, but the conductor gave him no check in return. Before reaching his destination, there was a change of conductors, and the new conductor expelled the passenger for want of a ticket or check. Held, that a verdict for $500 was not excessive. Pittsburg, etc., R. Co. *v.* Hennigh, 39 Ind. 509.

A passenger who had paid his fare, when the same was again demanded claimed that he had paid it, but, after the conductor had pulled the cord to stop the train, offered to pay again. The conductor refused to receive it, and put him off the train where there was no station, so that he was compelled to walk nine miles to his destination, by reason of which he suffered in his health. Held, that a verdict against the carrier for $500 was not excessive. Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158.

A boy of 16 became a passenger on defendant's train, and gave the conductor his ticket. The conductor afterwards demanded his fare again, and refused to believe the boy's assertion that he had given him a ticket, whereupon the boy gave the conductor 10 cents, which was all the money he had, but the conductor ordered him to leave the train at a station short of his destination, whereby he was compelled to walk the rest of the way. Held, that judgment for $195 was not excessive. Indianapolis, etc., R. Co. *v.* Howerton, 127 Ind. 236, 26 N. E. 792.

84. Ejection because of apparent invalidity of passenger's ticket—Verdict excessive.—In an action against a carrier for the ejection of a passenger because of the apparent invalidity of his ticket, where the evidence showed that the conductor did not act roughly or unkindly, and the ejection took place about a mile from the town at which plaintiff got on the train, and merely obliged him to walk back to the town and remain there until the next day, a verdict for $1,000 was grossly excessive. Southern R. Co. *v.* Hawkins, 89 S. W. 258, 121 Ky. 415, 28 Ky. L. Rep. 364.

A passenger was wrongfully ejected because of certain suspicious defects in his ticket. The ticket was in fact valid, and appeared on its face to be; but there was no evidence that the conductor acted maliciously, or with such disregard of his rights as would justify punitive damages. He was ejected in the morning, without force, purchased a ticket, and rode to his destination on another train the same evening. Held, that a verdict of $225 should be reduced to $125. Kleven *v.* Great Northern R. Co., 72 N. W. 978, 70 Minn. 79.

Where a conductor, without insult or rudeness, refused to recognize a passenger's ticket as valid, and ejected him on his refusal to pay the fare demanded, and the passenger took the next train to his destination, paying the fare thereon, punitive damages are not allowable; and,

ticket entitled him to ride no further,[85] for ejection on the ground that the passenger's ticket had expired,[86] for ejection on passenger's refusal to sign an indorsement on the back of a free ticket,[87] for ejection upon the passenger's refusal to pay more than the legal fare,[88] for ejection upon the passenger's refusal to pay a penalty exacted from passengers who fail to purchase tickets at a regular station,[89] for ejection of a passenger from a street car after he has pre-

where the actual damage did not exceed $25, a verdict of $500 is excessive. Alabama, etc., R. Co. *v.* Gibbs (Miss.), 12 So. 545.

Where a passenger was ejected from a train because of the invalidity of his ticket, and the conductor was not abusive, but polite and kind to the passenger, who was forced to walk in the daytime 11 miles, and there was nothing to show that the weather or the roads were bad, a verdict for $500 was excessive. Louisville, etc., R. Co. *v.* Fish (Ky.), 127 S. W. 519.

Verdict not excessive.—Plaintiff presented to the conductor of a train a limited ticket, which was all right, but which the conductor harshly and rudely insisted had been tampered with and altered. To avoid being forcibly ejected from the train, plaintiff got off, and then, changing his mind, got on again, paid his fare, and continued his journey. Held, that a verdict against the railroad company for $500 would not be set aside. McGinnis *v.* Missouri Pac. R. Co., 21 Mo. App. 399.

85. Ejection in belief that passenger's ticket entitled him to ride no further—Verdict excessive.—Where the conductor put plaintiff off the train, without violence or abuse, in the belief that plaintiff's ticket entitled plaintiff to ride no further, and, on discovering his mistake, tried to get a conveyance to send for plaintiff, a verdict of $1,000 for the ejection was excessive. Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

86. Ejection on ground that passenger's ticket had expired—Verdict excessive.—A passenger was ejected from a train on the ground that his ticket had expired; the testimony of three witnesses showed that there was no force used, but that the passenger obeyed the conductor's order to alight. The passenger testified that the conductor took hold of him and got the best of him; but there was no showing of any injury. He lost no time. He slept in a park, because, as he testified, the boarding house keepers refused to entertain him, and he was not sufficiently well dressed to go to a hotel. Held, that a verdict for $1,250 was so excessive as to show bias and prejudice. Georgia R. Co. *v.* Baldoni, 42 S. E. 364, 115 Ga. 1013.

In a passenger's action for damages by being ejected from defendant's train because the time limited for transportation in his ticket had expired when it was presented, held, that a verdict for $750 was excessive. Brian *v.* Oregon, etc., R. Co., 105 Pac. 489, 40 Mont. 109, 25 L. R. A., N. S., 459, 20 Am. & Eng. Ann. Cas. 311.

Verdict not excessive.—Where a passenger was illegally expelled from a train on the ground that the limit of his ticket had expired, a verdict of $250 damage is not excessive. Marx *v.* Louisiana, etc., R. Co., 36 So. 862, 112 La. 1085.

Where a boy 13 years of age was put on a train and carried about 30 yards, when he was wrongfully ejected, on the ground that his ticket had expired, and the conductor, after refusing to accept his ticket, took hold of him with the train porter, and the boy testified that his feelings were hurt, and that he walked back to his father, crying, and that the conductor had talked roughly to him, a verdict for $250 was not so unjust or unreasonable that it would be disturbed on appeal. St. Louis, etc., R. Co. *v.* Furlow, 81 Ark. 496, 99 S. W. 689.

87. Ejection upon refusal to sign indorsement on back of free ticket.—Where plaintiff was traveling on a free ticket, which had on its back an indorsement containing certain conditions for his signature, and the conductor declined to accept it unless the plaintiff signed such indorsement, and, on his refusal either to sign or pay fare, ejected him from the train, the discretion of the court below, setting aside a verdict for $5,000 damages, will not be controlled. Elliott *v.* Western, etc., R. Co., 58 Ga. 454.

88. Ejection upon refusal to pay more than legal fare—Verdict excessive.—Where a passenger tendered what he claimed to be and what was in fact the legal fare, and, on refusal to pay more, was ejected from the car by the conductor and brakeman, but without unnecessary violence, and acting in good faith, exemplary damages are not recoverable; and the sum of $390 for indignities is excessive. Atchison, etc., R. Co. *v.* Hogue, 50 Kan. 40, 31 Pac. 698.

Verdict not excessive.—Where a woman is ejected from a railroad train between stations because she refuses to pay double fare, as required by the rules of the company, and has to walk 3½ miles to her home, a verdict for $50 damages is not excessive. Durfee *v.* Union Pac. R. Co., 9 Utah 213, 33 Pac. 944.

89. Ejection for refusal to pay penalty—Verdict excessive.—Plaintiff was wrongfully ejected from defendant's train for refusing to pay a penalty exacted from passengers who failed to purchase tickets at a regular station, the conductor hav-

sented a valid transfer,[90] for the wrongful ejection of a passenger, and holding him up as one trying to ride without legal right,[91] for setting down a child at the wrong station,[92] for ejection without force, but accompanied by profane language,[93] for ejection accompanied by rude, profane, and abusive language,[94] for ejection in a rough manner, accompanied by profane and unbecoming language,[95] for ejection accompanied by conduct evincing wanton malice,[96] for forcible ejection and restraint of liberty,[97] for ejection resulting in loss of a con-

ing full knowledge of the facts excusing plaintiff. But it did not appear that there was any malice on the part of the conductor. Held that, while plaintiff was entitled to more than nominal damages, a verdict for $2,500 was excessive. Louisville, etc., R. Co. *v.* Wilsey, 12 S. W. 275, 11 Ky. L. Rep. 419, 5 L. R. A. 855.

In an action against a railroad company by a passenger for wrongful eviction from a train, it appeared that defendant's rules required every passenger to procure a ticket before entering the cars, or, in default thereof, the conductor to collect an additional sum of 25 cents, and issue a rebate certificate therefor. Plaintiff failed to procure a ticket because of the ticket agent's absence from the depot, and, on his refusal to pay the additional sum demanded by the conductor, was required to leave the train at the first station, which he did; but no actual force or insulting language was used, and no personal injury suffered. Held, that the damages should be compensatory only, and that a verdict for $500 was excessive. Finch *v.* Northern Pac. R. Co., 47 Minn. 36, 49 N. W. 329.

90. Ejection after presentation of valid transfer—Verdict not excessive.—Where, in an action for the ejection of a passenger from a street car after he had presented a valid transfer, it appeared that plaintiff had previously had trouble in regard to transfers at the point in question, and had been assured by the officers of the carrier that he was right in his demands, and that transfers should be honored, a verdict for $175 was not excessive. Arnold *v.* Rhode Island Co., 28 R. I. 118, 163, 66 Atl. 60, 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414.

Where plaintiff was expelled from an electric car on presentation of a transfer ticket which the conductor refused to accept, a verdict of $100 held not excessive. Brown *v.* Minneapolis, etc., R. Co., 113 N. W. 895, 102 Minn. 298.

91. Passenger wrongfully ejected and held up as one trying to ride without legal right—Verdict not excessive.—Where a passenger, having a legal right to ride on a train, is wrongfully expelled therefrom, and held up by such expulsion before the passengers on the train as one who was trying to ride thereon without lawful right, a verdict for $450 is not excessive. Southern R. Co. *v.* Wood, 39 S. E. 894, 114 Ga. 140, 55 L. R. A. 536.

92. Setting down child at wrong station—Verdict excessive.—In an action based on the theory of forcible ejection of a passenger for setting down a child at the wrong station, a verdict for $250 was grossly excessive, as plaintiff was detained only a few hours, during which time she was at the home of the station policeman, where she played with his children, and therefore could not have suffered great mental distress. Louisville, etc., R. Co. *v.* Jordan, 66 S. W. 27, 23 Ky. L. Rep. 1730, 112 Ky. 473.

93. Ejection without force, but accompanied by profane language.—Where a passenger is wrongfully compelled to leave a passenger train at a station without force, but the conductor in the presence of the other passengers used profane language toward him, and he walked back on a cold night about 10 miles to obtain accommodation, a verdict for $150 damages will not be disturbed as excessive. Gisleson *v.* Minneapolis, etc., R. Co., 88 N. W. 970, 85 Minn. 329.

94. Ejection accompanied by rude, profane and abusive language—Verdict not excessive.—In view of evidence of rude, profane, and abusive language of the conductor to a passenger in the presence of his wife and other passengers, held, a verdict for $350 for his ejection was authorized. Burnham *v.* Detroit, etc., R. Co., 133 N. W. 952, 168 Mich. 55, Ann. Cas. 1913B, 1204.

95. Ejection in rough manner, accompanied by profane and unbecoming language—Verdict not excessive.—Where a passenger was wrongfully expelled from a train in a rough manner, accompanied with profane and unbecoming language, the Supreme Court would not disturb as excessive a verdict for damages in the sum of $562.50. St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566.

96. Ejection accompanied by conduct evincing wanton malice—Verdict not excessive.—Where a conductor's wrongful expulsion of plaintiff was accompanied with conduct grossly insulting to him, and evincing wanton malice, plaintiff was entitled to exemplary damages, and a verdict of $2,000 was not excessive. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

97. Forcible ejection and restraint of liberty—Verdict not excessive.—In an action against a railroad company by a railway news agent for wrongful ejection from the train, in which it appeared that plaintiff was forcibly jerked from the train, and thereafter held and restrained of his liberty, and that his stock in trade

tract to labor, accompanied by insulting language and conduct,[98] for ejection with rude and insulting language, and causing the passenger's arrest,[99] for the arrest of a passenger by the captain of a vessel, and for chaining him to a post, and ejecting him at midnight before reaching his destination,[1] for ejection on a rainy day away from a station,[2] for ejection away from a station at night,[3]

was lost or destroyed in consequence, a verdict for $250 was not excessive. Choctaw, etc., R. Co. *v.* Hill, 75 S. W. 963, 110 Tenn. 396.

98. Ejection resulting in loss of contract, accompanied by aggravating circumstances—Verdict not excessive.—In an action for ejection of a passenger whose evidence established the loss of a contract to labor at $20 a month during the crop season, and insulting language on the part of the conductor, who refused to look among the tickets to find plaintiff's, and led him off the train in a coach full of people, a verdict for $350 was not excessive. Illinois Cent. R. Co. *v.* Jackson, 79 S. W. 1187, 117 Ky. 900, 25 Ky. L. Rep. 2087.

99. Ejection with rude and insulting language, and causing arrest—Verdict not excessive.—An award of $500 compensatory damages and $250 exemplary damages for the ejection of a passenger from a street car, with rude and insulting language by the conductor, and for causing the passenger's arrest for alleged disorderly conduct, was not excessive. Little Rock R., etc., Co. *v.* Dobbins, 95 S. W. 788, 78 Ark. 553.

1. Arrest, chaining to post, and ejection at midnight—Verdict not excessive.—Where plaintiff, a boy of 14, was arrested by the captain of defendant's vessel, and chained to a post, and was ejected at midnight, before reaching his destination, and was obliged to walk 30 miles to reach home, a verdict of $1,500 was not excessive. Trabing *v.* California Nav., etc., Co., 65 Pac. 478, 133 Cal. xx.

2. Ejection on rainy day away from station—Judgment excessive.—A judgment for $750 for the wrongful ejectment of a passenger from a train on a rainy day, more than a mile from any house, and three or four miles from a station, is excessive, in the absence of any ground for substantial damages other than physical and mental suffering, or any facts entitling him to exemplary damages. Gillen *v.* Minneapolis, etc., R. Co., 91 Wis. 633, 65 N. W. 373.

3. Ejection away from station at night—Verdict excessive.—A verdict of $500 damages in favor of one who, upon applying to defendant's railway office for a ticket, could get no answer, whereupon he took passage on a train carrying passengers, and explained his inability to procure a ticket to the conductor, but was put off the train in the nighttime, not at any regular station or stopping place, and compelled to walk back, not a very great distance, is excessive. Illinois Cent. R. Co. *v.* Cunningham, 67 Ill. 316.

A passenger, shortly after 5 o'clock in the morning of November 13th, was compelled to leave defendant's train, so that he had to walk back two miles, with a heavy satchel in his hand, to the station at which he took the train, and in the immediate vicinity of which he lived. The morning was dark and foggy, but it was not shown that he was specially inconvenienced, nor that he suffered any particular loss. The expulsion from the train was such as entitled the passenger to compensatory damages only. Held, that a verdict for $250 was excessive. McLean *v.* Chicago, etc., R. Co., 50 Minn. 485, 52 N. W. 966.

Verdict not excessive.—A passenger suffering from a slight fever was ejected from a train a mile or two from a station, in the nighttime, while a slight rain was falling. Held, that a judgment for $25 was not excessive. St. Louis, etc., R. Co. *v.* Harper, 61 S. W. 911, 69 Ark. 186, 53 L. R. A. 220, 86 Am. St. Rep. 190.

Where one finding the station office closed, entered the caboose of a freight train, gave this as a reason for not having procured a ticket, and offered to pay the regular fare, but the conductor stopped the train, in the night, not at a station, and put him off, whereby he was compelled to walk back, held, that $200 was not an excessive amount of compensatory damages. Illinois Cent. R. Co. *v.* Johnson, 67 Ill. 312.

A judgment for $700 against a railroad company is not excessive, where it appears that a conductor took up a ticket, which entitled plaintiff to ride to a certain place, and gave him no check, and afterwards, when within a few miles of his destination, accused him of attempting to ride beyond the place to which he had paid fare, charged him with falsehood, treated him insolently in the presence and hearing of other passengers, and, with the help of a brakeman, seized him, and put him off the train in a rude and angry manner, on a cold and dark night, at about 9 o'clock, at a place where there was no station or house. Indianapolis, etc., R. Co. *v.* Milligan, 50 Ind. 392.

In an action for damages for ejecting plaintiff from a railroad train it appeared that plaintiff, having bought a ticket, got on a freight train, the conductor of which took up the ticket, and gave plaintiff a card, on which he wrote the number of the station to which plaintiff was going, telling plaintiff he could get off the freight train at the next station, where

for ejection away from a station which necessitates the crossing of a cattle guard,[4] for ejection about midnight, at a strange town, accompanied by circumstances of aggravation,[5] for ejection of a sick passenger away from a station,[6] for ejection in the snow between stations,[7] for ejection of a cripple, at night, some miles

an express train would pass the freight train, and that the conductor of the express train would recognize and accept the card in payment of fare. Plaintiff got off the freight train, and entered the express train, but the conductor of the latter refused to take the card, and, on plaintiff's refusal to pay fare, forcibly ejected him from the train, in the nighttime, and at a place where there was no station. About five minutes later, the freight train came along, picked up plaintiff, and carried him to his destination. Held, that plaintiff was entitled to recover for his expulsion from the express train; and that a verdict in his favor for $400 was not excessive. Toledo, etc., R. Co. *v.* McDonough, 53 Ind. 289.

$1,000 was not excessive damages to a wife, who, with her husband and two children, and their baggage, was wrongfully put off a train, on a cold night, three-quarters of a mile from their station, which they had difficulty in finding. Baltimore, etc., R. Co. *v.* Pixley, 61 Ind. 22.

A woman traveling with a sister and two small children was put off a train at night, in a lonely place, five miles from where by mistake she had taken it, her mistake being in part the fault of the very conductor who put her off. Held, that a verdict of $6,500 would not be set aside as excessive. International, etc., R. Co. *v.* Gilbert, 64 Tex. 536.

A verdict for $8,000 for damages for personal injuries received, and fright and mental anguish suffered, by a lady passenger, who, with two infant children, was put off from defendant's train on a dark night, at a lonely place, not a regular station, and, being afraid to seek shelter there among negroes, walked back several miles to a station, through swamps and over a high railroad bridge, and was obliged to engage for a guide a negro, who insulted her, held not excessive. International, etc., R. Co. *v.* Smith (Tex.), 1 S. W. 565.

A man 65 years old was put off a train, in the nighttime, between stations. In walking along the track he fell through a trestle, and hurt his knee. He had a right to ride, the limitation of his ticket not having expired, though the conductor honestly believed that it had. Held, that a verdict for $1,750 would not be set aside as excessive. Georgia, etc., R. Co. *v.* Bigelow, 68 Ga. 219.

Where a passenger is unlawfully ejected from a train between stations by the conductor, who speaks roughly to him in presence of the other passengers, and mortifies his feelings, and he is thereby compelled to walk six or seven miles on a rainy night, a judgment for $200 damages is not excessive. Fordyce *v.* Manuel, 82 Tex. 527, 18 S. W. 657.

Where plaintiff, in the night, and at a lonesome, dangerous place, four or five miles from the station at which he had taken the train, was wrongfully ejected, and walked back to the city in dread of footpads, suffering the more because of his diseased physical condition, a verdict for $500 was not excessive, even as compensatory damages. Louisville, etc., R. Co. *v.* Joplin, 55 S. W. 206, 21 Ky. L. Rep. 1380.

4. Ejection away from station which necessitates crossing cattle guard—Verdict excessive.—Plaintiff and two small children were compelled on a dark night to alight from defendant's train away from the station, so that a cattle guard was between them and the station, and plaintiff was informed that she would have to cross the cattle guard. A friend of plaintiff, when the train had passed, assisted her across the cattle guard and accompanied her to her home. Plaintiff was acquainted in the village and knew the location of the station. Held, that a verdict for $1,000 for actual inconvenience suffered was excessive. St. Louis, etc., R. Co. *v.* Bragg, 64 S. W. 226, 69 Ark. 402, 86 Am. St. Rep. 206.

5. Ejection at strange town, accompanied by circumstances of aggravation—Verdict not excesive.—Where plaintiff was wrongfully ejected from defendant's train about midnight, at a strange town, for failure to satisfy the railroad conductor of his identity as original purchaser of a ticket presented by him, the evidence showing that the conductor's manner was insolent, highhanded, and unnecessarily humiliating, that he acted hastily and without proper consideration or prudence, and that he cursed plaintiff and otherwise treated him harshly in the presence of the passengers on the car, a verdict for $1,000 for plaintiff was not so excessive as to indicate passion or prejudice on the part of the jury. Southern R. Co. *v.* Cassell, 92 S. W. 281, 122 Ky. 317, 28 Ky. L. Rep. 1230.

6. Ejection of sick passenger away from station—Verdict not excessive.—Where the conductor of a freight train, on leaving a station, omitted to see if the caboose car had any passengers without tickets, and after going a mile and a half, at a point where there was no station, expelled a passenger, knowing him to be sick, held, that a verdict of $1,150 was not excessive. Illinois Cent. R. Co. *v.* Sutton, 53 Ill. 397.

7. Ejection in snow between stations—Verdict not excessive.—Where one intending to take a train has no opportu-

from his destination,[8] for ejection from a street car, at night, of a man of mature years,[9] for ejection causing or resulting in physical injuries or sickness,[10]

nity to buy a ticket, and boards the train, having in money only the price of a ticket, and, when this is refused, tries to borrow the additional 10 cents required, and there is a conflict of testimony as to the time occupied in thus procuring the 10 cents, and when it is obtained the train is slacking up for his ejectment, and the conductor then refuses the fare, and puts him off in the snow between stations, but without violence, a verdict for $500 will not be disturbed. Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308.

8. Ejection of cripple, at night, some miles from destination—Verdict not excessive.—Plaintiff, who was a cripple, compelled to walk with a crutch, was unlawfully ejected from a train at about midnight, and compelled to walk six or seven miles to his destination. Held, that a verdict for $800 was not excessive. Missouri, etc., R. Co. *v.* Smith, 89 S. W. 668, 6 Ind. T. 99.

9. Ejection, at night, of man of mature years—Verdict excessive.—A verdict for $1,500 for the unlawful ejection from a street-railway car, at 10 o'clock at night, of a man of mature years and respectable character, will be set aside as excessive, unless $1,000 is remitted, where only $25 was demanded for personal injuries, and the only evidence of injury to reputation and feelings is plaintiff's statement that the newspapers published an account of the matter, and that he had been pointed out as the man who was put off the car. Cunningham *v.* Seattle Elect. R., etc., Co., 3 Wash. 471, 28 Pac. 745.

10. Ejection causing or resulting in physical injuries or sickness—Verdict excessive.—In an action against a railroad company for wrongfully ejecting plaintiff from a car, it appeared that plaintiff's cane and a ring on one of his fingers were broken; that the broken ring cut the finger to the bone; that the back of one hand was lacerated so that the blood flowed; and that one arm was somewhat bruised. Held, that a verdict for $4,500, under instructions which did not allow exemplary damages, would be set aside as excessive. Bass *v.* Chicago, etc., R. Co., 39 Wis. 636; S. C., 42 Wis. 654, 24 Am. Rep. 437.

Twelve thousand dollars was excessive damages for the violent ejection of a passenger from a street car, he having pursued the car after being thrown from it by the conductor, and having overtaken it, and walked home that evening, and to work the next day, and who, when examined six weeks afterwards, showed no evidence of abrasion or external injury, and whose injuries did not disqualify him from earning a livelihood. Chicago City R. Co. *v.* Henry, 62 Ill. 142.

Plaintiff, an old man of 63 years, was ejected without force from a train, 40 miles short of his destination, through a mistake of the conductor in giving him a wrong check when he took up his ticket; and, though he had the money to pay his fare to within a few miles of his destination, he walked the whole distance, and slept one night on the railway track, and sustained injuries from the long walk and exposure. Held, that a verdict of $750 was excessive, under the evidence, since most of the injury sustained was caused by the unnecessary hardship to which the plaintiff voluntarily exposed himself. Bader *v.* Southern Pac. Co., 27 So. 584, 52 La. Ann. 1060.

Where a passenger is wrongfully expelled from the cars, and it appears that, while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfiguration, no long confinement, no protracted pain and suffering, no heavy expenses for medicine, nursing, or physician, little loss of time, not to exceed a day's delay, and no circumstances of outrage and insult independent of the actual expulsion, a verdict awarding $5,000 damages is excessive. Missouri, etc., R. Co. *v.* Weaver, 16 Kan. 456.

Where a boy, who was in the last stages of consumption, secured a ticket from defendant railroad and had a health certificate, which was rendered necessary by a yellow fever epidemic, and arrangements had been made with city officials for him to disembark at H., but a quarantine officer of H. compelled him to get off the train before reaching that place, and the conductor, not knowing he had a permit to get off at H., did not protest, and the boy was unable, on account of weakness from sickness, to explain, and was detained for 36 hours after his ejection and compelled to go home by another route, and died 3 days thereafter, a verdict for $7,500 was clearly excessive, and will be reduced to $2,500. St. Louis, etc., R. Co. *v.* Roane, 93 Miss. 7, 46 So. 711.

A passenger who was wrongfully ejected from a train about 6 o'clock in the evening was compelled to walk to his home, about six miles away. He reached there about dark, and felt weak, and the following day he felt sore and stiffened up, and for about two days he was unable to continue his work as a barber, earning from $3 to $5 a day. Held, that a verdict for $500 was excessive, and must be reduced to $250. Light *v.* Detroit, etc., R. Co., 130 N. W. 1124, 165 Mich. 433, 34 L. R. A., N. S., 282.

Five hundred and twenty-three dollars and ninety-three cents was an excessive

for ejection for using profane and obscene language in the presence of lady pas-

recovery as to the excess over $300 for personal injury to a railway passenger in ejecting him from a train, where his physical suffering was slight, he did not consult a physician, and his actual loss did not exceed $200. Wiles *v.* Northern Pac. R. Co., 119 Pac. 810, 66 Wash. 337.

Verdict not excessive.—Where an infirm passenger was wrongfully ejected from a train on a cold, wet day, and by reason thereof was taken sick, threatened with pneumonia, and contracted rheumatism, which thereafter settled in the stump of his leg, and his earning capacity was somewhat impaired, a verdict for $1,000 was not excessive. Pennsylvania R. Co. *v.* Palmer, 127 Fed. 956, 62 C. C. A. 588.

Where a passenger apparently sick, and in fact so, was ejected from a train a half mile from a station, where he was unknown, without being given time to search for the ticket which he claimed he had lost, or to produce his fare in money, and as a result he suffered a relapse, a verdict of $2,500 was not excessive. Western, etc., Railroad *v.* Ledbetter, 25 S. E. 663, 99 Ga. 318.

Where the regulations of a street-railway company provided that one taking a car without a station should pay fare, although one had already been paid in the station, and plaintiff, taking a car without a station, refused to pay the extra fare, and was ejected from the car, and injured, and plaintiff was feeble, subject to fits, and shortly after was taken with pneumonia, the severity of which was to some extent due to the injury, a verdict for $2,500 was not excessive; plaintiff being entitled to recover punitive damages under the circumstances. Nashville St. Railway *v.* Griffin, 57 S. W. 153, 104 Tenn. 81, 49 L. R. A. 451.

Where a passenger rightly on the train was ejected with unjustifiable violence on his refusal to pay his fare, the conductor having refused to honor his ticket, and sustained permanent injuries, besides an illness which prevented him from attending to the practice of his profession as before, a verdict for $7,000 for plaintiff is not so large as to require a reversal. Pennsylvania R. Co. *v.* Connell, 26 Ill. App. 594, affirmed in 127 Ill. 419, 20 N. E. 89.

$15,700 was not excessive damages for injuries to a boy of 12, caused by his being thrown off of a street car, whereby his collar bone was broken, also his second and third ribs, and his right arm in four or five places, the left arm at the wrist, and the thigh bone, and permanent injuries and deformities sustained. Schultz *v.* Third Ave. R. Co., 89 N. Y. 242, affirming 46 N. Y. Super. Ct. 211.

In an action by a passenger for her wanton expulsion from a train, causing a miscarriage, a verdict in her favor for $2,500 is not excessive. Texas, etc., R. Co. *v.* Casey, 52 Tex. 112.

Plaintiff bought and put in his pocket a proper railroad ticket, took a seat on the proper train, and, on the conductor's demand for his ticket, searched for and failed to find it, but informed the conductor in good faith that he had one, and asked the latter to wait for him to find it. The conductor instantly stopped the train, and ordered him to get off, between two stations 12½ miles apart, threatening to use force to carry out the order. Plaintiff obeyed, and was left, after midnight, in a forest, on a dark night, in an uninhabited, swampy locality, and, not knowing the distance to either station, walked back in about an hour and a half to the one whence he started, crossing on the way a long railroad bridge over a river, and, in consequence of these facts, became sick, lost two weeks' work, and had medical attendance. Held, that a verdict for $500 damages was not excessive. International, etc., R. Co. *v.* Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

Plaintiff testified that the train was moving 10 miles an hour; that the conductor took him by the shoulder, and threw him off the train; that he was not seriously injured, but was considerably bruised; that he was a little sore, and unable to work for a week. Held, that a verdict of $500 was not excessive. East Line, etc., R. Co. *v.* Lee, 71 Tex. 538, 9 S. W. 604.

Plaintiff, after tendering his fare, was wrongfully ejected in a rough and brutal manner. He was thrown against the ground so hard that his leg was badly bruised, and remained in that condition several weeks, and was compelled to walk while so injured a mile and a half to the next town. Held, that a verdict for $2,500 was not excessive. Louisville, etc., R. Co. *v.* Cottongim (Ky.), 119 S. W. 751.

Plaintiff, who was suffering from partial paralysis, having been carried beyond his station, was roughly and brutally put off defendant's train and seriously bruised. He attempted to walk back to his destination, but fell in a mudhole and remained there several hours until rescued by some negroes and carried to the home of his brother. The day was cold, and he suffered intensely while lying in the mudhole, and in consequence of his exposure had fever and was sick for two months. Held, that a verdict awarding plaintiff $1,500 was not excessive. St. Louis, etc., R. Co. *v.* Day, 86 Ark. 104, 110 S. W. 220.

Two hundred eighty-seven dollars was not an excessive recovery against a street railway company for wrongfully

sengers,[11] and for ejection, where the passenger immediately got back on the train and was carried to his destination;[12] actions in which the ground of action is a breach of contract in failing to furnish plaintiff the ticket contracted for;[13] and actions in which it is shown that the plaintiff bought a ticket and got upon a train expecting and hoping to be expelled, for the purpose of instituting an action for damages.[14]

ejecting a passenger weakened by typhoid fever and compelled to walk home. Birmingham R., etc., Co. *v.* Turner, 154 Ala. 542, 45 So. 671.

A verdict of $10,000 held not excessive in an action for unlawful ejection to a passenger where it appears that by reason of such unlawful ejection the plaintiff suffered permanent injuries to his mind and body, that his memory, his nerves of motion, his voice, his hearing, and his eyesight became permanently affected, and his earning power largely decreased. Chicago Union Tract. Co. *v.* Breathauer, 125 Ill. App. 204, judgment affirmed in 79 N. E. 287, 223 Ill. 521.

A verdict of $1,500 for ejection of a passenger who, according to his evidence, was violently set on by the trainmen, who insulted him with profane and abusive language, beat him severely, causing serious, though temporary, personal injuries, and expelled him from the train several miles short of his station, is not excessive, the circumstances being calculated to cause humiliation and warranting punitive damages. St. Louis, etc., R. Co. *v.* Mynott, 83 Ark. 6, 102 S. W. 380.

Plaintiff claimed that, on account of being ejected from defendant's passenger station while waiting for a train, he contracted a severe cold, which settled in his stomach, turned into neuralgia and pleurisy, and left him permanently injured; that since his injury he had suffered great pain, and had been hindered from carrying on his work. His physician testified that his condition was due to exposure; that he was suffering from chronic pleurisy, and would get worse, rather than better; and that this condition could be caused by getting wet and cold. Held, that a verdict allowing plaintiff $2,500 was not excessive. Flavin *v.* Chicago, etc., R. Co., 115 Pac. 667, 43 Mont. 220.

An award of $1,500 for serious injuries from being thrown from a car and striking the ground is not excessive. Willard *v.* St. Paul City R. Co., 116 Minn. 183, 133 N. W. 465.

11. Ejection for using profane and obscene language—Verdict excessive.—A verdict for a passenger for $1,500 against a railway company that ejected him from a car for using profane and obscene language in the presence of lady passengers, held to be grossly excessive, although the language was provoked by a mistake of a station agent in giving him a wrong ticket. Chicago, etc., R. Co. *v.* Griffin, 68 Ill. 499.

12. Passenger immediately getting back on train and carried to destination—Verdict excessive.—Plaintiff got on the defendant's train, and stated that he gave his ticket to the conductor, who afterwards asked for it again and denied receiving it. Two companions of plaintiff told the conductor that he had the ticket, but the latter ordered plaintiff to leave the train. He got off when the conductor again ordered him to do so, but immediately got back on the train and was carried to his destination. The conductor testified that plaintiff never gave him a ticket, and that after leaving the train he got on again and rode. Held, that damages for such ejection for $2,000 was excessive, and sufficient to warrant a reversal, in the absence of a remittitur reducing the judgment to $1,000. Alabama, etc., R. Co. *v.* Bell (Miss.), 29 So. 818.

13. Ground of action failure to furnish ticket contracted for—Verdict excessive.—Where a passenger ejected from a train walked back one mile to the station from which he started, where he remained until next day, when he paid his fare, and resumed his journey, a verdict for $260 for his ejection was excessive, the ground of action being the breach of contract in failing to furnish him the ticket contracted for. Lexington, etc., R. Co. *v.* Lyons, 104 Ky. 23, 20 Ky. L. Rep. 516, 46 S. W. 209.

14. Boarding train expecting ejection, for purpose of instituting action—Verdict excessive.—In an action against a railroad company for wrongfully ejecting plaintiff from its train, it appeared that the company had established a rule prohibiting the employees of a rival steamship line from wearing their uniform on the cars of the company; that plaintiff bought a ticket and went upon the cars, expecting and hoping to be expelled, for the purpose of instituting an action for damages; that he was expelled, only such force being used as was necessary to overcome his violent resistance; that he was compelled to walk about 4 miles to a station. The jury were charged that if he was violating no reasonable rule he was entitled to recover damages, either compensatory or exemplary; that he could only recover exemplary damages for acts accompanied with maliciousness or willful wrong, and could not recover for injuries received by reason of his own violent resistance. Held, that a verdict in his favor for $5,000 should have been set aside. South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 742 675 2